UNITED STATES REPORTS

VOLUME 488

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1988

BEGINNING OF TERM

OCTOBER 3, 1988, THROUGH FEBRUARY 3, 1989

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 1992

Printed on Uncoated Permanent Printing Paper

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328

ISBN 0-16-036171-0

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

RICHARD L. THORNBURGH, ATTORNEY GENERAL.[1]
CHARLES FRIED, SOLICITOR GENERAL.[2]
WILLIAM C. BRYSON, ACTING SOLICITOR GENERAL.[3]
JOSEPH F. SPANIOL, JR., CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.[4]
ROSALIE L. SHERWIN, ACTING LIBRARIAN.[5]
SHELLEY L. DOWLING, LIBRARIAN.[6]

---

*For notes, see p. IV.

NOTES

[1] Attorney General Thornburgh was presented to the Court on October 3, 1988 (see *post*, p. v).

[2] Mr. Fried resigned as Solicitor General effective January 20, 1989.

[3] Mr. Bryson became Acting Solicitor General effective January 21, 1989.

[4] Mr. Margeton resigned as Librarian effective November 18, 1988.

[5] Mrs. Sherwin was appointed Acting Librarian effective November 18, 1988.

[6] Mrs. Dowling was appointed Librarian effective January 15, 1989.

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, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, 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, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 3, 1988

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY.

Mr. Solicitor General Charles Fried said:

MR. CHIEF JUSTICE, and may it please the Court, I have the honor to present to the Court the seventy-sixth Attorney General of the United States, the Honorable Dick Thornburgh of Pennsylvania.

THE CHIEF JUSTICE said:

Mr. Attorney General, on behalf of the Court, I welcome you as the chief law officer of the Government and as an officer of this Court. We welcome you to the performance of the very important duties which will rest on you by virtue of your office. Your commission as Attorney General of the United States will be placed in the records of the Court. We wish you well in your new office.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1982 edition.

Cases reported before page 801 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 801 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices.

	Page
Aaron, *In re*	887
Aaron *v.* Graddick	846
Aaron *v.* Sullivan	907
Aaron Women's Clinic; Right to Life Advocates, Inc. *v.*	824
Abadjian *v.* Gulf Oil Corp.	997
Abbot; American Cyanamid Co. *v.*	908
Abdul-Akbar *v.* Proctor	958
Abdul Matiyn *v.* Edwin Gould Services for Children	865
Abishi; Vogt *v.*	891
Abshire; Williams *v.*	842
AB Volvo; American Protein Corp. *v.*	852
Action Automotive, Inc. *v.* National Labor Relations Bd.	1041
Adams *v.* Budd Co.	1008
Adams; Mann *v.*	898
Adams *v.* Vandemark	1042
Adler; Palma *v.*	968
Administrator, Federal Aviation Administration; Go Air, Inc. *v.*	890
Advanced Micro-Devices, Inc.; Constant *v.*	892
A. E. C. Trading Co. *v.* Trademasters International, Inc.	982
Aguas *v.* United States	863
A. H. Robins Co. *v.* Maressa	826
Aimone *v.* Scully	865
Ainsworth *v.* California	1050
Air Products & Chemicals, Inc.; Madej *v.*	1007
Akins; Board of Governors of State Colleges & Univs. *v.*	920
Akron; Summit County *v.*	1005
Alabama; Brown *v.*	994
Alabama; Cade *v.*	871
Alabama *v.* Cox	1018

Page
Alabama; Daniels *v.* ... 1051
Alabama; Gibson *v.* ... 957
Alabama; Hamilton *v.* ... 871
Alabama; Harrell *v.* ... 934
Alabama; Hooks *v.* ... 1050
Alabama; Johnson *v.* ... 876,976
Alabama; Jones *v.* ... 871
Alabama; Julius *v.* ... 1052
Alabama; Locke *v.* ... 912
Alabama; Mulvehill *v.* ... 1030
Alabama; Neelley *v.* ... 1020
Alabama; Nimmons *v.* ... 983
Alabama; Peoples *v.* ... 972
Alabama; Seymore *v.* ... 1018
Alabama *v.* Smith ... 1003
Alabama; Thompson *v.* ... 834
Alabama; Waldrop *v.* ... 871
Alabama; Watson *v.* ... 864
Alabama *v.* Weeks ... 851
Alabama; Young *v.* ... 834,950
Alabama Power Co. *v.* Thomas ... 888
Alabama State Personnel Bd.; Anderson *v.* ... 827
Alameda County Probation Dept.; Rowland *v.* ... 982
Alamo Foundation *v.* Ragland ... 852
Alaska; Jackson *v.* ... 828
Alaska; Pruett *v.* ... 959
Alaska Public Offices Comm'n; VECO International, Inc. *v.* ... 919
Albin, *In re* ... 1026
Alcan Aluminio do Brasil, S. A. *v.* Hernandez ... 934
Alcazar *v.* United States ... 866
Alexander *v.* United States ... 894
Alfieri, *In re* ... 808
Alfonzo-Larrain; Newman-Green, Inc. *v.* ... 1003
Alicea *v.* United States ... 832
Alive Enterprises; Fuller *v.* ... 972
All American Services, Ltd., *In re* ... 814
Allard *v.* Frech ... 1006
Allegheny County *v.* American Civil Liberties Union ... 816,991
Allegheny Pittsburgh Coal Co. *v.* Webster County Comm'n ... 336
Allen *v.* Cesario ... 983
Allen *v.* Morris ... 1011
Allen; Redding *v.* ... 864
Allen *v.* United States ... 944
Allen Organ Co. *v.* Kimball International, Inc. ... 850

Page
Allied Chemical *v.* Niagara Mohawk Power Corp. 1005
Allied Corp. *v.* International Trade Comm'n 1008
Allied-General Nuclear Services *v.* United States 819
Allied Van Lines Inc. *v.* Wilkerson 827
Allridge *v.* Texas 1026
Allsbrook; Satterfield *v.* 957
Allstate Ins. Co. *v.* Schon 994
Alpha Beta Co. *v.* Nahm 956
Alston *v.* New York 832
Alter *v.* Schroeder 891
Alton Packaging Corp. *v.* Pollution Control Bd. 891
Alumax Inc. *v.* U. S. Aluminum Corp./Tex. 822
Alvarado *v.* United States 847
Alvarez *v.* Trans World Airlines, Inc. 1043
Aman Collection Service, Inc.; Juras *v.* 875,977
Ambach; Hening *v.* 1008
Amerada Hess Shipping Corp.; Argentine Republic *v.* 428,810
American Bank of Martin Cty.; First Interstate Credit Alliance *v.* . 993
American Bd. of Endodontics *v.* Lanier 926
American Booksellers Assn., Inc.; Virginia *v.* 905
American Civil Liberties Union; Allegheny County *v.* 816,991
American Civil Liberties Union; Chabad *v.* 816,963,991
American Civil Liberties Union; Pittsburgh *v.* 816,991
American Cyanamid Co. *v.* Abbot 908
American Express Travel Servs. *v.* Wash. Pub. Power Supply Sys. 805
American Foreign Service Assn. *v.* Garfinkel 923
American Motorist Ins. Co.; Marshall *v.* 857
American Protein Corp. *v.* AB Volvo 852
American Standards Testing Bureau, Inc. *v.* Honeywell, Inc. 1010
American Synthetic Rubber Corp.; Panter *v.* 827
AT&T Co.; Bache *v.* 888
AT&T Co.; Bankston *v.* 888
AT&T Co.; Bell Atlantic *v.* 924
AT&T Technologies, Inc.; Lorance *v.* 887,1001
American Trucking Assns., Inc. *v.* Smith 954
Ameron, Inc.; Army Corps of Engineers *v.* 809,918
Ametek, Inc.; Brackenridge *v.* 801
Ammerman *v.* United States 842
Amos *v.* Minnesota 861
Amstar Corp.; California Land & Cattle Co. *v.* 1010
Amster; Cooper *v.* 852
A. M. Sunrise Construction Co.; Stout *v.* 1030
Anchorage; Cutler *v.* 896
Anclote Manor Hospital, Inc.; Lewis *v.* 828

Page
Anderson *v.* Alabama State Personnel Bd. 827
Anderson *v.* Department of Defense 944
Anderson *v.* North Carolina 975
Anderson *v.* North Dakota 965
Anderson *v.* Sno-King Village Assn., Inc. 801
Anderson *v.* United States 932,966,1012,1031
Anderson County Fiscal Court; Weaver *v.* 855
Andre *v.* Bendix Corp. 855
Andrew Corp.; Gabriel Electronics, Inc. *v.* 927
Andrews *v.* Texas 871,976
Andrews *v.* United States 1032
Andrews *v.* Veterans Administration 817
Angiulo *v.* United States 928
Anglicker *v.* Miller 890
Anglin *v.* Newsome 1031
An-Lo *v.* United States 966
Ansell *v.* Shannon 966
Anton, *In re* 989
Antrim *v.* Burlington Northern Inc. 891
Apodaca *v.* United States 932
April Enterprises, Inc.; Metromedia, Inc. *v.* 884
Aqeel *v.* Seiter 831
Aqeel *v.* U. S. District Court 894
Aranda-Rodriguez *v.* United States 847
ARA Services, Inc.; Periodical Marketing & Consulting Co. *v.* 855
ARA Services, Inc.; Sciambra *v.* 855
Arave; Curtis *v.* 996
Arave; LePage *v.* 972
ARC America Corp.; California *v.* 814,1001
Arcata Community Recycling Center; West Coast Truck Lines, Inc. *v.* 856
Archer *v.* United States 837,941
Arctic Slope Regional Corp. *v.* FERC 868
Arehart; Dow Chemical Co. *v.* 992
Argentine Republic *v.* Amerada Hess Shipping Corp. 428,810
Arizona *v.* Flint 979
Arizona; McMurtrey *v.* 997
Arizona *v.* Youngblood 51,1051
Arkansas *v.* Oklahoma 1000
Arkansas; Shamlin *v.* 863
Arkansas State Bd. of Ed. *v.* Little Rock School Dist. 869
Arko *v.* Department of Air Force 943
Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.; Tew *v.* 854
Armas *v.* United States 1032
Armentero *v.* Makel 984

Page
Armontrout *v.* Mercer 918
Armontrout; Mercer *v.* 900,998
Armontrout *v.* Smith 808,961
Armontrout; Stokes *v.* 1019
Armontrout; Turner *v.* 928
Armontrout; Williams *v.* 972,996
Armontrout; Winfrey *v.* 833
Armstead *v.* Mays 930
Army Corps of Engineers *v.* Ameron, Inc. 809,918
Army Corps of Engineers; Bowles *v.* 803
Arn *v.* Green 1034
Arn; Williams *v.* 1044
Arnold *v.* Opfer 890
Arons *v.* New Jersey Bd. of Ed. 942
Aronson *v.* Massachusetts 818
Arrington *v.* Wilks 810,938
Artesia; Colter *v.* 971
Asam *v.* Shapiro 1024
ASARCO Inc. *v.* Kadish 887,979,991,1039
Ashby *v.* United States 863
Asher *v.* United States 1029
Ashford *v.* Illinois 900
Associated Convalescent Enterprises, Inc. *v.* United States 819
Associated Pathologists, Ltd.; Collins *v.* 852
Association. For labor union, see name of trade.
A–T Industries, Inc.; Betka *v.* 939,1002
Atkins *v.* Prelesnik 1046
Atlantic Richfield Co.; McAlister *v.* 804
Atlantic Tele-Network Co. *v.* Public Services Comm'n of V. I. 981
Attleboro Savings Bank; Hull *v.* 856
Attorney General; Harmon *v.* 934
Attorney General; Hernandez *v.* 977
Attorney General; Herrmann *v.* 867
Attorney General; Michigan *v.* 980
Attorney General; Mitchell *v.* 841,976
Attorney General; Smith *v.* 930
Attorney General; Wrenn *v.* 1039
Attorney General of Ill.; Panhandle Eastern Pipe Line Co. *v.* 986
Attorney General of Me.; Neron *v.* 832
Attorney General of Mo. *v.* Reproductive Health Services 1003
Attorney General of N. C.; Satterfield *v.* 957
Attorney General of Pa.; Bey *v.* 838
Attorney General of Pa.; Larkins *v.* 867
Attorney General of Pa.; Snydor *v.* 838

Page
Attorney General of Pa.; Szarewicz *v.* 1045
Attorney General of R. I. *v.* Blackstone Valley Electric Co. 995
Auburn National Bank *v.* Sanda 927
Auster Oil & Gas, Inc.; Carmouche *v.* 848
Austin *v.* Honolulu 852
Automobile Workers; Clift *v.* 1025
Autorino *v.* Connecticut 855
Avnet, Inc.; Kahn *v.* 898
Azar *v.* Minister of Legal Affairs of Trinidad and Tobago 1005
B. *v.* Iowa Dept. of Human Services 896,977
Babbitt *v.* California 1034
Bache *v.* American Telephone & Telegraph Co. 888
Baddour, Inc. *v.* National Labor Relations Bd. 944
Badger *v.* United States 891
Badham *v.* Eu 804,953,1024
Baez *v.* Onondaga County 1014
Baggett *v.* Dugger 1045
Bagley *v.* United States 924
Bailey; Thorne *v.* 984
Bair; Poyner *v.* 871
Baird *v.* Bohle 828
Baisley; Vielle *v.* 917
Baker; Moody *v.* 985
Baker, Smith & Mills *v.* Minerex Erdoel, Inc. 817
Balawajder, *In re* 814,923
Balawajder *v.* Carpenter 836
Balawajder *v.* U. S. District Court 894
Ball; Collins *v.* 841
Ballantyne *v.* Erdbacher 984
Baltimore City Dept. of Social Services *v.* Bouknight 1301
Bank of America, N. T. & S. A.; D'Andrea *v.* 1006
Bank of America, N. T. & S. A.; Duck *v.* 1043
Bank of America, N. T. & S. A.; Kruse *v.* 1043
Bank of Louisville; Wright *v.* 1046
Bank of N. Y.; Miami Center Ltd. Partnership *v.* 823
Bank of San Marino Building, Ltd. *v.* Default Service Co. 807
Bankston *v.* American Telephone & Telegraph Co. 888
Banque de Paris et des Pays-Bas; Exxon Co., U. S. A. *v.* 920
Barasch; Duquesne Light Co. *v.* 299
Barber *v.* Cooper 933
Barber *v.* Tennessee 900
Barbizon Corp. *v.* ILGWU National Retirement Fund 967
Barcume *v.* Barcume 835
Barget *v.* Barget 813,969

Page
Barker *v.* United States 1017
Barlow *v.* Esselte Pendaflex Corp. 843
Barnard *v.* Thorstenn 921
Barnes; McDowell *v.* 1007
Barness; Terrydale Liquidating Trust *v.* 927
Barnette *v.* United States 908
Barnhart *v.* Pennsylvania 817
Barratteau *v.* Dugger 1015
Barren *v.* United States 827
Barrera *v.* United States 859
Barrett; Smith *v.* 931
Barrow *v.* Harrison 1031
Barrow *v.* Hood 822
Barry; Collins *v.* 826
Barry; Silverman *v.* 956
Barta *v.* Texas 951
Barton; Holmes *v.* 840
Bartos *v.* Chicago Bd. of Election 811
Barume *v.* Hager 835
Barwick; Williams *v.* 902
Baskin *v.* Mississippi 1010
Bastidas *v.* Henderson 889
Bateson, Inc.; Crawford Painting & Drywall Co. *v.* 1035
Batra *v.* Commodity Futures Trading Comm'n 995
Battle *v.* Missouri 871,950
Battle *v.* O'Keefe 865
Bauer *v.* United States 912
Baytown *v.* Campos 1002
Beach *v.* Florida 862
Beach *v.* Humphreys 865
Beard; Benson *v.* 926,1024
Beasley *v.* Hedrick 860
Becnel *v.* Dupuis 891
Beech Aerospace Services, Inc. *v.* Rainey 153
Beech Aircraft Corp. *v.* Rainey 153
Beer Institute; Healy *v.* 954,1039
Beer Institute; Wine & Spirits Wholesalers of Conn. *v.* 954,1039
Behning *v.* Camelback Ski Corp. 849
Behroozian; Islamic Republic of Iran Broadcasting *v.* 829
Belcher; Florida *v.* 912
Bell *v.* Borg 895
Bell *v.* Freeman 897
Bell *v.* Lynaugh 905
Bell *v.* United States 855

Page
Bell Atlantic *v.* American Telephone & Telegraph Co. 924
Bello *v.* Walker 868
Bello; Walker *v.* 851
Belmont County Children Services; Palmer *v.* 958
Belmontes *v.* California 1034
Benavides *v.* United States 973
Bendix Corp.; Andre *v.* 855
Beneficial Corp. *v.* Deutschman 811
Benet; Vail Village Inn Associates *v.* 1042
Benet; Village Inn Plaza *v.* 1042
Bengivenga *v.* United States 924
Benjamin, *In re* 906,1000
Bennerson; Small *v.* 845
Bennett *v.* Corroon & Black Corp. 812,964
Benny *v.* Chicago Title Ins. Co. 1014
Benson *v.* Bearb 926,1024
Benson; Murphy *v.* 892
Bentley *v.* Louisiana 834
Bentley *v.* United States 970,1051
Berger *v.* Davis 892
Berger *v.* United States 946
Berkeley; Kay *v.* 1014
Berley; Laupot *v.* 962
Bermudez *v.* United States 898
Berry; Ferguson *v.* 828
Berry *v.* United States 1040
Berwick *v.* Neiderhiser 822
Betka *v.* A–T Industries, Inc. 939,1002
Betka *v.* West Linn 999
Betts; Public Employees Retirement System of Ohio *v.* 907
Bey *v.* Zimmerman 838
Beyer; Jones *v.* 973
Beyer; Rodriguez *v.* 844
Beyer; Wakefield *v.* 1033
B. F. Goodrich Co. *v.* Lake 826
Bhaya; Westinghouse Electric Corp. *v.* 1004
Bibb *v.* United States 1010
Biberfeld *v.* United States 1029
BidNet, Inc.; Graves *v.* 868,977
Bigford; Spoor *v.* 822
Bigford *v.* Taylor 851
Bigg *v.* Office of Personnel Management 932,1023
Bilal *v.* Dayton Hudson Corp. 985
Bilal *v.* Little Rock School Dist. 839

Page
Bilder *v.* Ohio 1044
Bintz *v.* Riddick 824
Birdsell *v.* Schmidt 932
Birges *v.* Nevada 804,987
Birtell; Lockheed Cal. Co. *v.* 1042
Birth *v.* United States 860
Bishop *v.* Osborn Transportation, Inc. 832
Bitcheri *v.* Immigration and Naturalization Service 957
B. J. F.; Florida Star *v.* 887
Black; Leviston *v.* 865
Black *v.* Robinson 985
Blackfeet Indian Tribe *v.* Montana Power Co. 828
Blackston *v.* United States 867
Blackstone Valley Electric Co.; O'Neil *v.* 995
Blackwelder *v.* Virginia 851
Blakey *v.* Vassar 1014
Blankemeyer *v.* Federal Land Bank of Omaha 805
Blankenship *v.* Georgia 871
Blanton *v.* North Las Vegas 810,938
Bledsoe *v.* United States 849
Blinder, Robinson & Co. *v.* Securities and Exchange Comm'n 869
Blount International, Ltd.; Ironworkers *v.* 1005
Blue Cross & Blue Shield United of Wis.; Reilly *v.* 856
Blue Cross of Southern Cal.; Hartenstine *v.* 899
Blue Mountain Arts; Hallmark Cards, Inc. *v.* 908
Blue Shield of Western N. Y., Inc.; Kuritzky *v.* 1006
Blumberg *v.* HCA Management Co. 1007
Blumthal, *In re* 938
BMT Commodity Corp. *v.* United States 962
Board of Comm'rs of Calvert County; Pritchard *v.* 881
Board of County Comm'rs of Frederick County; Faux-Burhans *v.* 1042
Board of Elections Comm'rs of Chicago; Citizens for Moore Party *v.* 1029
Board of Estimate of New York City *v.* Morris 938
Board of Governors of Federal Reserve System; Jenkins *v.* 1045
Board of Governors of State Colleges & Univs. *v.* Akins 920
Board of Trade of Chicago *v.* Commodity Futures Trading Comm'n 816
Board of Trustees of Conn. State Univs.; Mehta *v.* 822
Board of Trustees of State Univ. of N. Y. *v.* Fox 815
Board of Trustees of Univ. of Ala. *v.* Medical Laundry Service 826
Board of Trustees of Univ. of D. C.; Kaushiva *v.* 893
Bobo *v.* Ohio 910
Boddie *v.* Faison 823
Bodnar *v.* Synpol, Inc. 908
Boeing Co.; Brown *v.* 865

Page
Boeing Co. *v.* Equal Employment Opportunity Comm'n 889
Boersma *v.* Karnes 801
Boggs *v.* United States 932
Bohle; Baird *v.* 828
Bohte; Dotson *v.* 862,977
Boles *v.* United States 955
Boling *v.* United States 893
Boller *v.* National Mediation Bd. 820
Bollman *v.* Smith 957
Bolton *v.* California 804
Bonacker; Wintjen *v.* 996
Bonanno *v.* United States 1016
Bonanza Investment Co.; Szemborski *v.* 910
Bondzie *v.* Lively 864
Bongiorno, *In re* 963
Bonilla Romero *v.* United States 817
Bonneville Power Admin.; Cal. Energy Cons. & Dev. Comm'n *v.* .. 818
Bonneville Power Admin.; Cal. Public Utilities Comm'n *v.* 818
Booker *v.* Geneva 839
Boone *v.* Redevelopment Agency of San Jose 965
Booss *v.* Carlson 1012
Booss *v.* Turner 1012
Borg; Bell *v.* 895
Borg; Bowie *v.* 1046
Boring; Kozakiewicz *v.* 934
Borom *v.* Lacy 835
Borough. See name of borough.
Boscio *v.* United States 848
Bosselait *v.* New Hampshire Dept. of Employment Security 1011
Boston *v.* Nelson 966
Boston Symphony Orchestra, Inc.; Redgrave *v.* 1043
Bostwick; Johns *v.* 836,950
Boswell; Witschen *v.* 1010
Bott; Four Star Corp. *v.* 968
Bouknight; Baltimore City Dept. of Social Services *v.* 1301
Boulder Community Hospital; Geear *v.* 927
Bounds *v.* Smith 869
Bove; DeSimone *v.* 853
Bovino *v.* Middlesex County Bd. of Social Services 919
Bowen; Christian *v.* 922
Bowen; Conner *v.* 840,864
Bowen; Dickey *v.* 834
Bowen; Ervin *v.* 864
Bowen *v.* Georgetown Univ. Hospital 204,809

Page
Bowen *v.* Hudson 980,1027
Bowen; Hurvitz *v.* 968
Bowen *v.* Jabe 1018
Bowen; Kelly *v.* 833,976
Bowen; Kerr *v.* 1011
Bowen; Lawson *v.* 843
Bowen; Linquist *v.* 908
Bowen; Ransom *v.* 968
Bowen; Simmons *v.* 1044
Bowen; Sunshine Health Systems, Inc. *v.* 965
Bowen; Walker *v.* 835
Bowen; Wrenn *v.* 1028
Bowens *v.* Snow 910
Bowie *v.* Borg 1046
Bowie *v.* United States 959
Bowles *v.* Army Corps of Engineers 803
Bowman *v.* California 985
Bowman *v.* Missouri 829
Boyer; Zosky *v.* 1042
Boyle *v.* Illinois 898
Boyle *v.* United Technologies Corp. 886,994
Bracamontes; Weyerhaeuser Co. *v.* 854
Brackenridge *v.* Ametek, Inc. 801
Bradford *v.* Louisiana 835
Bradshaw *v.* United States 924
Bradshaw *v.* Zoological Society of San Diego 945,1023
Brady; Humphrey *v.* 966
Brady; National Assn. of Counties *v.* 1005
Branch *v.* United States 1018
Brandon *v.* United States 973
Brandt *v.* Brandt 870
Branion *v.* Gramly 1040
Brannon *v.* United States 985
Brantley *v.* United States 1012
Brathwaite *v.* Henderson 952
Bratton *v.* Monroe County 945,997
Braumann; Jankowski *v.* 1045
Breininger *v.* Sheet Metal Workers 811
Brendale *v.* Confed. Tribes & Bands of Yakima Indian Nation ... 886,939
Brennan *v.* Brennan 1033
Brewer *v.* United States 946
Briddle *v.* Texas 986
Brieck; Harbison-Walker Refractories *v.* 226
Brill, *In re* 885

Page
Brimmer; Tripati *v.* ... 858
Bristow *v.* Life & Casualty Ins. Co. of Tenn. ... 1009
Broad *v.* Conway ... 927,1023
Broaden *v.* Montgomery ... 840
Broadus *v.* Oklahoma ... 970
Brobst *v.* Dean Witter Reynolds, Inc. ... 981
Broce; United States *v.* ... 563
Brofford *v.* Ohio Dept. of Rehabilitation and Correction ... 970
Broglin; Haggenjos *v.* ... 968
Broida *v.* Tendrich ... 1042
Bromberg *v.* United States ... 993
Brooks; McColpin *v.* ... 984,1051
Brookside Veneers, Ltd. *v.* United States ... 943
Brotherhood. For labor union, see name of trade.
Broussard *v.* California ... 971
Brower; Michigan *v.* ... 933
Brown *v.* Alabama ... 994
Brown *v.* Boeing Co. ... 865
Brown *v.* Covington & Burling ... 876
Brown *v.* Florida ... 944
Brown; Florida *v.* ... 912
Brown *v.* Georgia ... 945
Brown; Graves *v.* ... 880
Brown *v.* Hoke ... 840,976
Brown *v.* Illinois ... 841
Brown *v.* Lurye ... 876
Brown *v.* Maryland ... 839
Brown *v.* Missouri Bd. of Probation and Parole ... 835
Brown *v.* Newsome ... 931
Brown *v.* New York ... 897
Brown *v.* 1250 Twenty-Fourth Street Associates Ltd. ... 956
Brown; Phillips Petroleum Co. *v.* ... 822
Brown *v.* Rhyne Floral Supply Mfg. Co. ... 1045
Brown *v.* Ryan ... 860
Brown *v.* Southern Md. Hospital ... 839
Browning *v.* Jabe ... 1018
Browning-Ferris Industries of Vt., Inc. *v.* Kelco Disposal, Inc. ... 953,980
Broyles; Director, Office of Workers' Compensation Programs *v.* ... 105
Brozyna *v.* United States ... 854
Bruch; Firestone Tire & Rubber Co. *v.* ... 809
Bruder; Pennsylvania *v.* ... 9
Bruegging *v.* Wilson ... 1009
Bruewer; Mahlerwein *v.* ... 803,976
Brundage *v.* United States ... 831

Page
Brunell; Vermont *v.* ... 1047
Bruni; Lewis *v.* ... 960
Brunot *v.* United States ... 911
Bryant *v.* Carlucci ... 806
Bryant; Ford Motor Co. *v.* ... 816,986
Bryant *v.* United States ... 916,987,1017
Bryce *v.* United States ... 861
Bryson *v.* DeRidder ... 956
Bucci *v.* United States ... 844
Buchan *v.* Dugger ... 839
Buchanan *v.* Rothgerber ... 1013
Buckley *v.* United States ... 1015
Buckner; Pet, Inc. *v.* ... 819
Buckno *v.* Pennsylvania ... 817
Budd Co.; Adams *v.* ... 1008
Budig; Willner *v.* ... 1031
Buehl *v.* Pennsylvania ... 871
Buffalo Wire Works Co. *v.* Department of HUD ... 889
Buford Evans & Sons; Polyak *v.* ... 962,1035
Building Materials & Construction Teamsters; Granite Rock Co. *v.* 986
Bull; Holley *v.* ... 945,987
Buller *v.* Hurley State Bank ... 920
Bullock; Texas Monthly, Inc. *v.* ... 906
Bundy *v.* Dugger ... 1034,1036
Bundy *v.* Florida ... 1036
Bunge Corp.; Taylor *v.* ... 910
Bunnell; Watts *v.* ... 957
Bunner *v.* United States ... 996
Burak *v.* General American Life Ins. Co. ... 828
Bureau of Alcohol, Tobacco, and Firearms; Muza *v.* ... 957
Bureau of Prisons; Caldwell *v.* ... 895,1035
Bureau of Prisons; Laroque *v.* ... 847
Bureau of Prisons; Muhammad *v.* ... 1013
Bureau of Prisons; Pendleton *v.* ... 995
Bureau of Rooming House Standards; Market St. Mission *v.* ... 882
Burgess *v.* Director, Office of Workers' Compensation Programs ... 803
Burgest *v.* Gearinger ... 1016
Burke, *In re* ... 906
Burlington Northern Inc.; Antrim *v.* ... 891
Burlington Northern Inc.; Herold *v.* ... 825
Burnett *v.* Martin ... 830
Burnett; Mulazim *v.* ... 839
Burnham *v.* Firemen's and Policemen's Civil Service Comm'n ... 842
Burnley *v.* Mid-America Pipeline Co. ... 814

Page
Burns; Simmons *v.* ... 969
Burns *v.* United States ... 840
Burrell *v.* Dugger ... 896
Burris *v.* United States ... 974
Burrows *v.* Illinois ... 862
Burt *v.* Maui Architectural Group, Inc. ... 962
Burton *v.* Evans ... 907
Burton *v.* Reppond ... 843
Bury *v.* Herrington ... 860
Bush *v.* United States ... 932
Business Computer Corp. *v.* U. S. Robotics, Inc. ... 1035
Bussey, *In re* ... 885,989
Butcher *v.* Johnson ... 930
Butler; Commissioners of Land Office of Okla. *v.* ... 993
Butler; Gibson *v.* ... 844
Butler; Jones *v.* ... 846
Butler; Kramer *v.* ... 865
Butler; Procter *v.* ... 888
Butler; Tubbs *v.* ... 971
Butler; Washington *v.* ... 857
Butler; Woods *v.* ... 970
Button *v.* Connecticut General Life Ins. Co. ... 909
Byrd *v.* California ... 858
Byrd *v.* Gardinier, Inc. ... 853
Byron *v.* United States ... 892
Cabana; Grays *v.* ... 836
Cabana; Warren *v.* ... 1012
Cabey *v.* Collins ... 970
Cable News Network, Inc.; Law Firm of Daniel P. Foster *v.* ... 994
Cade *v.* Alabama ... 871
Calco, Ltd. *v.* Water Technologies Corp. ... 968
Calderon *v.* United States ... 959
Caldwell *v.* Bureau of Prisons ... 895,1035
Calhoun *v.* California ... 837
California; Ainsworth *v.* ... 1050
California *v.* ARC America Corp. ... 814,1001
California; Babbitt *v.* ... 1034
California; Belmontes *v.* ... 1034
California; Bolton *v.* ... 804
California; Bowman *v.* ... 985
California; Broussard *v.* ... 971
California; Byrd *v.* ... 858
California; Calhoun *v.* ... 837
California; Carella *v.* ... 940,964,992

Page
California; Cherry *v.* ... 896
California; Cholodenko *v.* ... 820
California; Corwin *v.* ... 1006
California; Costanzo *v.* ... 858
California; Delgadillo *v.* ... 930
California; Dyer *v.* ... 934
California; Elder *v.* ... 1030
California; Evins *v.* ... 1012
California *v.* Freeman ... 1311
California; Glenna *v.* ... 864
California; Gonzalez *v.* ... 948
California; Grant *v.* ... 1050
California; Guzman *v.* ... 1050
California; Hamilton *v.* ... 1047
California; Heishman *v.* ... 948,997
California; Hendricks *v.* ... 900
California; Hovey *v.* ... 871
California; Howard *v.* ... 871
California; Jackson *v.* ... 840
California; Jenkins *v.* ... 894
California; Jimenez *v.* ... 1044
California; John Lewis S. *v.* ... 928
California; Kimble *v.* ... 871
California; Kirkpatrick *v.* ... 1036
California; Loudermilk *v.* ... 830
California; Lowery *v.* ... 970
California; Lucky *v.* ... 1034
California; Macioce *v.* ... 908
California; Melton *v.* ... 934
California; Miller *v.* ... 819
California; Munoz *v.* ... 872
California; Odle *v.* ... 917
California; Prantil *v.* ... 861
California *v.* Radke ... 1034
California; Reumont *v.* ... 844
California; Rich *v.* ... 1051
California; Richard T. *v.* ... 986
California; Robbins *v.* ... 1034
California; Roman *v.* ... 981
California; Ruiz *v.* ... 871
California; Segura *v.* ... 1046
California; Silva *v.* ... 1019
California; Silvaggio *v.* ... 958,997
California; Siripongs *v.* ... 1019

Page
California; Smith *v.* 835
California; Taylor *v.* 931
California; Thompson *v.* 844,960
California *v.* United States 810,824
California; Wade *v.* 900
California; Wiley *v.* 832
California; Williams *v.* 900,975,1050
California Bd. of Prison Terms; Maurer *v.* 968
California Coastal Comm'n; Jonathan Club *v.* 881
California Energy Cons. & Dev. Comm'n *v.* Bonneville Power Admin. 818
California Land & Cattle Co. *v.* Amstar Corp. 1010
California Public Utilities Comm'n *v.* Bonneville Power Admin. 818
California State Bd. of Equalization *v.* Sierra Summit, Inc. 992
California Superior Court of Fresno County; Ikeni *v.* 920,1023
Calpin *v.* Carlson 1036
Camelback Ski Corp.; Behning *v.* 849
Campbell; De Young *v.* 866
Campbell *v.* Fair 847
Campbell; Hunter *v.* 835
Campbell *v.* Kincheloe 948,1023
Campbell *v.* Michigan 1045
Campbell; Sanders *v.* 833
Campbell *v.* United States 908,965,993
Campbell; Weinreich *v.* 984
Campo *v.* New York City Employees' Retirement System 889
Campos; Baytown *v.* 1002
Cannon *v.* Rowen 856,891
Canon U. S. A., Inc.; Dawns *v.* 880
Cantu *v.* United States 973
Capital Controls Co. *v.* Chlorinators, Inc. 981
Caplin & Drysdale, Chartered *v.* United States 940
Caputo; McClain *v.* 897
Cardin; Charter Medical Corp. *v.* 982
Cardin *v.* Maryland 827,935
Carella *v.* California 940,964,992
Carl Colteryahn Dairy; W. Pa. Teamsters & Employers Pens. Fund *v.* 1041
Carlin Communications, Inc. *v.* Federal Communications Comm'n 924
Carlisle *v.* San Mateo County 827
Carlson; Booss *v.* 1012
Carlson; Calpin *v.* 1036
Carlucci; Bryant *v.* 806
Carlucci *v.* Doe 93
Carmouche *v.* Auster Oil & Gas, Inc. 848
Carpenter; Balawajder *v.* 836

Page
Carpenter *v.* Reed 857
Carpenters *v.* New York 966
Carr *v.* Redman 845
Carroll *v.* Central Prison 847
Carroll *v.* Moore 1019
Carroll *v.* White 1013
Carson Pirie Scott & Co. *v.* Lacey 1004
Carter, *In re* 963,1000
Carter *v.* Chattanooga 1010
Carter *v.* Modjeski & Masters 988
Carter *v.* Turner 888
Carter *v.* United States 1044
Caruso *v.* Illinois 829
Casamento *v.* Northern Va. Mental Health Institute 897
Caso; Florida *v.* 870
Cassell *v.* Texas 847
Castano *v.* United States 932
Castille *v.* Peoples 810
Cast Iron Soil Pipe Institute; Clamp-All Corp. *v.* 1007
Cattouse *v.* United States 929
Caucus Distributors, Inc. *v.* Minnesota Comm'r of Commerce 1006
Causey *v.* United States 859
Cegelka *v.* United States 1011
Celotex Corp. *v.* Grimes 889
Celotex Corp. *v.* Smith Land & Improvement Corp. 1029
Center for Environmental Ed.; Verity *v.* 1004
Central Bucks School Dist.; Muth *v.* 838
Central Columbia School Dist. *v.* Polk 1030
Central Plastics Co.; Golgart *v.* 806
Central Prison; Carroll *v.* 847
Central States Health & Welf. Fd. *v.* Hawkeye-Security Ins. Co. . 1004
Cerello *v.* United States 844
Cesario; Allen *v.* 983
Cespedes *v.* United States 845
Cessna Aircraft Co.; White Industries, Inc. *v.* 856
Chabad *v.* American Civil Liberties Union 816,963,991
Chaires *v.* Department of Housing and Urban Development 829,1023
Chaisson *v.* Rutland 818
Chalan *v.* United States 983
Chalko *v.* Chalko 801,975
Champion Spark Plug Co.; Stitt Spark Plug Co. *v.* 890
Chang An-Lo *v.* United States 966
Charlton *v.* Enterprise Leasing Corp. 966
Charter Medical Corp. *v.* Cardin 982

Page
Chasser; Lauro Lines s. r. l. *v.* ... 887
Chatman *v.* Cowley ... 896
Chattanooga; Carter *v.* ... 1010
Chavez *v.* Taylor ... 860
Chavez-Sanchez; United States *v.* ... 1036
Chavez-Tesina *v.* United States ... 1003
Cherry *v.* California ... 896
Chesapeake & Ohio R. Co.; McCall *v.* ... 879
Chesapeake & Ohio R. Co. *v.* Schwalb ... 811
Chesson, *In re* ... 885,989
Chicago Bd. of Election; Bartos *v.* ... 811
Chicago Fire Fighters; Rivard *v.* ... 909,987
Chicago & N. W. Transp.; Railway Labor Executives' Assn. *v.* 812,966,1051
Chicago Title Ins. Co.; Benny *v.* ... 1014
Chief Justice, Supreme Court of Pa.; Stern *v.* ... 826
Child, Inc. *v.* Texas Employment Comm'n ... 849
Chipman Freight Services *v.* National Labor Relations Bd. ... 848
Chipman Freight Services *v.* Teamsters ... 848
Chisholm *v.* Kansas ... 962
Chisom; Roemer *v.* ... 955
Chlorinators, Inc.; Capital Controls Co. *v.* ... 981
Cholodenko *v.* California ... 820
Chou *v.* University of Cal. ... 875,1012
Chou *v.* University of Cal. at Berkeley ... 1012
Chowaniec, *In re* ... 938
Chrans; Johnson *v.* ... 835
Christian *v.* Bowen ... 922
Christianson, *In re* ... 1002
Christopher; Hicks *v.* ... 842
Church *v.* Thompson ... 1045
Churnock; Muncie Power Products, Inc. *v.* ... 1009
Cimo *v.* Petty ... 1009
Cincotti *v.* United States ... 852
Circuit Court, 19th Judicial Circuit, Lake County, Ill. *v.* Lovinger ... 851
Circuit Judge, Orange County, Fla.; Eischen *v.* ... 851
Cirocco *v.* U. S. Postal Service ... 945
Citizens Bank of Clovis *v.* McLaughlin ... 829
Citizens for Better Gretna; Gretna *v.* ... 1002
Citizens for Moore Party *v.* Board of Elections Comm'rs of Chicago 1029
C. Itoh & Co. (America), Inc.; Martin *v.* ... 951,1024
Citro *v.* United States ... 866
Citron *v.* United States ... 862
City. See name of city.
Clallam County *v.* Department of Transportation of Wash. ... 1008

Page
Clamp-All Corp. *v.* Cast Iron Soil Pipe Institute 1007
Claridge Hotel & Casino *v.* McLaughlin 925
Clark, *In re* 964
Clark; Dugger *v.* 1052
Clark *v.* Florida Bar 999
Clark *v.* United States 1043
Clarke; Golden Pacific Bancorp. *v.* 890
Clarke; Sanders *v.* 1025
Clawson *v.* United States 923
Clay; Nationwide Mut. Ins. Co. *v.* 1040
Clayton, *In re* 1000
Clemmons *v.* Missouri 948
Clemons *v.* United States 835
Clerk of Court, Gloucester County Circuit; Curry *v.* 1046
Cleveland Bd. of Ed. *v.* Loudermill 946
Cleveland Bd. of Ed.; Loudermill *v.* 941
Cleveland Newspaper Guild *v.* Plain Dealer Publishing Co. 899
Clift *v.* Automobile Workers 1025
Cline; Stauber *v.* 817,975
Cline; Tyler *v.* 996
Clinton *v.* Smith 988
Clothier; Kansas *v.* 924
Clovervale Foods Processing, Inc.; Oscar *v.* 909
Cluett, Peabody & Co. *v.* LHLC Corp. 926
Cochrane *v.* Conte 824
Cohen *v.* Pennsylvania 1035
Cok *v.* Cok 801
Colding; Herzog *v.* 805
Cole *v.* Mississippi 934,1023
Cole *v.* United States 966
Cole *v.* Wells 928
Coleman, *In re* 843
Coleman *v.* Delaware 973,1016
Coleman *v.* Ladd 843
Coleman *v.* Ohio 900
Coleman *v.* O'Leary 972
Coleman *v.* United States 1035
Colgate *v.* United States 833
Collier *v.* Jones 929,997
Collin *v.* United States 911
Collins *v.* Associated Pathologists, Ltd. 852
Collins *v.* Ball 841
Collins *v.* Barry 826
Collins; Cabey *v.* 970

Page
Collins *v.* United States 931
Colonial American Life Ins. Co. *v.* Commissioner 980,1027
Colonial Pipeline Co. *v.* Wright Contracting Co. 805
Colorado *v.* Harris 985
Colorado; Kansas *v.* 978
Colorado *v.* Western Paving Construction Co. 870
Colozzi *v.* Pennsylvania 1014
Colston *v.* Texas 980
Colter *v.* Artesia 971
Colteryahn Dairy; Western Pa. Teamsters & Employers Pens. Fund *v.* 1041
Colzie *v.* United States 823
Combined Communications Corp. of Ky., Inc., J & C, Inc. *v.* 826
Comerford *v.* United States 1016
Commissioner; Colonial American Life Ins. Co. *v.* 980,1027
Commissioner; Daniels *v.* 876
Commissioner; Green *v.* 850
Commissioner; Koziara *v.* 822
Commissioner; Ledbetter *v.* 856
Commissioner; Love Box Co. *v.* 820
Commissioner; Martin *v.* 909
Commissioner; O'Leary's Estate *v.* 818
Commissioner; Qureshi *v.* 852
Commissioner; Sochin *v.* 824
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents; Schifferly *v.* 823
Commissioner of Revenue Services of Conn.; Magic II, Inc. *v.* 819
Commissioners of Land Office of Okla. *v.* Butler 993
Committee on Prof. Ethics & Conduct, Iowa Bar Assn.; Harlan *v.* . 1009
Commodity Futures Trading Comm'n; Batra *v.* 995
Commodity Futures Trading Comm'n; Board of Trade of Chicago *v.* 816
Commodity Futures Trading Comm'n; Geldermann, Inc. *v.* 816
Commonwealth. See name of Commonwealth.
Communications Workers *v.* United Inter-Mountain Telephone Co. 993
Community Federal S. & L. Assn. *v.* Director of Revenue of Mo. . 893
Community for Creative Non-Violence *v.* Reid 940,1027
Comptroller of Currency; Golden Pacific Bancorp. *v.* 890
Comptroller of State of Fla. *v.* Continental Bank Corp. 811
Concerned Citizens of Bridesburg; Philadelphia *v.* 853
Cone *v.* Tennessee 871
Confederated Tribes, Yakima Indian Nation; Brendale *v.* 886,939
Confederated Tribes, Yakima Indian Nation; Wilkinson *v.* 886,939
Confederated Tribes, Yakima Indian Nation; Yakima County *v.* . 886,939
Conmar Corp.; VSL Corp. *v.* 1010
Conn *v.* Conn 955

Page
Connaughton; Harte-Hanks Communications, Inc. *v.* 907
Connecticut; Autorino *v.* 855
Connecticut *v.* Counsel 955
Connecticut; Fenn *v.* 1031
Connecticut; Flynn *v.* 891
Connecticut *v.* Plourde 1034
Connecticut; Rado *v.* 927
Connecticut; Robinson *v.* 899
Connecticut; Warren *v.* 1030
Connecticut; Wood *v.* 895
Connecticut Dept. of Income Maintenance; Hoffman *v.* 1003
Connecticut General Life Ins. Co.; Button *v.* 909
Conner *v.* Bowen 840,864
Conner; Reinhard *v.* 856
Connor; Graham *v.* 816,1001,1027
Consolidated Capital Corp. *v.* Shea & Gould 1006
Consolidated Rail Corp.; Moore *v.* 823
Consolidated Rail Corp. *v.* Railway Labor Executives' Assn. 815
Constant *v.* Advanced Micro-Devices, Inc. 892
Constant *v.* United States 1007
Conte; Cochrane *v.* 824
Contemporary Mission, Inc. *v.* United States 981
Conti; Grabner *v.* 927
Continental Bank Corp.; Lewis *v.* 811
Continental Ins. Cos.; Missouri *v.* 821
Contreras *v.* Newton 846
Conway; Broad *v.* 927,1023
Conway *v.* First Trust Co. of N. D. 982
Conway *v.* United States 943
Cook; Maleng *v.* 941,1027
Cook *v.* Texas 807
Cook *v.* United States 1006,1015,1016
Cook County; Mannheim Books, Inc. *v.* 882
Cooker *v.* Tennessee 871
Cooley *v.* Federal Energy Regulatory Comm'n 933
Coombe; Reddy *v.* 929
Cooper *v.* Amster 852
Cooper; Barber *v.* 933
Cooter; Lafferty *v.* 968
Cornhusker Christ. Childrens Home *v.* Dept. of Soc. Servs. of Neb. 919
Corr *v.* Hinds 848
Corrections Commissioner. See name of commissioner.
Correll *v.* Florida 871
Corroon & Black Corp.; Bennett *v.* 812,964

Page
Cortes-Quinones; Jimenez-Nettleship *v.* ... 823
Cortez *v.* Mondragon ... 842
Corwin *v.* California ... 1006
Corwin; VanCaspel *v.* ... 924
Cosentino *v.* United States ... 923
Cossett *v.* Merchants & Mechanics Federal Savings & Loan Assn. . 962
Costanzo *v.* California ... 858
Coughlin; Doe *v.* ... 879
Coughlin; Lee *v.* ... 1014
Coughlin; Young *v.* ... 985
Council of New Orleans; New Orleans Public Service Inc. *v.* ... 907,1003
Counsel; Connecticut *v.* ... 955
County. See name of county.
County Line Joint Venture *v.* Grand Prairie ... 890
Court of Appeals. See also U. S. Court of Appeals.
Court of Appeals of Mich.; Kalvans *v.* ... 848
Cousins *v.* United States ... 853
Couture *v.* Lopes ... 861
Covington & Burling; Brown *v.* ... 876
Cowherd *v.* Doe ... 967
Cowley; Chatman *v.* ... 896
Cowling *v.* United States ... 911
Cox; Alabama *v.* ... 1018
Cox *v.* New Mexico ... 996
Cox *v.* United States ... 1044
Cox Enterprises, Inc. *v.* Guinn ... 1041
Coxsey *v.* Employers Mut. Casualty Co. ... 956
Craig; Liberis *v.* ... 853
Cranford *v.* Sumner ... 971
Cravens *v.* Washington ... 957
Crawford; Sullivan *v.* ... 910
Crawford Painting & Drywall Co. *v.* J. W. Bateson, Inc. ... 1035
Credit Bureaus of Southeast Mo., Inc.; McDowell *v.* ... 852
Creekmore *v.* United States ... 984
Creel *v.* Heckmann ... 1014
Crews *v.* United States ... 846
Crocker National Bank *v.* San Francisco ... 881
Cronk *v.* United States ... 942
Croson Co.; Richmond *v.* ... 469
Cross *v.* Department of Housing and Urban Development ... 845
Cross *v.* Morgan ... 944
Cross *v.* San Mateo County Transit Dist. ... 862
Cross *v.* State Ins. Fund of N. Y. ... 943
Cross *v.* United States ... 946

Page
Crowson *v.* United States 831
Crum *v.* United States 1033
Crumb *v.* Sachs, Greenbaum & Tayler 842
Crummey *v.* United States 836
Cruz; Illinois *v.* 869
Cuero-Flores *v.* United States 835
Culverhouse *v.* Texas 863
Cunningham; Martin *v.* 859
Curro *v.* United States 843
Curry *v.* Clerk of Court, Gloucester County Circuit 1046
Curtis *v.* Arave 996
Curtiss Wright Corp.; Paster *v.* 1045
Cusumano *v.* United States 1011
Cutler *v.* Anchorage 896
Cycle Logic *v.* Ladd 843
Daggett; Kimber Petroleum Corp. *v.* 935
Dagley *v.* North Dakota 965
Dailey *v.* West Virginia Dept. of Welfare 923,997
Daily Gazette Co.; Hemphill *v.* 897
Dallas *v.* Stanglin 815,939,979
Dallas Independent School Dist. *v.* Jett 940
Dallas Independent School Dist.; Jett *v.* 940
Daloia *v.* Rose 898
D'Andrea *v.* Bank of America National Trust & Savings Assn. 1006
Daniel *v.* Eaton Corp. 826
Daniels *v.* Alabama 1051
Daniels *v.* Commissioner 876
Daniels; Johnson Moving & Storage Co. *v.* 1042
Danville Police Dept.; Spencer *v.* 862
Darlington *v.* United States 1026
Darnall; Hicks *v.* 830
Darouse *v.* United States 1016
Daste & Sons, Inc.; Dobard *v.* 828
Data Controls North, Inc. *v.* Equitable Bank, National Assn. 1008
Daugherty *v.* Dugger 871,936
Daugherty *v.* Florida 936,959
Davenport *v.* Georgia 834,976
Davenport; Lane *v.* 908
Davis, *In re* 814,977
Davis; Berger *v.* 892
Davis *v.* DeChiaro Limited Partnership 1024
Davis *v.* Florida 866
Davis *v.* Hoke 1016
Davis *v.* McLaughlin 897,987

Page
Davis *v.* Michigan Dept. of Treasury 809
Davis *v.* Nevada 926
Davis *v.* Ohio 1034
Davis *v.* Oklahoma 999
Davis *v.* Proctor 958
Davis *v.* San Ramon Police Dept. 957
Davis *v.* Trenton Resins Credit Union 836
Davis *v.* Tucson 1032
Davis *v.* United States 832,1016
Davison *v.* Lowery 854
Dawns *v.* Canon U. S. A., Inc. 880
Day; Gracey *v.* 880,950
Dayton; Kuntz *v.* 1008
Dayton; Neal *v.* 930
Dayton Hudson Corp.; Bilal *v.* 985
D. C. Transit System *v.* Washington Metro. Area Transit Comm'n 1043
Deak; Fleming *v.* 945,1023
Dean *v.* United States 1016
Dean Witter Reynolds, Inc.; Brobst *v.* 981
DeChiaro Limited Partnership; Davis *v.* 1024
Deerman *v.* United States 856
Default Service Co.; Bank of San Marino Building, Ltd. *v.* 807
De Izaguirre *v.* United States 909
Deklewa *v.* National Labor Relations Bd. 889
Deklewa & Sons *v.* National Labor Relations Bd. 889
De Koster; De Young *v.* 895
Delaware; Coleman *v.* 973,1016
Delaware *v.* New York 990
Delaware; Williams *v.* 969
Delay *v.* Georgia 850
Delgadillo *v.* California 930
Delumen *v.* U. S. Postal Service 927
Demaco Corp. *v.* F. Von Langsdorff Licensing Ltd. 956
DeMenna; Scott *v.* 853
Democratic National Committee Chairman; Kokkonen *v.* 1028
Dempsey *v.* United States 830
Denker, *In re* 963
Dennis, *In re* 907
Dennis *v.* Miller 836
Department of Ag.; Federal Labor Relations Authority *v.* 1025
Department of Ag.; Wohlford *v.* 941,1023
Department of Ag. & Consumer Services *v.* Mid-Florida Growers . 870
Department of Air Force; Arko *v.* 943
Department of Air Force *v.* Federal Labor Relations Authority ... 880

Page
Department of Air Force; Hill *v.* 825
Department of Air Force; Krishnan *v.* 957,1023
Department of Army; Rowe *v.* 951,1024
Department of Army; Shinn *v.* 929,997
Department of Commerce; Kramer *v.* 928
Department of Defense; Anderson *v.* 944
Department of Education; Dozier *v.* 858
Department of Employment and Training of Md.; Gisriel *v.* 846
Department of Health and Human Services *v.* FLRA 880
Department of Health and Human Services; Prenzler *v.* 862
Department of HUD; Buffalo Wire Works Co. *v.* 889
Department of HUD; Chaires *v.* 829,1023
Department of HUD; Cross *v.* 845
Department of Interior; TransAmerican Natural Gas Corp. *v.* 819
Department of Justice; Public Citizen *v.* 979
Department of Justice; Quansah *v.* 834
Department of Justice *v.* Tax Analysts 1003,1039
Department of Justice; Washington Legal Foundation *v.* 979
Department of Navy *v.* Federal Labor Relations Authority 881
Department of Navy; Ferry *v.* 848
Department of Public Safety, Northern Mariana Islands *v.* Fleming 889
Department of Revenue of Fla.; Shell Oil Co. *v.* 951
Department of Revenue of Pa.; H & H Beverage Distributors, Inc. *v.* 994
Department of Sanitation of New York City; Noel *v.* 925
Department of Soc. Servs., Neb.; Cornhusker Christ. Child. Home *v.* 919
Department of State; Landes *v.* 811,1043
Department of Transportation of Wash.; Clallam County *v.* 1008
Department of Treasury; Gordon *v.* 954
DePriest *v.* Virginia 985
DeRidder; Bryson *v.* 956
Derosia; Massachusetts *v.* 980
DeShaney *v.* Winnebago County Dept. of Social Services 808
DeSimone *v.* Bove 853
Desmond; Taylor *v.* 861
Deutschman; Beneficial Corp. *v.* 811
De Wiest *v.* Tarleton State Univ. 927
De Young *v.* Campbell 866
De Young *v.* De Koster 895
De Young *v.* Nelson 944
De Young *v.* O'Brien 896,944
De Young *v.* O'Keefe 958
De Young *v.* Republican Party of Iowa 841
De Young *v.* Soens 843
Diamond *v.* Reynolds 955

Page
Diamond Farms Condominium; Wardell *v.* ... 855
Dianella Shipping Corp. *v.* Hernandez ... 981,1030
Dias; McCabe *v.* ... 1036
Diaz *v.* United States ... 818
Dickens *v.* United States ... 859
Dickey *v.* Bowen ... 834
Diggs *v.* Harris Hospital-Methodist, Inc. ... 956
Dillon *v.* United States ... 893
DiPrizio *v.* Massachusetts ... 1046
Director, Ill. Dept. of Revenue; Goldberg *v.* ... 252
Director, Ill. Dept. of Revenue; GTE Sprint Communications Corp. *v.* 252
Director, Office of Workers' Compensation Programs *v.* Broyles ... 105
Director, Office of Workers' Compensation Programs; Burgess *v.* ... 803
Director, Office of Workers' Compensation Programs; Gilmore *v.* ... 1031
Director, Office of Workers' Compensation Programs *v.* Kyle ... 997
Director of penal or correctional institution. See name or title of director.
Director of Revenue of Mo.; Community Federal S. & L. Assn. *v.* ... 893
Disciplinary Comm., 1st Jud. Department; Wehringer *v.* ... 988
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
District of Columbia; Stebbins *v.* ... 929
Ditmar *v.* Needham Harper Worldwide, Inc. ... 882
Division of Alcoholic Beverages & Tobacco of Fla.; McKesson Corp. *v.* 954
Dixon *v.* Penrod Drilling Co. ... 853
Dobard *v.* Oscar Daste & Sons, Inc. ... 828
Dodrill *v.* Tate ... 1044
Doe; Carlucci *v.* ... 93
Doe *v.* Coughlin ... 879
Doe; Cowherd *v.* ... 967
Doe *v.* Sobol ... 850
Doe; Strader *v.* ... 864
Doe; Times Mirror Co. *v.* ... 1036
Doe *v.* United States ... 894
Doherty, *In re* ... 989
Dolenc *v.* Fulcomer ... 930
Dolenc *v.* Owens ... 838,845
Domby *v.* United States ... 857
Donnelly *v.* Eklutna, Inc. ... 1046
Donnelly *v.* United States ... 956
Dopico-Fernandez *v.* Grand Union Supermarket ... 864
Dorn *v.* Wisconsin ... 981
Dorrough *v.* United States ... 840
Dotson *v.* Bohte ... 862,977

Page
Doud *v.* Wisconsin 1032
Douglas, *In re* 1039
Douglas; Jackson *v.* 835
Douglas *v.* Mapother & Mapother 854
Douglas *v.* Nebraska *ex rel.* Nebraska State Bar Assn. 802
Douglass, *In re* 923
Dow Chemical Co. *v.* Arehart 992
Dow Jones & Co.; Liberty Lobby, Inc. *v.* 825
Dow Jones & Co. *v.* Simon 946
Dow Pharmaceuticals, Inc.; Hoffman *v.* 1006
Dozier *v.* Department of Education 858
Dozier *v.* United States 846,927
Drabick *v.* Drabick 807,958,1024
Drake Publishers, Inc. *v.* Samad 925
Drasen *v.* United States 909
Drinkwater *v.* Metropolitan Life Ins. Co. 909
Drivers, Chauffeurs & Helpers; Yellow Bus Lines, Inc. *v.* 926
Druid Hills Civic Assn., Inc. *v.* Federal Highway Administration 819
DuBois; Moore *v.* 1043
Duck *v.* Bank of America, N. T. & S. A. 1043
Duckworth *v.* Eagan 888,921,1002
Duckworth; Jeffers *v.* 858
Duckworth *v.* Mauricio 869
Dudosh *v.* Warg 942
Duffy *v.* Tease 833
Duggan; Pulitzer Publishing Co. *v.* 1009
Dugger; Baggett *v.* 1045
Dugger; Barratteau *v.* 1015
Dugger; Buchan *v.* 839
Dugger; Bundy *v.* 1034,1036
Dugger; Burrell *v.* 896
Dugger *v.* Clark 1052
Dugger; Daugherty *v.* 871,936
Dugger; Ferenc *v.* 929
Dugger; Ford *v.* 807
Dugger; Golden *v.* 1015
Dugger; Hayes *v.* 958,972
Dugger; Jones *v.* 833
Dugger; Layton *v.* 971,983
Dugger; Lightbourne *v.* 934
Dugger; LoConte *v.* 958
Dugger; Mattox *v.* 833
Dugger; Pacheco *v.* 1046
Dugger; Portee *v.* 1045

Page
Dugger; Rembert *v.* 969
Dugger *v.* Ruffin 1047
Dugger; Ruffin *v.* 1044
Dugger; Salaahuddin *v.* 972
Dugger; Span *v.* 973
Dugger; Tarpley *v.* 837
Dugger; Topley *v.* 837
Dugger; Torres *v.* 833,837
Dugger *v.* Waterhouse 869
Dugger; White *v.* 871
Duncan *v.* Lynaugh 859
Duncan *v.* Tennessee 934
Dunkins *v.* Thigpen 963
Dunsmore *v.* United States 833
Du Pont de Nemours & Co. *v.* Phillips Petroleum Co. 986
Dupuis; Becnel *v.* 891
Duquesne Light Co. *v.* Barasch 299
Dutton; Lee *v.* 1032
Dutton; Williams *v.* 847
Duty *v.* Lynaugh 912
Dye; Michigan *v.* 985
Dyer *v.* California 934
Dynamics Corp. of America; McDowell *v.* 1030
Eagan; Duckworth *v.* 888,921,1002
Eagle-Picher Industries, Inc. *v.* United States 965
Earnst; Fairchilde *v.* 929
Easter House *v.* United States 907
Eastham *v.* Oklahoma 857
East Ky. Energy Corp. *v.* Webster County Comm'n 336
Eaton *v.* Louisiana 1019
Eaton Corp.; Daniel *v.* 826
Eberstein, *In re* 1000
EBSCO Industries, Inc.; Lilly *v.* 825
Eckhardt *v.* United States 839
Economou *v.* Securities and Exchange Comm'n 850
Edwards *v.* Lynaugh 834
Edwards; Nabors *v.* 972
Edwards *v.* Scroggy 918
Edwin Gould Services for Children; Abdul Matiyn *v.* 865
E. I. du Pont de Nemours & Co. *v.* Phillips Petroleum Co. 986
Eilrich *v.* Remas 819
Eischen *v.* Kaney 851
Eisenhauer *v.* Texas 848
Eklutna, Inc.; Donnelly *v.* 1046

Page
Eklutna, Inc.; Lee *v.* ... 1046
Elder *v.* California ... 1030
Electrical Apprentice. & Training Comm. of No. Va.; Washington *v.* 944
El Gawli *v.* United States ... 817
Ellerbe *v.* United States ... 868
Ellingsworth *v.* Reynolds ... 960
Elliott; Pierce County District Court Probation Office *v.* ... 909
Ellis *v.* Kentucky State Bd. of Parole ... 1017
Ellis *v.* Massachusetts ... 817
Ellis *v.* Texas ... 850
Embrey *v.* United States ... 839
Emerson *v.* Illinois ... 900
Emeryville Trucking, Inc. *v.* National Labor Relations Bd. ... 980
Empey *v.* Texas Bd. of Pardons and Paroles ... 896
Empire Blue Cross & Blue Shield *v.* United States ... 993,1051
Empire Life Ins. Co.; Moody *v.* ... 967
Empire Lumber Co. *v.* Washington Water Power Co. ... 892
Employers Mut. Casualty Co.; Coxsey *v.* ... 956
Emrani; Kane *v.* ... 849
Endell *v.* Walker ... 981
Endell; Walker *v.* ... 926
Engle; West Penn Power Co. *v.* ... 965
Englert *v.* Small Business Administration ... 858,977
Engle's Holiday Harbor; West Penn Power Co. *v.* ... 965
Enoch *v.* Illinois ... 917
Enterprise Leasing Corp.; Charlton *v.* ... 966
EPA; Kaganove *v.* ... 1011
EPA; National Gypsum Co. *v.* ... 942
EPA; National-Southwire Aluminum Co. *v.* ... 955
Environmental Tectonics Corp.; W. S. Kirkpatrick & Co. *v.* ... 921
Epps *v.* United States ... 973
Equal Employment Opportunity Comm'n; Boeing Co. *v.* ... 889
Equal Employment Opportunity Comm'n; Ithaca Industries, Inc. *v.* 924
Equal Employment Opportunity Comm'n; University of Pa. *v.* ... 992
Equitable Bank, National Assn.; Data Controls North, Inc. *v.* ... 1008
Erdbacher; Ballantyne *v.* ... 984
Erickson; Fairchilde *v.* ... 894
Erie Police Dept.; Nichols *v.* ... 866
Ernst *v.* United States ... 945
Ervin *v.* Bowen ... 864
Ervin; Nash *v.* ... 897,950
Esselte Pendaflex Corp.; Barlow *v.* ... 843
Essex *v.* Vassar ... 969
Estate. See name of estate.

Page
Estes Park Bank; Shanks *v.* 927,1023
Eu; Badham *v.* 804,953,1024
Eu *v.* San Francisco County Democratic Central Committee 991
Eunice; Robertson *v.* 1033
Evans; Burton *v.* 907
Evans *v.* Fulcomer 865,1013
Evans *v.* Henman 941
Evans; Michigan *v.* 956
Evans *v.* United States 1011
Evans & Sons; Polyak *v.* 962,1035
Evatt; Plyler *v.* 897
Evins *v.* California 1012
Evola *v.* United States 821
Exxon Co., U. S. A. *v.* Banque de Paris et des Pays-Bas 920
Ezeodo *v.* Immigration and Naturalization Service 1044
Ezrin, *In re* 808
F.; Florida Star *v.* 887
Fahmy *v.* United States 888
Fair; Campbell *v.* 847
Fairchild *v.* Lockhart 1051
Fairchilde *v.* Earnst 929
Fairchilde *v.* Erickson 894
Fairchilde *v.* Fuller 894
Fairchilde *v.* Hodel 929
Fairchilde *v.* Moylan 859
Fair, Inc.; Vane's Estate *v.* 1008
Fairness in Media *v.* Federal Communications Comm'n 893
Faison; Boddie *v.* 823
Faison *v.* Nesbitt 841,950
Falkner *v.* Jones 895
Fallon; Pineman *v.* 824
Farm Credit Admin.; Production Credit Assn. of Northern Ohio *v.* 851
Fat of Cal. *v.* McLaughlin 1040
Fat Seto *v.* McLaughlin 1040
Faux-Burhans *v.* Board of County Comm'rs of Frederick County .. 1042
Feagin *v.* Lynaugh 1032
Feaster *v.* Miksch 857
Feaster *v.* United States 898
Federal Bureau of Investigation; James *v.* 895
Federal Bureau of Investigation; Mahdavi *v.* 958
Federal Communications Comm'n; Carlin Communications, Inc. *v.* . 924
Federal Communications Comm'n; Fairness in Media *v.* 893
Federal Communications Comm'n *v.* Sable Communications of Cal. 1003
Federal Communications Comm'n; Sable Communications of Cal. *v.* 1003

Page
Federal Employees; Karahalios *v.* 809
Federal Energy Regulatory Comm'n; Arctic Slope Regional Corp. *v.* 868
Federal Energy Regulatory Comm'n; Cooley *v.* 933
Federal Energy Regulatory Comm'n; Shostak *v.* 942,1023
Federal Highway Administration; Druid Hills Civic Assn., Inc. *v.* . 819
Federal Labor Relations Authority *v.* Department of Agriculture . 1025
Federal Labor Relations Authority; Department of Air Force *v.* ... 880
Federal Labor Relations Authority; Department of HHS *v.* 880
Federal Labor Relations Authority; Department of Navy *v.* 881
Federal Land Bank of Louisville; Mahlerwein *v.* 803,976
Federal Land Bank of Omaha; Blankemeyer *v.* 805
Federal Maritime Comm'n; Longshoremen *v.* 1041
Federal Mine Safety and Health Review Comm'n; Terco, Inc. *v.* ... 818
Federal Savings & Loan Ins. Corp. *v.* Stevenson Associates 935
Federal Savings & Loan Ins. Corp. *v.* Ticktin 815
Federal Savings & Loan Ins. Corp.; Van Voorhis & Skaggs *v.* 848
Federal Savings & Loan Ins. Corp.; York Bank & Trust Co. *v.* ... 1005
Federal Trade Comm'n; Orkin Exterminating Co. *v.* 1041
Federico *v.* Lingl 819
Feeney; Hicks *v.* 1005
Feiss *v.* Veterans Administration 849
Feldman *v.* United States 974,1018
Felix Chevrolet; Steele *v.* 888,976
Fenn *v.* Connecticut 1031
Ferenc *v.* Dugger 929
Ferenc *v.* Internal Revenue Service 895
Ferguson *v.* Berry 828
Ferguson; Friedman *v.* 993
Ferguson *v.* McMackin 983
Ferguson *v.* Norfolk Southern Corp. 856
Ferkins *v.* Scully 970
Fernandez *v.* United States 832,838
Ferrell *v.* Tate 932
Ferrell *v.* U. S. Parole Comm'n 972
Ferry *v.* Department of Navy 848
Ficarotta *v.* Renna 968
Fidelity & Deposit Co. of Md.; Skirlick *v.* 1007
Fields *v.* Martin Marietta, Inc. 978
Fields *v.* Pruett 978
Fields *v.* Testerman 978
Filipas *v.* Workmen's Compensation of Industrial Comm'n of Ohio 846,961
Finley *v.* United States 815
Finn; Prudential-Bache Securities, Inc. *v.* 917
Finnegan *v.* Maryland 854

Page
Fiorilla *v.* United States 966
Firemen & Policemen's Pension Trustees of San Antonio; Lott *v.* .. 927
Firemen's & Policemen's Civil Service Comm'n; Burnham *v.* 842
Firestone Tire & Rubber Co. *v.* Bruch 809
Firestone Tire & Rubber Co. *v.* Richard 1042
First Interstate Credit Alliance *v.* American Bank of Martin Cty. . 993
First National Bank, Lexington *v.* United States 893
First National Bank of Atlanta; Smith *v.* 821
First National Bank & Trust Co.; Unsecured Creditors' Committee *v.* 817
First State Bank of Benson; VanderWeyst *v.* 943
First Trust Co. of N. D.; Conway *v.* 982
First Wis. National Bank of Milwaukee; Szemborski *v.* 866
Fisher *v.* Riddick 897
Fitger Brewing Co. *v.* Minnesota 819
Fitzsimmons *v.* Fitzsimmons 821
Fixel *v.* Whitley 864
Flaherty; Szarewicz *v.* 843
Fleegle *v.* Maryland 895
Fleek *v.* Warden 836
Fleenor *v.* Indiana 872
Fleming *v.* Deak 945,1023
Fleming; Department of Public Safety, Northern Mariana Islands *v.* 889
Fleming; Squires *v.* 1044
Fleming *v.* United States 932
Fleming Cos.; Ruskin Hardware, Inc. *v.* 942
Flight Attendants *v.* Zipes 1029
Flint; Arizona *v.* 979
Flip Side Productions, Inc. *v.* Jam Productions, Ltd. 909
Florida; Beach *v.* 862
Florida *v.* Belcher 912
Florida *v.* Brown 912
Florida; Brown *v.* 944
Florida; Bundy *v.* 1036
Florida *v.* Caso 870
Florida; Correll *v.* 871
Florida; Daugherty *v.* 936,959
Florida; Davis *v.* 866
Florida; Flynn *v.* 895
Florida; Hardwick *v.* 871
Florida; Jackson *v.* 871,1050
Florida; Lopez *v.* 818
Florida; Mitchell *v.* 960
Florida; Moore *v.* 825
Florida; Parres *v.* 957

Page
Florida *v.* Potts 870
Florida; Puiatti *v.* 871
Florida; Ranck *v.* 969
Florida; Remeta *v.* 871
Florida *v.* Riley 445
Florida; Rodriguez Diaz *v.* 845
Florida; Ruiz *v.* 1044
Florida; Smith *v.* 842,950
Florida; Torres-Arboledo *v.* 901
Florida; Vandercreek *v.* 1009
Florida; Waterhouse *v.* 846
Florida; Woods *v.* 919
Florida Bar; Clark *v.* 999
Florida Comm'n on Human Relations; Kleinschmidt *v.* 842,976
Florida Star *v.* B. J. F. 887
Florida State Univ. Health Center; Joshi *v.* 1029
Flota Mercante Grancolombiana, S. A.; O. N. E. Shipping, Ltd. *v.* 923
Flowers *v.* Warden, Conn. Correctional Institution 995,1051
Floyd *v.* Kellogg Sales Co. 970
Flynn *v.* Connecticut 891
Flynn *v.* Florida 895
Flynn *v.* United States 974
Foley *v.* Secretary of Army 980,1051
Folio *v.* United States 945
Foltz; Houston *v.* 968
Foltz; Turnpaugh *v.* 996
Forbes *v.* Hennepin County Attorney's Office, Criminal Division .. 971
Forbes *v.* United States 1033
Forbes *v.* U. S. District Court 835
Ford, *In re* 905
Ford *v.* Dugger 807
Ford; Fulghum *v.* 1013
Ford *v.* Seabold 928
Forde *v.* United States 974
Ford Motor Co. *v.* Bryant 816,986
Ford Motor Co.; Griffin *v.* 822
Forest Hills Early Learning Center, Inc. *v.* Jackson 1029
Forest Hills Early Learning Center, Inc.; Jackson *v.* 1029
Foretich; Morgan *v.* 1007
Fornino *v.* New Jersey 859
Forrest *v.* Fulcomer 838
Forrest *v.* Occidental Petroleum Corp. 994
Forrest; Washington State Electrical Contractors Assn., Inc. *v.* ... 806
Fort *v.* National American Ins. Co. 884

Page
Fortel Corp.; Phone-Mate, Inc. *v.* 848
Fort Myers; Howard *v.* 905
Fortney *v.* United States 882
Fort Wayne Books, Inc. *v.* Indiana 809,886
Foster *v.* Milliken 856
Foster *v.* Oklahoma 884
Fountain *v.* United States 982
Fournier *v.* Petroleum Helicopters, Inc. 909
Four Star Corp. *v.* Bott 968
Fox; Board of Trustees of State Univ. of N. Y. *v.* 815
Foy *v.* Northeast Suburban Life 922
Fraley *v.* United States 1033
Franchise Tax Bd. of Cal.; Loebner *v.* 854
Francis *v.* Kentucky 985
Francois *v.* United States 865
Frank; Malone *v.* 819
Frank *v.* Minnesota Newspaper Assn., Inc. 815,1001
Franklin *v.* Lynaugh 935
Fraychineaud *v.* New Orleans 882
Frazee *v.* Illinois Dept. of Employment Security 814
Frazier *v.* Jabe 832
Frazier *v.* Wilkinson 842
Frech; Allard *v.* 1006
Frederick, *In re* 963
Free *v.* Illinois 872,977
Freels; Hills *v.* 997
Freeman; Bell *v.* 897
Freeman; California *v.* 1311
Freeman; Sohmer *v.* 931
Freeman; Sullivan *v.* 830
Freidgood *v.* Peters Publishing Co. 1042
Freight Drivers *v.* Rozay's Transfer 953
Freiwald *v.* Jabe 898
Friedman *v.* Ferguson 993
Friedman *v.* Ganassi 1042
Friedman *v.* Hall 849
Friedman *v.* Katz 962
Frigard *v.* Regents of Univ. of Cal. 1025
Fritts *v.* Rogers 971
Fritz; Southern Natural Gas Co. *v.* 887
Froschauer *v.* United States 1010
Frost *v.* Hawkins County Bd. of Ed. 981
F/S Airlease II, Inc.; Simon *v.* 852
Fuchilla; University of Medicine & Dentistry of N. J. *v.* 826

Page
Fudge *v.* Penthouse International, Ltd. 821
Fulcomer; Dolenc *v.* 930
Fulcomer; Evans *v.* 865,1013
Fulcomer; Forrest *v.* 838
Fulcomer; Moore *v.* 984
Fulcomer; Powell *v.* 866
Fulghum *v.* Ford 1013
Fuller *v.* Alive Enterprises 972
Fuller; Fairchilde *v.* 894
Fulton *v.* United States 889
Fulton County Medical Examiner; Jankowski *v.* 1014
F. Von Langsdorff Licensing Ltd.; Demaco Corp. *v.* 956
F. W. Woolworth Co.; Shaver *v.* 856
Gabriel *v.* United States 867,958
Gabriel Electronics, Inc. *v.* Andrew Corp. 927
Gacho *v.* Illinois 910
Gagnier *v.* Hartnett 987
Gaitan *v.* United States 944
Galberth *v.* United States 865
Gallagher *v.* Vermont 995
Gallo *v.* United States 894
Gamble *v.* Oklahoma 835
Ganassi; Friedman *v.* 1042
Ganen *v.* United States 837
Gannon; Payne *v.* 927
Garcia *v.* San Antonio Metropolitan Transit Authority 889
Garcia *v.* United States 957,1018
Garcia-Caban *v.* University of Puerto Rico 820
Gardinier, Inc.; Byrd *v.* 853
Gardinier, Inc.; Kilgore Real Estate *v.* 853
Gardner; Morton *v.* 924
Gardner; Szarewicz *v.* 864
Gardner *v.* Texas 1034
Garfinkel; American Foreign Service Assn. *v.* 923
Garland Independent School Dist.; Texas State Teachers Assn. *v.* 815
Garner *v.* Pennsylvania 1009
Garraghty; Hooper *v.* 843
Garraghty; Wilson *v.* 1013
Garrett *v.* General Motors Corp. 908
Garrett *v.* Stickrath 845
Garrison *v.* United States 996
Garver *v.* United States 820
Garza *v.* Grammer 896,987
Gathers; South Carolina *v.* 888,1002,1027,1039

Page
Gaunce *v.* St. Paul Mercury Ins. Co. ... 804,950
Gearinger; Burgest *v.* ... 1016
Geear *v.* Boulder Community Hospital ... 927
Geever *v.* Illinois ... 920
Geldermann, Inc. *v.* Commodity Futures Trading Comm'n ... 816
General American Life Ins. Co.; Burak *v.* ... 828
General Dynamics Corp.; Horrigan *v.* ... 992
General Dynamics Corp./Electric Boat; Harvey *v.* ... 1043
General Electric Co. *v.* United States ... 901
General Foods Corp.; Young *v.* ... 1004
General Motors Corp.; Garrett *v.* ... 908
General Motors Corp. *v.* Glenn ... 948
General Motors Corp.; Maxwell *v.* ... 957
General Motors Corp.; Miles *v.* ... 828
Geneva; Booker *v.* ... 839
Gensler *v.* New York ... 932
George *v.* Michigan Dept. of Natural Resources ... 1008
Georgetown Univ. Hospital; Bowen *v.* ... 204,809
Georgia; Blankenship *v.* ... 871
Georgia; Brown *v.* ... 945
Georgia; Davenport *v.* ... 834,976
Georgia; Delay *v.* ... 850
Georgia; Holiday *v.* ... 934
Georgia; Lee *v.* ... 879
Georgia; Lipham *v.* ... 873,976
Georgia; Lonchar *v.* ... 1019
Georgia; Mincey *v.* ... 871,977
Georgia; Newland *v.* ... 975
Georgia; Patillo *v.* ... 948,1023
Georgia; Wadley *v.* ... 1043
Georgia; Williams *v.* ... 891,942
Georgia Power Co.; Jenkins *v.* ... 1007
Geter *v.* Wille ... 1043
Giacalone *v.* United States ... 910
Giakovmis *v.* Washington ... 1013
Giardina *v.* United States ... 821
Giarratano; Murray *v.* ... 923
Gibbons *v.* United States ... 907
Gibson *v.* Alabama ... 957
Gibson *v.* Butler ... 844
Gibson *v.* United States ... 868
Gilbert *v.* Office of Bar Counsel of D. C. ... 828
Gilhool *v.* Muth ... 815,921,1001
Gill, *In re* ... 814,1002

Page
Gill *v.* Mercy Hospital 892
Gillespie *v.* Ryan 833
Gilley *v.* Texas 944
Gilliard *v.* Scroggy 1019
Gilliard *v.* United States 1033
Gillies *v.* United States 857
Gilmore *v.* Director, Office of Workers' Compensation Programs ... 1031
Gilmore *v.* Kansas Parole Bd. 930
Gilstrap *v.* Wharton 970
Giralt; Vail Village Inn Associates *v.* 1042
Giralt; Village Inn Plaza *v.* 1042
Gisriel *v.* Department of Employment and Training of Md. 846
Gjessing *v.* West Indian Co. 802,976
Glados, Inc.; Reliance Ins. Co. *v.* 999
Glassboro Service Assn., Inc. *v.* McLaughlin 821
Glaude *v.* Regional Postmaster General 839,976
Gleco; Rampp *v.* 882
Glenn; General Motors Corp. *v.* 948
Glenna *v.* California 864
Gligorijevic *v.* Kean 929
Glover *v.* United States 982
Gluckstern; Latham *v.* 1014
Go Air, Inc. *v.* Administrator, Federal Aviation Administration ... 890
Goerg; Parungao *v.* 1034
Goldberg *v.* Sweet 252,979,1001
Goldberger; Wedinger *v.* 850
Golden *v.* Dugger 1015
Golden *v.* Golden 1032
Golden Pacific Bancorp. *v.* Clarke 890
Goldsmith; Valenzuela *v.* 865
Golgart *v.* Central Plastics Co. 806
Gomez *v.* United States 838,1003
Gonzales *v.* Kerby 983
Gonzales *v.* United States 867
Gonzalez *v.* California 948
Gonzalez *v.* United States 973
Goode; Norfolk & Western R. Co. *v.* 811
Goodrich Co. *v.* Lake 826
Goodsky *v.* United States 867
Goodwin; Munchinski *v.* 971
Goodwin; Wade *v.* 854
Gordon *v.* Department of Treasury 954
Gordon *v.* United States 825,912,1017
Gosselin; Pennington *v.* 867

Page
Gould, *In re* ... 814
Gould Services for Children; Abdul Matiyn *v.* ... 865
Govantes *v.* United States ... 842
Governor of Ark. *v.* Smith ... 988
Governor of Ind.; Rhinebarger *v.* ... 824
Governor of La. *v.* Chisom ... 955
Gowin *v.* Illinois ... 860
Grabner *v.* Conti ... 927
Gracey *v.* Day ... 880,950
Graddick; Aaron *v.* ... 846
Graham, *In re* ... 1038
Graham *v.* Connor ... 816,1001,1027
Graham; Oklahoma Tax Comm'n *v.* ... 816,979
Graham Cos.; Karsteter *v.* ... 981
Gramley; Martin *v.* ... 863
Gramly; Branion *v.* ... 1040
Grammer; Garza *v.* ... 896,987
Grand Prairie; County Line Joint Venture *v.* ... 890
Grand Union Supermarket; Dopico-Fernandez *v.* ... 864
Granite Rock Co. *v.* Building Materials & Construction Teamsters ... 986
Grant *v.* California ... 1050
Grant *v.* Kerby ... 1044
Grant; Rob J. *v.* ... 1040
Grant *v.* Silva ... 835
Grant County Court; Payne's Estate *v.* ... 853
Graves *v.* BidNet, Inc. ... 868,977
Graves *v.* Brown ... 880
Graves *v.* Thurman ... 843,897
Gravity Guidance, Inc.; Sky's the Limit *v.* ... 1006
Gravity Guidance, Inc.; Teeter *v.* ... 1006
Gray *v.* United States ... 866,1016
Grays *v.* Cabana ... 836
Greanias *v.* Wrigley ... 850
Greater Lowell Bd. of Realtors; Wells Real Estate, Inc. *v.* ... 955
Greco *v.* Tampa Wholesale Co. ... 1006
Green; Arn *v.* ... 1034
Green *v.* Commissioner ... 850
Green *v.* Johnson ... 1012
Green *v.* North Carolina ... 900
Green *v.* Ohio ... 972
Green *v.* Scully ... 945
Greenberg *v.* United States ... 819
Greene County Hospital; Path-Science Laboratories, Inc. *v.* ... 820
Greenman *v.* United States ... 824

Page
Greeno *v.* United States ... 858
Gresham; Poole *v.* ... 978
Gretna *v.* Citizens for a Better Gretna ... 1002
Gridley, *In re* ... 1038
Griffin, *In re* ... 814,1029
Griffin *v.* Ford Motor Co. ... 822
Griffin *v.* United States ... 1013
Grimes; Celeotex Corp. *v.* ... 889
Grinter; Petroleum Operation Support Service, Inc. *v.* ... 969
Grizzly & Daley Ranch *v.* United States ... 980
Grogan *v.* Platt ... 981
Groppo; Magic II, Inc. *v.* ... 819
Gross *v.* Illinois ... 854
Grossman *v.* United States ... 1040
Group W Cable, Inc.; Loretto *v.* ... 827
Gruenholz *v.* United States ... 898
GTE Sprint Communications Corp. *v.* Sweet ... 252,979,1001
G & U, Inc.; Soler *v.* ... 832
Guinn; Cox Enterprises, Inc. *v.* ... 1041
Guinn; Waco Tribune Herald *v.* ... 1041
Guinnane *v.* San Francisco ... 823
Gulf Oil Corp.; Abadjian *v.* ... 997
Gulley *v.* U. S. Postal Service ... 835
Gurule *v.* Kautzky ... 1017
Guys & Dolls Billiards, Inc. *v.* McHale ... 892
Guzman *v.* California ... 1050
G & W Laboratories, Inc. *v.* United States ... 1040
Haberlain; Jones *v.* ... 898
Haberman *v.* Washington Public Power Supply System ... 805
Haberman; Wood Dawson Smith & Hellman *v.* ... 805
Hacker *v.* Missouri ... 1015
Haedo *v.* United States ... 857
Hager; Barcume *v.* ... 835
Hagerman; Yukon Energy Corp. *v.* ... 820
Haggenjos *v.* Broglin ... 969
Haines; Jensen *v.* ... 822
Hale *v.* Oklahoma ... 878
Halifax County School Bd.; Hughes *v.* ... 1042
Hall; Friedman *v.* ... 849
Hall *v.* Hawaii ... 803
Hall *v.* Illinois ... 867
Hall *v.* Rogers ... 847
Hall *v.* United States ... 860
Hallmark Cards, Inc. *v.* Blue Mountain Arts ... 908

Page
Hallmark Cards, Inc. *v.* Hartford House, Ltd. ... 908
Hallstrom *v.* Tillamook County ... 811
Halper; United States *v.* ... 906
Hamblin *v.* Ohio ... 975,1051
Hamby; Metheny *v.* ... 913
Hamdan *v.* United States ... 1016
Hamilton *v.* Alabama ... 871
Hamilton *v.* California ... 1047
Hamilton; Polyak *v.* ... 803,961
Hamm *v.* Maryland ... 843
Hammock *v.* Plunkett ... 943
Hammond *v.* Terminal Railroad Assn. of St. Louis ... 921
Handley *v.* United States ... 984
Harbison-Walker Refractories *v.* Brieck ... 226
Hardage *v.* Neal ... 972
Hardcastle; Johnson *v.* ... 843
Harden *v.* Paul ... 967
Harden *v.* United States ... 910
Hardin *v.* Hardin ... 1012
Hardin *v.* Straub ... 887,953
Harding *v.* Lewis ... 871
Hardwick *v.* Florida ... 871
Hardy; Holmes *v.* ... 931
Hardy; Richards *v.* ... 931
Hargrove *v.* United States ... 826
Harkins Amusement Enterprises; United Artists Theatre Cir. *v.* ... 1019
Harlan *v.* Comm. on Prof. Ethics & Conduct, Iowa Bar Assn. ... 1009
Harleson; Wilson *v.* ... 917
Harmon *v.* Thornburgh ... 934
Harrell *v.* Alabama ... 934
Harriatt *v.* United States ... 865
Harris; Colorado *v.* ... 985
Harris *v.* Illinois ... 842
Harris *v.* Patuxent Institution ... 945
Harris *v.* Refiners Transport & Terminal Corp. ... 823,975
Harris *v.* Samson ... 967
Harris; Small *v.* ... 837
Harris Hospital-Methodist, Inc.; Diggs *v.* ... 956
Harrison; Barrow *v.* ... 1031
Harston *v.* Seabold ... 931
Hart *v.* United States ... 830
Harte-Hanks Communications, Inc. *v.* Connaughton ... 907
Hartenstine *v.* Blue Cross of Southern Cal. ... 899
Hartenstine *v.* Superior Court of Cal., San Bernardino Cty. ... 899

Page
Hartford House, Ltd.; Hallmark Cards, Inc. *v.* 908
Hartigan; Panhandle Eastern Pipe Line Co. *v.* 986
Hartman, *In re* 1026
Hartmann, *In re* 1027
Hartness *v.* United States 925
Hartnett; Gagnier *v.* 987
Harvey *v.* General Dynamics Corp./Electric Boat 1043
Hasbrouck; Texaco Inc. *v.* 811
Hastings *v.* United States 925
Hatcher *v.* Jackson 1018
Hawaii; Hall *v.* 803
Hawaii; Hutch *v.* 860
Hawkeye-Security Ins. Co.; Central States Health & Welf. Fund *v.* 1004
Hawkins *v.* Lynaugh 900,989
Hawkins County Bd. of Ed.; Frost *v.* 981
Haydon; Poe *v.* 1007
Hayes *v.* Dugger 958,972
Hayes *v.* Western Weighing and Inspection Bureau 953
Haynes; North County Transit Dist. *v.* 851
Haynes; North San Diego County Transit Development Bd. *v.* 851
Hazelhurst; Williams *v.* 984
HCA Management Co.; Blumberg *v.* 1007
Headley *v.* Zon 836,976
Healy *v.* Beer Institute 954,1039
Heart of Cedar Lane, Inc.; Priovolos *v.* 962
Hecht, *In re* 963
Hecht; O'Connor *v.* 996
Heckmann; Creel *v.* 1014
Hedrick; Beasley *v.* 860
Hedrick; Murphy *v.* 908
Hefner *v.* United States 868
Heintz *v.* United States 1004
Heirens *v.* Mizell 830
Heishman *v.* California 948,997
Hemphill *v.* Daily Gazette Co. 897
Henderson; Bastidas *v.* 889
Henderson; Brathwaite *v.* 952
Henderson *v.* McKellar 863
Henderson; Medina *v.* 838
Henderson; Waul *v.* 984
Hendricks *v.* California 900
Hendricks *v.* United States 1017
Hendrickson; Marine Bank of Springfield *v.* 822
Hendrickson Brothers, Inc. *v.* New York 848

Page
Hening *v.* Ambach 1008
Henman; Evans *v.* 941
Henman; Tripati *v.* 982,1035
Hennepin County Attorney's Office, Criminal Division; Forbes *v.* ... 971
Hensley *v.* Kentucky 1018
Henson *v.* United States 1005
Hepting; Williams *v.* 851
Herman Brothers, Inc. *v.* Teamsters 848
Hermanski *v.* United States 983
Hernandez; Alcan Aluminio do Brasil, S. A. *v.* 934
Hernandez *v.* Dianella Shipping Corp. 1030
Hernandez; Dianella Shipping Corp. *v.* 981
Hernandez; Illinois *v.* 869
Hernandez *v.* Thornburgh 977
Hernandez-Garcia *v.* United States 959
Hernandez-Molina *v.* United States 1016
Herold *v.* Burlington Northern Inc. 825
Herrera-Diaz *v.* United States 924
Herrington; Bury *v.* 860
Herrmann *v.* Thornburgh 867
Herzog *v.* Colding 805
Hester; Operating Engineers *v.* 1025
H & H Beverage Distributors, Inc. *v.* Department of Revenue of Pa. 994
Hicks *v.* Christopher 842
Hicks *v.* Darnall 830
Hicks *v.* Feeney 1005
High *v.* Zant 886
High Society Magazine *v.* Samad 925
Hill *v.* Department of Air Force 825
Hill *v.* Murray 910
Hill *v.* Redman 996
Hill *v.* Schukie 1014
Hill *v.* United States 847
Hill-Dunning *v.* United States 967
Hillebrand; M-Tron Industries, Inc. *v.* 1004
Hills *v.* Freels 997
Hilton-Davis; King *v.* 1030
Hilton-Davis Chemical Co.; King *v.* 1030
Hinds; Corr *v.* 848
Hines *v.* Illinois 895
Hines; Lloyd *v.* 985
Hines *v.* Superior Court of Cal., Sacramento County 896
Hines *v.* United States 958
Hinkel; Wool *v.* 802,976

Page
Hintz *v.* Kincheloe 846
Hix *v.* Ohio 983
Hoai *v.* Thanh Van Vo 1008
Hodel; Fairchilde *v.* 929
Hodel; Jordan *v.* 1006
Hodel; Macharia *v.* 992
Hodel *v.* Muscogee (Creek) Nation 1010
Ho Fat of Cal. *v.* McLaughlin 1040
Ho Fat Seto *v.* McLaughlin 1040
Hoffa; Troche *v.* 844
Hoffman *v.* Connecticut Dept. of Income Maintenance 1003
Hoffman *v.* Merrell Dow Pharmaceuticals, Inc. 1006
Hoffman *v.* Pennsylvania 928
Hoffman; Turner *v.* 862
Hohri *v.* United States 925
Hoke; Brown *v.* 840,976
Hoke; Davis *v.* 1016
Holiday *v.* Georgia 934
Holley *v.* Bull 945,987
Holloway *v.* Lynaugh 838
Holmes *v.* Barton 840
Holmes *v.* Hardy 931
Holmes *v.* United States 831
Holyfield; Mississippi Band of Choctaw Indians *v.* 809
Holy Spirit Byelorussian Autocephalic Orthodox Church *v.* Kendysh 994
Holywell Corp. *v.* Smith 850
Holzer *v.* United States 928
Homecraft Land Development; Howell *v.* 952
Honeywell, Inc.; American Standards Testing Bureau, Inc. *v.* 1010
Honolulu; Austin *v.* 852
Honolulu; Lai *v.* 994
Hood; Barrow *v.* 822
Hooker *v.* United States 999
Hooks *v.* Alabama 1050
Hooper *v.* Garraghty 843
Hooper *v.* Musolino 823
Hooper; Washington *v.* 941
Hopkins, *In re* 938
Horner *v.* Tennessee 853
Horn & Hardart Co. *v.* National Railroad Passenger Corp. 849
Hornsby *v.* Stinson 959
Horrigan *v.* General Dynamics Corp. 992
Horton *v.* United States 1016
Horwitz; Wool *v.* 802,976

Page
Hoskins *v.* Kentucky 1018
Houlton *v.* Nebraska 820
Housewright; Thompson *v.* 866
Houston *v.* Foltz 968
Houston Lighting & Power Co. *v.* Public Utility Comm'n of Tex. 805
Hovey *v.* California 871
Howard *v.* California 871
Howard *v.* Fort Myers 905
Howard *v.* Johnson 865
Howell *v.* Homecraft Land Development 952
Howell *v.* State Bar of Tex. 982
Howell *v.* United States Fire Ins. Co. 943
Howes; Perry *v.* 982
Hubbard Broadcasting, Inc. *v.* Southern Satellite Systems, Inc. 961
Hudson; Bowen *v.* 980,1027
Huggins *v.* United States 1017
Hughes *v.* Halifax County School Bd. 1042
Hughes *v.* Hughes 846
Hughes; Patrolmen's Benevolent Assn. of New York City, Inc. *v.* 967
Hughes Aircraft Co.; Roveda *v.* 951
Hugley *v.* Jones 842
Hulen; Polyak *v.* 802,961,999
Hull *v.* Attleboro Savings Bank 856
Humphrey *v.* Brady 966
Humphreys; Beach *v.* 865
Hunter *v.* Campbell 835
Huntington *v.* Huntington Branch, NAACP 15,1023
Huntington Branch, NAACP; Huntington *v.* 15,1023
Hurley State Bank; Buller *v.* 920
Huron Valley Hospital, Inc. *v.* Pontiac 942
Hurt, *In re* 887
Hurtado *v.* United States 912
Hurvitz *v.* Bowen 968
Hutch *v.* Hawaii 860
Hutchenson; Lynch *v.* 840
Hutchinson; Koch *v.* 909
Hydril Co.; Ingersoll Milling Machine Co. *v.* 890
Hylton, *In re* 813
Ibekwe *v.* United States 860
Idaho; Rhoades *v.* 999
Iddeen *v.* United States 911
I. Kahlowsky & Co.; Vitiello *v.* 849
Ikard *v.* United States 1041
Ikard Mfg. Co. *v.* United States 1041

Page
Ikeni *v.* California Superior Court of Fresno County 920,1023
ILGWU National Retirement Fund; Barbizon Corp. *v.* 967
Illinois; Ashford *v.* 900
Illinois; Boyle *v.* 898
Illinois; Brown *v.* 841
Illinois; Burrows *v.* 862
Illinois; Caruso *v.* 829
Illinois *v.* Cruz 869
Illinois; Emerson *v.* 900
Illinois; Enoch *v.* 917
Illinois; Free *v.* 872,977
Illinois; Gacho *v.* 910
Illinois; Geever *v.* 920
Illinois; Gowin *v.* 860
Illinois; Gross *v.* 854
Illinois; Hall *v.* 867
Illinois; Harris *v.* 842
Illinois *v.* Hernandez 869
Illinois; Hines *v.* 895
Illinois; Johnson *v.* 830
Illinois; Jones *v.* 1046
Illinois; Krohe *v.* 930
Illinois; Lego *v.* 902
Illinois *v.* Madison 907
Illinois *v.* Marinez 868
Illinois; Moore *v.* 840
Illinois; Orange *v.* 900
Illinois; Pierson *v.* 925
Illinois; Porter *v.* 837
Illinois; Prince *v.* 824
Illinois; Rivera *v.* 1046
Illinois; Rodriguez *v.* 858
Illinois; Rogers *v.* 1046
Illinois; Sequoia Books, Inc. *v.* 868,869,960
Illinois; Sims *v.* 844
Illinois; Spencer *v.* 841,950
Illinois; Spreitzer *v.* 917
Illinois; Stewart *v.* 900,987
Illinois *v.* Struebin 851
Illinois; Thompkins *v.* 871,977
Illinois; VanMatre *v.* 839
Illinois; Watson *v.* 863
Illinois; Wilson *v.* 902
Illinois Commerce Comm'n *v.* Interstate Commerce Comm'n 1004

Page
Illinois Dept. of Employment Security; Frazee *v.* 814
Illinois *ex rel.* Hartigan; Panhandle Eastern Pipe Line Co. *v.* 986
Illinois State Bd. of Ed.; Lachman *v.* 925
Immigration and Naturalization Service; Bitcheri *v.* 957
Immigration and Naturalization Service; Ezeodo *v.* 1044
Immigration and Naturalization Service; Kabongo *v.* 982
Indiana; Fleenor *v.* 872
Indiana; Fort Wayne Books, Inc. *v.* 809,886
Indiana *v.* Jones 869
Indiana; Kitchen *v.* 895
Indiana; Montgomery *v.* 840,950
Indiana; Smith *v.* 934
Indiana; Van Cleave *v.* 1019
Indiana Dept. of Revenue; Western Union Corp. *v.* 1035
Indiana Hospital *v.* Miller 870
Indiana Ins. Co.; Winstead *v.* 1030
Industrial Steel Products Co. *v.* McLaughlin 993
Ingersoll Milling Machine Co. *v.* Hydril Co. 890
Ingram *v.* Kemp 975
Ingram *v.* United States 859
Ingram *v.* Wilson 972
In re. See name of party.
Internal Revenue Service; Ferenc *v.* 895
Internal Revenue Service; Prunty *v.* 1045
Internal Revenue Service; Richter *v.* 861
International. For labor union, see name of trade.
International Trade Comm'n; Allied Corp. *v.* 1008
Interstate Commerce Comm'n; Illinois Commerce Comm'n *v.* 1004
Interstate Commerce Comm'n *v.* Pittsburgh & Lake Erie R. Co. .. 965
Interstate Commerce Comm'n; Safir *v.* 841,976
Interstate Commerce Comm'n *v.* Texas 821
Interstate Commerce Comm'n *v.* Transportation Union 969
Interstate Commerce Comm'n; Winter *v.* 925
Iowa Dept. of Human Services; T. B. *v.* 896,977
Iowa Dept. of Revenue; Shell Oil Co. *v.* 19
Iowa Southern Utilities Co. *v.* United States 952
Irby; Johnson *v.* 862,950
Ironworkers *v.* Blount International, Ltd. 1005
Iron Workers *v.* National Labor Relations Bd. 889
Irvin *v.* United States 975
Islamic Republic of Iran Broadcasting *v.* Behroozian 829
Ismail *v.* United States 1018
Isquith; Middle South Utilities, Inc. *v.* 926
Ithaca Industries, Inc. *v.* Equal Employment Opportunity Comm'n 924

Page
Itoh & Co. (America), Inc.; Martin *v.* 951,1024
Ivers *v.* United States 958
Ivey *v.* Lexington Fayette Urban County Government 1013
J. *v.* Grant 1040
J.; Massinga *v.* 1018
Jabe; Bowen *v.* 1018
Jabe; Browning *v.* 1018
Jabe; Frazier *v.* 832
Jabe; Friewald *v.* 898
Jackson *v.* Alaska 828
Jackson *v.* California 840
Jackson *v.* Douglas 835
Jackson *v.* Florida 871,1050
Jackson *v.* Forest Hills Early Learning Center, Inc. 1029
Jackson; Forest Hills Early Learning Center, Inc. *v.* 1029
Jackson; Hatcher *v.* 1018
Jackson *v.* St. Joseph State Hospital 892
Jackson *v.* United States 811,821,857,929
Jacob; Rosberg *v.* 984
Jacobsen; Rzepka *v.* 890
J. A. Croson Co.; Richmond *v.* 469
Jain *v.* University of Tenn. at Martin 827
J. A. Jones Construction Co.; Plumbers *v.* 881
James *v.* Federal Bureau of Investigation 895
James *v.* Leeke 984
James *v.* Tansy 928
James *v.* United States 863
Jamesbury Corp. *v.* Litton Industrial Products, Inc. 828
Jam Productions, Ltd.; Flip Side Productions, Inc. *v.* 909
Jankowski *v.* Braumann 1045
Jankowski *v.* Fulton County Medical Examiner 1014
Jarrett *v.* Ohio 972
Jaworsky; Moore *v.* 847
J & C, Inc. *v.* Combined Communications Corp. of Ky., Inc. 826
Jeffers *v.* Duckworth 858
Jeffries *v.* Washington 948
Jenkins *v.* Board of Governors of Federal Reserve System 1045
Jenkins *v.* California 894
Jenkins *v.* Georgia Power Co. 1007
Jenkins *v.* Missouri 889
Jenkins; Missouri *v.* 888
Jenkins *v.* New Jersey 1032
Jenkins *v.* Ohio 871
Jenkins *v.* United States 998

Page
Jensen *v.* Haines 822
Jensen; Specht *v.* 1008
Jessup *v.* United States 1005
Jett *v.* Dallas Independent School Dist. 940
Jett; Dallas Independent School Dist. *v.* 940
Jewel Food Stores *v.* Merk 956
J. F. Enterprises, Inc.; Torres *v.* 890
Jimenez, *In re* 1044
Jimenez *v.* California 1044
Jimenez *v.* Texas 837
Jimenez-Nettleship *v.* Cortes-Quinones 823
John *v.* Salamanca 850
John Deklewa & Sons *v.* National Labor Relations Bd. 889
John Doe Agency *v.* John Doe Corp. 1306
John Doe Corp.; John Doe Agency *v.* 1306
John Lewis S. *v.* California 928
Johns *v.* Bostwick 836,950
Johns-Manville Corp.; McArthur Co. *v.* 868
Johnson *v.* Alabama 876,976
Johnson; Butcher *v.* 930
Johnson *v.* Chrans 835
Johnson; Green *v.* 1012
Johnson *v.* Hardcastle 843
Johnson; Howard *v.* 865
Johnson *v.* Illinois 830
Johnson *v.* Irby 862,950
Johnson *v.* Johnson 806
Johnson; Julius *v.* 960
Johnson *v.* Kaiser 839
Johnson *v.* Lynaugh 840,864
Johnson; Muhammad *v.* 1017
Johnson *v.* Muncy 930
Johnson; Offshore Express, Inc. *v.* 968
Johnson *v.* Oklahoma 872
Johnson; Rodriguez *v.* 842
Johnson; Stringer *v.* 1013
Johnson *v.* Texas 930
Johnson; Texas *v.* 884,907
Johnson *v.* Texas Dept. of Corrections 931
Johnson *v.* United States 823,939,944,995,1015
Johnson Moving & Storage Co. *v.* Daniels 1042
Jonathan Club *v.* California Coastal Comm'n 881
Jones, *In re* 979
Jones *v.* Alabama 871

Page
Jones *v.* Beyer 973
Jones *v.* Butler 846
Jones; Collier *v.* 929,997
Jones *v.* Dugger 833
Jones; Falkner *v.* 895
Jones *v.* Haberlain 898
Jones; Hugley *v.* 842
Jones *v.* Illinois 1046
Jones; Indiana *v.* 869
Jones *v.* Lynaugh 959
Jones *v.* Missouri 871
Jones *v.* New Mexico 995
Jones *v.* Newsome 911
Jones *v.* Niagara Frontier Transportation Authority 825
Jones *v.* Oitker 973
Jones; Parez *v.* 836
Jones; Pinson *v.* 829
Jones; Poole *v.* 996
Jones *v.* St. Louis 983
Jones *v.* Schaffer 802
Jones; Sterner *v.* 936
Jones *v.* Thomas 1003
Jones *v.* United States 860
Jones; White *v.* 842
Jones Construction Co.; Plumbers *v.* 881
Jones & Laughlin Steel Co.; Serrano *v.* 988,1000
Jordan *v.* Hodel 1006
Jordan *v.* Kyle 834
Jordan *v.* Mississippi 818
Joshi *v.* Florida State Univ. Health Center 1029
Jouflas; Wyatt *v.* 890
Joyce; Szarewicz *v.* 896
Joyce *v.* United States 959
Judge *v.* United States 959
Judge, Circuit Court of Lawrence County; Polyak *v.* 803,961
Judge, Court of Common Pleas of Pa. *v.* Judicial Inq. & Rev. Bd. . 805
Judge, Madison County Probate Court; Fisher *v.* 897
Judge, Super. Ct. of N. J., Chancery Div., Camden Cty.; Reardon *v.* 1031
Judicial Inquiry & Review Bd. of Pa.; White *v.* 805
Julius *v.* Alabama 1052
Julius *v.* Johnson 960
Jupin *v.* Stetzer 896
Juras *v.* Aman Collection Service, Inc. 875,977
Juras *v.* Phelps 831

Page
Juron, *In re* 1000
Justice, Appellate Div., Supreme Court of N. Y.; Neville *v.* 943,1023
J. W. Bateson, Inc.; Crawford Painting & Drywall Co. *v.* 1035
Kabongo *v.* Immigration and Naturalization Service 982
Kadish; ASARCO Inc. *v.* 887,979,991,1039
Kaganove *v.* Environmental Protection Agency 1011
Kahlowsky & Co.; Vitiello *v.* 849
Kahn *v.* Avnet, Inc. 898
Kaiser; Johnson *v.* 839
Kaltenbach *v.* Stalder 930
Kaltsas *v.* North Chicago 804,975
Kalvans *v.* Court of Appeals of Mich. 848
Kammer *v.* Young 919
Kane *v.* Emrani 849
Kaney; Eischen *v.* 851
Kansas; Chisholm *v.* 962
Kansas *v.* Clothier 924
Kansas *v.* Colorado 978
Kansas; Miller *v.* 855
Kansas Parole Bd.; Gilmore *v.* 930
Karahalios *v.* Federal Employees 809
Karnes; Boersma *v.* 801
Karsteter *v.* Graham Cos. 981
Kaschak *v.* Pine Mountain Club Property Owners' Assn. 827,975
Kaschak *v.* Superior Court of Cal., Kern County 827,975
Kastner; Lightsey *v.* 1015
Kastner; Prows *v.* 941
Katz; Friedman *v.* 962
Kaushiva *v.* Board of Trustees of Univ. of D. C. 893
Kautzky; Gurule *v.* 1017
Kay *v.* Berkeley 1014
Kean; Gligorijevic *v.* 929
Keenan *v.* United States 831
Kelco Disposal, Inc.; Browning-Ferris Industries of Vt., Inc. *v.* 953,980
Kelley; Lindquist *v.* 859
Kelley *v.* Ohio 891
Kelley; Patterson *v.* 858
Kelley; Tallman *v.* 1025
Kelley *v.* United States 911,982
Kellogg Sales Co.; Floyd *v.* 970
Kelly *v.* Bowen 833,976
Kelly; Liberta *v.* 832
Kelly *v.* United States 861
Kelsey *v.* Muskin Inc. 1030

Page
Kemp; Ingram *v.* ... 975
Kemp; Presnell *v.* ... 1050
Kemp; Stephens *v.* ... 872
Kendall *v.* Williams ... 1032
Kendrick *v.* United States ... 946
Kendysh; Holy Spirit Byelorussian Autocephalic Orthodox Church *v.* 994
Kennedy Sky-Lites, Inc.; Sun-Tek Industries, Inc. *v.* ... 1009
Kentucky; Francis *v.* ... 985
Kentucky; Hensley *v.* ... 1018
Kentucky; Hoskins *v.* ... 1018
Kentucky; Olden *v.* ... 227
Kentucky; Slaughter *v.* ... 841
Kentucky; Stanford *v.* ... 887,906
Kentucky; Taub *v.* ... 870
Kentucky; Thompson *v.* ... 836
Kentucky State Bd. of Parole; Ellis *v.* ... 1017
Kentucky W. Va. Gas Co. *v.* Pennsylvania Public Utility Comm'n . 941
Kerby; Gonzales *v.* ... 983
Kerby; Grant *v.* ... 1044
Kern Oil & Refining Co.; Tenneco Oil Co. *v.* ... 948
Kero *v.* Morel ... 823
Kerpa, *In re* ... 964,1051
Kerpa *v.* Valley Neurosurgical Assn. ... 971
Kerpelman *v.* Maryland ... 856
Kerr *v.* Bowen ... 1011
Keystone Lamp Mfg. Co. *v.* National Labor Relations Bd. ... 1000,1041
Khalil *v.* University of Medicine and Dentistry of N. J. ... 851
Kier Corp.; Maltby *v.* ... 844
Kilgore Real Estate *v.* Gardinier, Inc. ... 853
Kimball International, Inc.; Allen Organ Co. *v.* ... 850
Kimberlin *v.* United States ... 807
Kimber Petroleum Corp. *v.* Daggett ... 935
Kimble *v.* California ... 871
Kincheloe; Campbell *v.* ... 948,1023
Kincheloe; Hintz *v.* ... 846
King *v.* Hilton-Davis ... 1030
King *v.* Hilton-Davis Chemical Co. ... 1030
King *v.* Lynaugh ... 1019
King *v.* United States ... 834,839,932
King *v.* Zimmerman ... 845
Kingsley; Praet *v.* ... 849
Kinnard *v.* Oklahoma ... 858
Kinsey *v.* United States ... 836,880,1013
Kirk *v.* United States ... 890

Page
Kirkpatrick *v.* California 1036
Kirkpatrick & Co. *v.* Environmental Tectonics Corp. 921
Kitchen *v.* Indiana 895
Klein *v.* United States 867
Kleinschmidt *v.* Florida Comm'n on Human Relations 842,976
Klincar; Shannon *v.* 859
Kluver *v.* O'Brien 841
Kneeland *v.* National Collegiate Athletic Assn. 1042
Knight; Patterson *v.* 839
Knowles *v.* United States 974,1051
Knox *v.* United States 831,1041
Koch *v.* Hutchinson 909
Koedatich *v.* New Jersey 1017
Koehler *v.* Rees 896
Kokkonen *v.* Democratic National Committee Chairman 1028
Koplow *v.* Portland 843,862
Kord *v.* United States 824
Kotzker, *In re* 1038
Kozakiewicz *v.* Boring 934
Koziara *v.* Commissioner 822
Krajewski *v.* Kurowski 926
Kramer *v.* Butler 865
Kramer *v.* Department of Commerce 928
Kramer *v.* United States 974
Kreisher *v.* Mobil Oil Corp. 899
Krishnan *v.* Department of Air Force 957,1023
Krohe *v.* Illinois 930
Krugman *v.* Palmer College of Chiropractic 944
Kruse *v.* Bank of America, N. T. & S. A. 1043
Krzyske *v.* United States 832
Kuenzi; Wilson *v.* 893
Kuntz *v.* Dayton 1008
Kuntz *v.* Shawmut Bank of Boston 952
Kuntze *v.* United States 932
Kuran, *In re* 887
Kuritzky *v.* Blue Shield of Western N. Y., Inc. 1006
Kurowski; Krajewski *v.* 926
Kusek *v.* United States 860
Kwoun *v.* Southeast Mo. Professional Standards Review Org. 880
Kyle; Director, Office of Workers' Compensation Programs *v.* 997
Kyle; Jordan *v.* 834
Kyle; National Council on Compensation Ins. *v.* 997
Laaman *v.* Massachusetts 834
Labor Union. See name of trade.

Page
Lacey; Carson Pirie Scott & Co. *v.* 1004
Lachman *v.* Illinois State Bd. of Ed. 925
Lacy; Borom *v.* 835
Ladd; Coleman *v.* 843
Ladd; Cycle Logic *v.* 843
Lafferty *v.* Cooter 968
Lagos *v.* Modesto City Schools Dist. 926
Lai *v.* Honolulu 994
Lake; B. F. Goodrich Co. *v.* 826
Lake Nacimiento Ranch Co. *v.* San Luis Obispo County 827
Lakes *v.* United States Fidelity & Guaranty Co. 842
Lamberth *v.* Muncy 1032
Lamberti *v.* United States 970
Landes *v.* Department of State 811,1043
Landi *v.* United States 867
Landreth *v.* United States 1042
Landry *v.* Lynaugh 900
Landry *v.* Texas 989,1018
Lane *v.* Davenport 908
Lane; Lewis *v.* 829
Lane; Sheridan *v.* 833
Lane; Washington *v.* 861
Lane *v.* Williams 1047
Langella *v.* United States 982
Langley *v.* United States 897
Langley; Young *v.* 898
Lanier; American Bd. of Endodontics *v.* 926
Lanigan; Maloney *v.* 1007
Lansiquot; Stockton *v.* 891
Lara *v.* United States 911
Laramie County Community College Dist.; Long *v.* 825
Larkins *v.* Zimmerman 867
Laroque *v.* Bureau of Prisons 847
Larson *v.* North Dakota 805
Larson *v.* Shawano County 806
Last Chance Mining Co. *v.* United States 823
Latham *v.* Gluckstern 1014
Laupot *v.* Berley 962
Lauritzen *v.* McLaughlin 898,987
Lauritzen Farms *v.* McLaughlin 898,987
Lauro Lines s. r. l. *v.* Chasser 887
Law Firm of Daniel P. Foster *v.* Cable News Network, Inc. 994
Law Firm of Daniel P. Foster *v.* Turner Broadcasting System, Inc. 994
Lawrence *v.* OAO Corp. 845,950

Page
Lawrence *v.* United States 980
Lawson, *In re* 964,1051
Lawson *v.* Bowen 843
Lawson *v.* Murray 831
Lawson *v.* Valley Neurosurgical Assn. 971
Lawyers Surety Corp.; Youngs *v.* 945,1051
Layton *v.* Dugger 971,983
Lease Financing Corp.; Northrop *v.* 955
Lease Lights, Inc. *v.* Public Service Co. of Okla. 1019
Lechiara *v.* Southern Ohio Coal Co. 864
Ledbetter *v.* Commissioner 856
Lee *v.* Coughlin 1014
Lee *v.* Dutton 1032
Lee *v.* Eklutna, Inc. 1046
Lee *v.* Georgia 879
Leeke; James *v.* 984
Leeke; Perry *v.* 272
LeFevre; Matos *v.* 908
Legislature of Virgin Islands *v.* West Indian Co. 802,976
Lego *v.* Illinois 902
Lego Systems, Inc. *v.* Tyco Industries, Inc. 955
LeGrand *v.* Ward 958
Lehman *v.* Pennsylvania 855
Leigh; Michigan *v.* 1002
Leigh *v.* United States 910
Leisure *v.* United States 932
Lemberg *v.* Tseng 984
Lemeron *v.* Powers 924
Lemons *v.* Myers 802
Lena *v.* United States 894
Leon County; Tallahassee Branch, NAACP *v.* 960
Leone *v.* United States 974
Leonetti *v.* United States 893
LePage *v.* Arave 972
Lepiscopo *v.* Traub 865
Leucadia National Corp.; Stern *v.* 852
Levasseur *v.* United States 894
Levert *v.* Levert 854
Levin *v.* Parrillo 893
Levin *v.* Redken Laboratories, Inc. 852
Levin Beauty Supply *v.* Redken Laboratories, Inc. 852
Leviston *v.* Black 865
Levitt *v.* University of Tex. at El Paso 984
Levy *v.* Regents of Univ. of Cal. 893

Page
Lewis *v.* Anclote Manor Hospital, Inc. ... 828
Lewis *v.* Bruni ... 960
Lewis *v.* Continental Bank Corp. ... 811
Lewis; Harding *v.* ... 871
Lewis *v.* Lane ... 829
Lewis *v.* Lewis ... 967
Lewis *v.* Midwestern State Univ. ... 849
Lewis; Myers *v.* ... 967
Lewis *v.* United States ... 894,910,923,987
Lexington Fayette Urban County Government; Ivey *v.* ... 1013
Leyba *v.* Sullivan ... 969
LHLC Corp.; Cluett, Peabody & Co. *v.* ... 926
Lhotka *v.* United States ... 841
Libarios *v.* Office of Personnel Management ... 844
Libbey Co.; McNulty *v.* ... 968
Liberis *v.* Craig ... 853
Liberta *v.* Kelly ... 832
Liberty Lobby, Inc. *v.* Dow Jones & Co. ... 825
Liberty National Bank & Trust Co. *v.* North Dakota ... 956
Life & Casualty Ins. Co. of Tenn.; Bristow *v.* ... 1009
Liggett Group, Inc. *v.* Public Citizen ... 1030
Lightbourne *v.* Dugger ... 934
Lightsey *v.* Kastner ... 1015
Lilly *v.* EBSCO Industries, Inc. ... 825
Lindquist, *In re* ... 963
Lindquist *v.* Kelley ... 859
Liner *v.* Terrebonne Parish School Bd. ... 827
Lingl; Federico *v.* ... 819
Link Mfg. Co. *v.* National Labor Relations Bd. ... 854
Linkous *v.* Olinger ... 929
Linquist *v.* Bowen ... 908
Lipham *v.* Georgia ... 873,976
Lipsman *v.* Mason ... 896
Lis *v.* Mamott ... 1044
Litchfield *v.* United States ... 863
Little *v.* Texas ... 934
Little *v.* United States ... 912,1016
Littlefield *v.* United States ... 860
Little Rock School Dist.; Arkansas State Bd. of Ed. *v.* ... 869
Little Rock School Dist.; Bilal *v.* ... 839
Litton Industrial Products, Inc.; Jamesbury Corp. *v.* ... 828
Lively; Bondzie *v.* ... 864
Livingston *v.* United States ... 946
Lizza Industries, Inc. *v.* New York ... 848

Page
L. J.; Massinga *v.* ... 1018
Lloyd *v.* Hines ... 985
Lloyd *v.* North Carolina ... 807
Local. For labor union, see name of trade.
Locke *v.* Alabama ... 912
Lockhart; Fairchild *v.* ... 1051
Lockhart; McFarland *v.* ... 995
Lockhart *v.* Nelson ... 33
Lockheed Cal. Co. *v.* Birtell ... 1042
Lockheed Corp.; Texas Extrusion Corp. *v.* ... 926
Lockstrom *v.* Lockstrom ... 803
LoConte *v.* Dugger ... 958
Loebner *v.* Franchise Tax Bd. of Cal. ... 854
Logarusic *v.* United States ... 860
Lombardo *v.* United States ... 1031
Lonchar *v.* Georgia ... 1019
Long *v.* Laramie County Community College Dist. ... 825
Longshoremen *v.* Federal Maritime Comm'n ... 1041
Lopes; Couture *v.* ... 861
Lopez *v.* Florida ... 818
Lopez; Parez *v.* ... 836
Lorance *v.* AT&T Technologies, Inc. ... 887,1001
Lord; Tedders *v.* ... 962,1051
Lorenz, *In re* ... 952
Loretto *v.* Group W Cable, Inc. ... 827
Los Angeles Police Dept.; Shane *v.* ... 1045
Lott *v.* Firemen & Policemen's Pension Trustees of San Antonio ... 927
Loudermilk *v.* California ... 830
Loudermill *v.* Cleveland Bd. of Ed. ... 941
Loudermill; Cleveland Bd. of Ed. *v.* ... 946
Louisiana; Bently *v.* ... 834
Louisiana; Bradford *v.* ... 835
Louisiana; Eaton *v.* ... 1019
Louisiana *v.* Mississippi ... 808,990
Louisiana; Rouselle *v.* ... 822
Louisiana; Thompson *v.* ... 871,976
Louisiana Ethics Comm'n for Pub. Employees; Schneckenburger *v.* 829
Louisiana Power & Light Co.; United Gas Pipe Line Co. *v.* ... 917
Love *v.* United States ... 841
Love Box Co. *v.* Commissioner ... 820
Lovinger; Circuit Court, 19th Judicial Circuit, Lake County, Ill. *v.* 851
Lovingood *v.* United States ... 844,976
Lowery *v.* California ... 970
Lowery; Davison *v.* ... 854

Page
Lucas *v.* Philadelphia Naval Shipyard 892
Luciano Pisoni Fabbrica Accessori Instrumenti Musicali *v.* U. S. .. 819
Lucky *v.* California 1034
Lumbar *v.* United States 867
Lumbee Farms Cooperative, Inc. *v.* National Labor Relations Bd. 1010
Lun Woon Tam *v.* United States 867
Lurye; Brown *v.* 876
Luther *v.* Pennsylvania 971,1051
Lyerla *v.* South Dakota 999
Lynaugh; Bell *v.* 905
Lynaugh; Duncan *v.* 859
Lynaugh; Duty *v.* 912
Lynaugh; Edwards *v.* 834
Lynaugh; Feagin *v.* 1032
Lynaugh; Franklin *v.* 935
Lynaugh; Hawkins *v.* 900,989
Lynaugh; Holloway *v.* 838
Lynaugh; Johnson *v.* 840,864
Lynaugh; Jones *v.* 959
Lynaugh; King *v.* 1019
Lynaugh; Landry *v.* 900
Lynaugh; Plazinich *v.* 1031
Lynaugh; Ramirez *v.* 841
Lynaugh; Schneider *v.* 831
Lynaugh; Spearman *v.* 841
Lynaugh; Spinelli *v.* 866
Lynaugh; Thompson *v.* 1014
Lynaugh; Valles *v.* 808,952
Lynaugh; Whitfield *v.* 845
Lynch *v.* Hutchenson 840
Lynch *v.* Seybert Nicholas Printing Corp. 857,977
Lyng; Williams *v.* 956
Lynn; Sheet Metal Workers *v.* 347
Maass; Twitty *v.* 897
Mabry *v.* Muncy 1015
MacGuire, *In re* 808,975
Macharia *v.* Hodel 992
Machinists *v.* Trans World Airlines, Inc. 820
Macioce *v.* California 908
Macomb County; Pilarowski *v.* 850
M/A-Com, Inc.; Paradyne Corp. *v.* 881
Madamba *v.* United States 912
Maddux *v.* Texas 1032
Madej *v.* Air Products & Chemicals, Inc. 1007

Page
Madison; Illinois *v.* ... 907
Madrid *v.* United States ... 912
Magic II, Inc. *v.* Groppo ... 819
Mahdavi *v.* Federal Bureau of Investigation ... 958
Mahdavi *v.* Shirani ... 971
Mahlerwein *v.* Bruewer ... 803,976
Mahlerwein *v.* Federal Land Bank of Louisville ... 803,976
Mahlerwein *v.* Stitsinger ... 803,976
Mahmood *v.* United States ... 973
Maine; St. Hilaire *v.* ... 919
Maine; Thayer *v.* ... 970
Mak *v.* Washington ... 871
Makel; Armentero *v.* ... 984
Maki *v.* United States ... 943
Maleng *v.* Cook ... 941,1027
Mallard *v.* U. S. District Court ... 815
Mallen *v.* United States ... 849
Malone *v.* Frank ... 819
Maloney *v.* Lanigan ... 1007
Maltby *v.* Kier Corp. ... 844
Mamott; Lis *v.* ... 1044
Mance *v.* United States ... 942
Mandell *v.* U. S. Army ... 946
Mangan *v.* Weinberger ... 1013
Manion; Perkinson *v.* ... 851
Mann *v.* Adams ... 898
Mann *v.* Oklahoma ... 877
Mann *v.* United States ... 824
Mann; Wilson *v.* ... 929
Mannhalt; Reed *v.* ... 908
Mannheim Books, Inc. *v.* Cook County ... 882
Mansell *v.* Mansell ... 809,906,921,952
Mansion House Center North Redevelopment Co. *v.* United States 993
Manzo *v.* Manzo ... 853,977
Maples *v.* United States ... 974
Mapother & Mapother; Douglas *v.* ... 854
Marcos *v.* United States ... 952
Maressa; A. H. Robins Co. *v.* ... 826
Marietta, Inc.; Fields *v.* ... 978
Marina Gardens No. 1; Nieves *v.* ... 1024
Marine Bank of Springfield *v.* Hendrickson ... 822
Marine Corps; Watts *v.* ... 836
Marinez; Illinois *v.* ... 868
Market St. Mission *v.* Bureau of Rooming House Standards ... 882

Page
Markham *v.* United States 843
Marsden *v.* Moore 983
Marsh; New Haven *v.* 848
Marsh *v.* Oregon Natural Resources Council 810,886
Marsh; Simmons *v.* 996
Marsh; Wolfe *v.* 942
Marshall *v.* American Motorist Ins. Co. 857
Marshall; Pollock *v.* 897,987
Marshall *v.* Western Grain Co. 852
Marshburn *v.* U. S. Postal Service 1017
Marsten; Scullin *v.* 967
Martin, *In re* 1002
Martin; Burnett *v.* 830
Martin *v.* C. Itoh & Co. (America), Inc. 951,1024
Martin *v.* Commissioner 909
Martin *v.* Cunningham 859
Martin *v.* Gramley 863
Martin *v.* Maryland State Bd. of Law Examiners 804,950
Martin *v.* Morris 924,1023
Martin *v.* Shank 833,950
Martin *v.* Shughart 870,951
Martin *v.* Tyson 863
Martin *v.* Walker 1008
Martin *v.* Wilks 810,938
Martin *v.* Zook 972,1024
Martinez *v.* New Mexico 859,977
Martinez *v.* United States 959,1015
Martin Marietta, Inc.; Fields *v.* 978
Maryland; Brown *v.* 839
Maryland; Cardin *v.* 827,935
Maryland; Finnegan *v.* 854
Maryland; Fleegle *v.* 895
Maryland; Hamm *v.* 843
Maryland; Kerpelman *v.* 856
Maryland; Ricks *v.* 832
Maryland; West *v.* 858
Maryland Public Defender Office; Walker *v.* 895
Maryland State Bd. of Law Examiners; Martin *v.* 804,950
Mason, *In re* 814,977
Mason; Lipsman *v.* 896
Mason *v.* United States 984
Massa *v.* United States 973
Massachusetts; Aronson *v.* 818
Massachusetts *v.* Derosia 980

Page
Massachusetts; DiPrizio *v.* ... 1046
Massachusetts; Ellis *v.* ... 817
Massachusetts; Laaman *v.* ... 834
Massachusetts *v.* Morash ... 815
Massinga *v.* L. J. ... 1018
Mathenia *v.* Missouri ... 1019
Matiyn *v.* Edwin Gould Services for Children ... 865
Matlock *v.* Texas ... 893
Matos *v.* LeFevre ... 908
Matson Plastering, Inc. *v.* Plasterers ... 994
Matthews *v.* United States ... 863
Mattias *v.* Texas ... 831
Mattox *v.* Dugger ... 833
Maui Architectural Group, Inc.; Burt *v.* ... 962
Maulick *v.* Taylor ... 866
Maurer *v.* California Bd. of Prison Terms ... 968
Mauricio; Duckworth *v.* ... 869
Maxwell *v.* General Motors Corp. ... 957
May *v.* Ohio Unemployment Compensation Bd. of Review ... 838,976
May *v.* Warner Amex Cable Communications ... 931,1023
Mayes *v.* North Carolina ... 1009
Mayfair Construction Co. *v.* United States ... 980
Mayfield; Nash *v.* ... 861
Mayon *v.* Southern Pacific Transportation Co. ... 925
Mayor of D. C.; Silverman *v.* ... 956
Mays; Armstead *v.* ... 930
McAlister *v.* Atlantic Richfield Co. ... 804
McArthur Co. *v.* Johns-Manville Corp. ... 868
McCabe *v.* Dias ... 1036
McCabe *v.* Sandness ... 1032
McCall *v.* Chesapeake & Ohio R. Co. ... 879
McCarron *v.* United States ... 853
McCarthy *v.* United States ... 954
McCaslin *v.* Pennsylvania ... 830
McClain *v.* Caputo ... 897
McClurkin, *In re* ... 1026
McColpin *v.* Brooks ... 984,1051
McConico *v.* Robinson ... 1045
McCormick; McKenzie *v.* ... 901
McCracken County; Shoulders *v.* ... 951
McDevitt *v.* Philadelphia ... 811
McDevitt *v.* United States ... 959
McDonald, *In re* ... 813,940
McDonald *v.* Sullivan ... 1033

Page
McDonald *v.* Tobey 971
McDowell *v.* Barnes 1007
McDowell *v.* Credit Bureaus of Southeast Mo., Inc. 852
McDowell *v.* Dynamics Corp. of America 1030
McFarland *v.* Lockhart 995
McGann *v.* United States 830
McGee *v.* Treharne 994
McHale; Guys & Dolls Billiards, Inc. *v.* 892
McKabney *v.* United States 993
McKay, *In re* 1026
McKellar; Henderson *v.* 863
McKenzie *v.* McCormick 901
McKesson Corp. *v.* Fla. Division of Alcoholic Beverages and Tobacco 954
McKibbon *v.* Texas 859
McLaughlin; Citizens Bank of Clovis *v.* 829
McLaughlin; Claridge Hotel & Casino *v.* 925
McLaughlin; Davis *v.* 897,987
McLaughlin; Glassboro Service Assn., Inc. *v.* 821
McLaughlin; Ho Fat of Cal. *v.* 1040
McLaughlin; Ho Fat Seto *v.* 1040
McLaughlin; Industrial Steel Products Co. *v.* 993
McLaughlin; Lauritzen *v.* 898,987
McLaughlin; Lauritzen Farms *v.* 898,987
McLaughlin; Oregon Meat Cutting School *v.* 806
McLaughlin; Rusco Industries, Inc. *v.* 889
McLaughlin *v.* Sebben 105
McLaughlin; Shirk *v.* 806
McMackin; Ferguson *v.* 983
McMackin; Royster *v.* 1011
McMahon; Turner *v.* 818
McMurtrey *v.* Arizona 997
McNamara *v.* San Diego County Dept. of Social Services 152,964
McNulty *v.* W. S. Libbey Co. 968
McQuarie *v.* United States 843
Meachum; Oppel *v.* 911
Mead Corp. *v.* Tilley 815,906
Medical Laundry Service; Board of Trustees of Univ. of Ala. *v.* 826
Medina *v.* Henderson 838
Medrano *v.* United States 818
Mehta *v.* Board of Trustees of Conn. State Univs. 822
Melin *v.* North Dakota 942
Mellon Bank; Northwestern National Ins. Co. of Milwaukee *v.* 818
Melnick *v.* State Farm Mut. Automobile Ins. Co. 822
Melton *v.* California 934

Page
Mercedes-Benz of North America, Inc.; Mozart Co. *v.* 870
Mercer *v.* Armontrout 900,998
Mercer; Armontrout *v.* 918
Mercer *v.* United States 996
Merchants & Mechanics Federal Savings & Loan Assn.; Cossett *v.* 962
Mercy Hospital; Gill *v.* 892
Merk; Jewel Food Stores *v.* 956
Merlino Enterprises, Inc. *v.* Thompson 1024
Merola; Schiavone Construction Co. *v.* 855
Merrell Dow Pharmaceuticals, Inc.; Hoffman *v.* 1006
Metheny *v.* Hamby 913
Methow Valley Citizens Council; Robertson *v.* 810,886
Metromedia, Inc. *v.* April Enterprises, Inc. 884
Metropolitan Federal Savings & Loan Assn. of James Town; Rott *v.* 804
Metropolitan Life Ins. Co.; Drinkwater *v.* 909
Metropolitan Life Ins. Co.; Nelson *v.* 834
Metropolitan Life Ins. Co.; Stuart *v.* 968
Metts *v.* United States 985
Mexicana de Avion, S. A.; Rodriguez Diaz *v.* 826
Miami Center Ltd. Partnership *v.* Bank of N. Y. 823
Michigan *v.* Brower 933
Michigan; Campbell *v.* 1045
Michigan *v.* Dye 985
Michigan *v.* Evans 956
Michigan *v.* Leigh 1002
Michigan *v.* Serrano 1008
Michigan *v.* Thornburgh 980
Michigan *v.* Tullock 825
Michigan Dept. of Natural Resources; George *v.* 1008
Michigan Dept. of State Police; Will *v.* 1039
Michigan Dept. of Treasury; Davis *v.* 809
Michigan State Univ.; Redman *v.* 945
Mid-America Pipeline Co.; Burnley *v.* 814
Middlesex County Bd. of Social Services; Bovino *v.* 919
Middle South Utilities, Inc. *v.* Isquith 926
Middleton *v.* South Carolina 872,961
Mid-Florida Growers; Department of Ag. & Consumer Services *v.* . 870
Midwestern State Univ.; Lewis *v.* 849
Miksch; Feaster *v.* 857
Miles *v.* General Motors Corp. 828
Milkowski, *In re* 1002
Miller; Anglicker *v.* 890
Miller *v.* California 819
Miller; Dennis *v.* 836

Page
Miller; Indiana Hospital *v.* 870
Miller *v.* Kansas 855
Miller *v.* Morongo Band of Mission Indians 1006
Miller; Reardon *v.* 1031
Miller *v.* United States 807
Milliken; Foster *v.* 856
Mincey *v.* Georgia 871,977
Miner *v.* New York State Dept. of Correctional Services 941,1023
Minerex Erdoel, Inc.; Baker, Smith & Mills *v.* 817
Mine Workers 1950 Pension Tr. & Plan; Spring Branch Min. Co. *v.* 1019
Mingledolph, *In re* 814
Minister of Legal Affairs of Trinidad and Tobago; Azar *v.* 1005
Minizza *v.* Stone Container Corp. 908
Minnesota; Amos *v.* 861
Minnesota; Fitger Brewing Co. *v.* 819
Minnesota Comm'r of Commerce; Caucus Distributors, Inc. *v.* 1006
Minnesota Newspaper Assn., Inc.; Frank *v.* 815,1001
Minnesota Newspaper Assn., Inc. *v.* Postmaster General 815,998
Minnesota Public Utilities Comm'n; Northwestern Bell Tel. Co. *v.* 849
Minnesota State Ethical Practices Bd.; National Rifle Assn. *v.* 892
Mirabile *v.* Wright 1030
Miranda-Enriquez *v.* United States 836
Mirro *v.* United States 826
Mislivecek *v.* Wisconsin 847
Mississippi; Baskin *v.* 1010
Mississippi; Cole *v.* 934,1023
Mississippi; Jordan *v.* 818
Mississippi; Louisiana *v.* 808,990
Mississippi; Whittington *v.* 923
Mississippi Band of Choctaw Indians *v.* Holyfield 809
Missouri; Battle *v.* 871,950
Missouri; Bowman *v.* 829
Missouri; Clemmons *v.* 948
Missouri *v.* Continental Ins. Cos. 821
Missouri; Hacker *v.* 1015
Missouri *v.* Jenkins 888
Missouri; Jenkins *v.* 889
Missouri; Jones *v.* 871
Missouri; Mathenia *v.* 1019
Missouri; Murray *v.* 871
Missouri; O'Dell *v.* 930
Missouri; Parkus *v.* 900
Missouri *v.* Presley 975
Missouri *v.* Rockwood School Dist. 825

Page
Missouri; Sidebottom *v.* 975
Missouri; Smith *v.* 978,1019
Missouri; Sterling *v.* 1014
Missouri; Walls *v.* 871
Missouri; Wilkins *v.* 887
Missouri Bd. of Probation and Parole; Brown *v.* 835
Missouri Pacific R. Co.; Railroad Comm'n of Tex. *v.* 1009
Mistretta *v.* United States 361
Mistretta; United States *v.* 361
Mitan *v.* Mitan 951
Mitchell, *In re* 940
Mitchell *v.* Florida 960
Mitchell *v.* Thornburgh 841,976
Mixon *v.* United States 894
Mizell; Heirens *v.* 830
Mobile; Palughi *v.* 855
Mobil Oil Corp.; Kreisher *v.* 899
Modeen *v.* United States 1010
Modesto City Schools Dist.; Lagos *v.* 926
Modgling; Texas *v.* 898
Modjeski & Masters; Carter *v.* 988
Moellering; Scruggs *v.* 930,987
Molenaar *v.* New Jersey 828
Mollen; Neville *v.* 943,1023
Monaco *v.* United States 952,1040
Monastero *v.* Nebraska 936
Mondragon; Cortez *v.* 842
Monroe County; Bratton *v.* 945,997
Monsanto; United States *v.* 941,1002
Montana; Moran *v.* 826
Montana; Pease *v.* 1033
Montana Power Co.; Blackfeet Indian Tribe *v.* 828
Montgomery; Broaden *v.* 840
Montgomery *v.* Indiana 840,950
Moody *v.* Baker 985
Moody *v.* Empire Life Ins. Co. 967
Moody *v.* Texas Court of Criminal Appeals 985
Moore; Carroll *v.* 1019
Moore *v.* Consolidated Rail Corp. 823
Moore *v.* DuBois 1043
Moore *v.* Florida 825
Moore *v.* Fulcomer 984
Moore *v.* Illinois 840
Moore *v.* Jaworsky 847

Page
Moore; Marsden *v.* ... 983
Moore *v.* Paul ... 970
Moore; Roden *v.* ... 1032
Mora *v.* United States ... 995
Morales, *In re* ... 885
Morales *v.* United States ... 1011
Moran *v.* Montana ... 826
Morash; Massachusetts *v.* ... 815
Morderosian *v.* Office of Personnel Management ... 928
Morel; Kero *v.* ... 823
Morgan; Cross *v.* ... 944
Morgan *v.* Foretich ... 1007
Morgenstern *v.* United States ... 855
Morison *v.* United States ... 908
Moritz; Union Pacific R. Co. *v.* ... 899
Morongo Band of Mission Indians; Miller *v.* ... 1006
Moronihaah *v.* Parke ... 844
Morris; Allen *v.* ... 1011
Morris; Board of Estimate of New York City *v.* ... 938
Morris; Martin *v.* ... 924,1023
Morris; Owens *v.* ... 1045
Morris; Ponterio *v.* ... 938
Morris; Skatzes *v.* ... 930,997
Morrison *v.* San Diego County ... 819
Mortgage Mart, Inc. *v.* Rechnizer ... 892
Morton *v.* Gardner ... 924
Moylan; Fairchilde *v.* ... 859
Mozart Co. *v.* Mercedes-Benz of North America, Inc. ... 870
M-Tron Industries, Inc. *v.* Hillebrand ... 1004
Muhammad *v.* Bureau of Prisons ... 1013
Muhammad *v.* Johnson ... 1017
Muhammad *v.* United States ... 832
Mulazim *v.* Burnett ... 839
Mulvehill *v.* Alabama ... 1030
Munchinski *v.* Goodwin ... 971
Muncie Power Products, Inc. *v.* Churnock ... 1009
Muncy; Johnson *v.* ... 930
Muncy; Lamberth *v.* ... 1032
Muncy; Mabry *v.* ... 1015
Municipality. See name of municipality.
Munoz *v.* California ... 872
Munson *v.* Oklahoma ... 1019
Murphy *v.* Benson ... 892
Murphy *v.* Hedrick ... 908

Page

Murphy *v.* United States 924
Murphy; Whitehorn *v.* 997
Murr *v.* Nelson 837
Murray *v.* Giarratano 923
Murray; Hill *v.* 910
Murray; Lawson *v.* 831
Murray *v.* Missouri 871
Murray *v.* National Broadcasting Co. 955
Murray; Smith *v.* 958
Murray; Wiggins *v.* 838
Muscogee (Creek) Nation; Hodel *v.* 1010
Muskin Inc.; Kelsey *v.* 1030
Musolino; Hooper *v.* 823
Muth *v.* Central Bucks School Dist. 838
Muth; Gilhool *v.* 815,921,1001
Mutual of Omaha Ins. Co.; Novak *v.* 933
Muza *v.* Bureau of Alcohol, Tobacco, and Firearms 957
Myer *v.* Weeks 833
Myers; Lemons *v.* 802
Myers *v.* Lewis 967
Nabors *v.* Edwards 972
Nahm; Alpha Beta Co. *v.* 956
Nash *v.* Ervin 897,950
Nash *v.* Mayfield 861
Nash *v.* Parke 844
National American Ins. Co.; Fort *v.* 884
National Assn. of Counties *v.* Brady 1005
National Broadcasting Co.; Murray *v.* 955
National Coal Assn. *v.* Natural Resources Defense Council 888
National Collegiate Athletic Assn.; Kneeland *v.* 1042
National Collegiate Athletic Assn. *v.* Tarkanian 179
National Collegiate Athletic Assn.; Vannelli *v.* 956
National Council on Compensation Ins. *v.* Kyle 997
National Gypsum Co. *v.* Environmental Protection Agency 942
National Labor Relations Bd.; Action Automotive, Inc. *v.* 1041
National Labor Relations Bd.; Baddour, Inc. *v.* 944
National Labor Relations Bd.; Chipman Freight Services *v.* 848
National Labor Relations Bd.; Deklewa *v.* 889
National Labor Relations Bd.; Emeryville Trucking, Inc. *v.* 980
National Labor Relations Bd.; Iron Workers *v.* 889
National Labor Relations Bd.; John Deklewa & Sons *v.* 889
National Labor Relations Bd.; Keystone Lamp Mfg. Co. *v.* ... 1000,1041
National Labor Relations Bd.; Link Mfg. Co. *v.* 854
National Labor Relations Bd.; Lumbee Farms Cooperative, Inc. *v.* 1010

Page
National Labor Relations Bd.; Southern Ind. Gas & Electric Co. *v.* 1031
National Labor Relations Bd.; Star Color Plate Service *v.* 828
National Labor Relations Bd.; WCCO Radio, Inc. *v.* 824
National Mediation Bd.; Boller *v.* 820
National Mediation Bd.; Trans World Airlines, Inc. *v.* 820
National Railroad Passenger Corp.; Horn & Hardart Co. *v.* 849
National Railroad Passenger Corp.; Pennsylvania P. U. C. *v.* 893
National Rifle Assn. *v.* Minnesota State Ethical Practices Bd. 892
National-Southwire Aluminum Co. *v.* EPA 955
Nationwide Mut. Ins. Co. *v.* Clay 1040
Natural Resources Defense Council; National Coal Assn. *v.* 888
N & C Properties *v.* Pritchard 856
Neal *v.* Dayton 930
Neal; Hardage *v.* 972
Neal *v.* United States 829
Neal; Walker *v.* 971
Nebraska; Houlton *v.* 820
Nebraska; Monastero *v.* 936
Nebraska; Trahan *v.* 995
Nebraska *ex rel.* Nebraska State Bar Assn.; Douglas *v.* 802
Nebraska State Bar Assn.; Douglas *v.* 802
Nebraska State Tax Comm'r; Boersma *v.* 801
Nedlloyd Lines, B. V.; Seawinds Ltd. *v.* 891
Needham Harper Worldwide, Inc.; Ditmar *v.* 882
Neelley *v.* Alabama 1020
Neiderhiser; Berwick *v.* 822
Neitzke *v.* Williams 816,939,991
Nelson; Boston *v.* 966
Nelson; De Young *v.* 944
Nelson; Lockhart *v.* 33
Nelson *v.* Metropolitan Life Ins. Co. 834
Nelson; Murr *v.* 837
Nelson *v.* Nelson 925
Nelson *v.* United States 909
Neron *v.* Tierney 832
Nesbitt; Faison *v.* 841,950
Nesbitt *v.* United States 1015
Nevada; Birges *v.* 804,987
Nevada; Davis *v.* 926
Nevada; Ohai *v.* 822
Neve *v.* United States 982
Neville *v.* Mollen 943,1023
New Hampshire; Public Service Co. of N. H. *v.* 1035
New Hampshire; Wehringer *v.* 964

Page
New Hampshire Dept. of Employment Security; Bosselait *v.* 1011
New Haven *v.* Marsh 848
Newhouse, *In re* 885
New Jersey; Fornino *v.* 859
New Jersey; Jenkins *v.* 1032
New Jersey; Koedatich *v.* 1017
New Jersey; Molenaar *v.* 828
New Jersey; Pollio *v.* 817
New Jersey; Regan *v.* 985
New Jersey; Telepo *v.* 1014
New Jersey; Watson *v.* 983
New Jersey; Wisniewski *v.* 818
New Jersey Bd. of Ed.; Arons *v.* 942
Newland *v.* Georgia 975
Newman, *In re* 885,989
Newman *v.* United States 1005
Newman-Green, Inc. *v.* Alfonzo-Larrain 1003
New Mexico; Cox *v.* 996
New Mexico; Jones *v.* 995
New Mexico; Martinez *v.* 859,977
New Mexico; Oklahoma *v.* 989
New Mexico; Texas *v.* 808,917,921
New Orleans; Fraychineaud *v.* 882
New Orleans Public Service Inc. *v.* Council of New Orleans 907,1003
Newsome; Anglin *v.* 1031
Newsome; Brown *v.* 931
Newsome; Jones *v.* 911
Newsome *v.* United States 894
Newton; Contreras *v.* 846
Newton *v.* United States 1031
New York; Alston *v.* 832
New York; Brown *v.* 897
New York; Carpenters *v.* 966
New York; Delaware *v.* 990
New York; Gensler *v.* 932
New York; Hendrickson Brothers, Inc. *v.* 848
New York; Lizza Industries, Inc. *v.* 848
New York; Saldana *v.* 1029
New York; Shaw *v.* 840
New York *v.* United States 1041
New York; Weaver *v.* 968
New York City; Parkview Associates *v.* 801
New York City; Weigner *v.* 1005
New York City Comm'n on Human Rights; Skibinski *v.* 847

Page
New York City Employees' Retirement System; Campo *v.* 889
New York Hotel Trades Coun. & Assn. Pens. Fd. *v.* Park So. Hotel 966
New York State Dept. of Correctional Services; Miner *v.* 941,1023
New York Times Co.; O'Reilly *v.* 856
Niagara Frontier Transportation Authority; Jones *v.* 825
Niagara Mohawk Power Corp.; Allied Chemical *v.* 1005
Niakan; Samaan *v.* 986
Niceville; Warner Cable Communications, Inc. *v.* 825
Nichols *v.* Erie Police Dept. 866
Nichols *v.* Texas 1019
Nicklos Drilling Co.; Smith *v.* 956
Nicolau *v.* United States 860
Nieto *v.* United States 859
Nieves *v.* Marina Gardens No. 1 1024
Nikrasch *v.* United States 838
Nimmons *v.* Alabama 983
Nix; Stern *v.* 826
NL Industries, Inc. *v.* United States 820
Noel *v.* Department of Sanitation of New York City 925
Noll *v.* Turner 945
Norfolk Southern Corp.; Ferguson *v.* 856
Norfolk & Western R. Co. *v.* Goode 811
Norfolk & Western R. Co.; Pinney Dock & Transport Co. *v.* 880
North Carolina; Anderson *v.* 975
North Carolina; Green *v.* 900
North Carolina; Lloyd *v.* 807
North Carolina; Mayes *v.* 1009
North Carolina; Powell *v.* 830
North Carolina; White *v.* 958
North Chicago; Kaltsas *v.* 804,975
North County Transit Dist. *v.* Haynes 851
North Dakota; Anderson *v.* 965
North Dakota; Dagley *v.* 965
North Dakota; Larson *v.* 805
North Dakota; Liberty National Bank & Trust Co. *v.* 956
North Dakota; Melin *v.* 942
Northeast Savings; Tucker *v.* 1007
Northeast Suburban Life; Foy *v.* 922
Northern Va. Mental Health Institute; Casamento *v.* 897
North Las Vegas; Blanton *v.* 810,938
Northrop *v.* Lease Financing Corp. 955
North San Diego County Transit Development Bd. *v.* Haynes 851
Northwest Acute Care Corp.; Tallman *v.* 813
Northwest Central Pipeline Corp. *v.* State Corp. Comm'n of Kan. 808,886

Page
Northwestern Bell Tel. Co. *v.* Minnesota Public Utilities Comm'n . 849
Northwestern National Ins. Co. of Milwaukee *v.* Mellon Bank 818
Northwest Hospital; Tallman *v.* 813
Nottingham *v.* United States 861
Novak *v.* Mutual of Omaha Ins. Co. 933
Nubine *v.* Texas Bd. of Corrections 863,950
Oahu Gas Service, Inc. *v.* Pacific Resources, Inc. 870
Oakey *v.* United States 1033
Oakley *v.* Wilson 864
OAO Corp.; Lawrence *v.* 845,950
O'Brien; De Young *v.* 896,944
O'Brien; Kluver *v.* 841
Occidental Petroleum Corp.; Forrest *v.* 994
Ochoa-Ochoa *v.* United States 898
O'Connell *v.* United States 1011
O'Connor *v.* Hecht 996
O'Dell *v.* Missouri 930
O'Dell *v.* Virginia 871,977
Odle *v.* California 917
Office of Bar Counsel of D. C.; Gilbert *v.* 828
Office of Personnel Management; Bigg *v.* 932,1023
Office of Personnel Management; Libarios *v.* 844
Office of Personnel Management; Morderosian *v.* 928
Offshore Express, Inc. *v.* Johnson 968
Ohai *v.* Nevada 822
Ohio; Bilder *v.* 1044
Ohio; Bobo *v.* 910
Ohio; Coleman *v.* 900
Ohio; Davis *v.* 1034
Ohio; Green *v.* 972
Ohio; Hamblin *v.* 975,1051
Ohio; Hix *v.* 983
Ohio; Jarrett *v.* 972
Ohio; Jenkins *v.* 871
Ohio; Kelley *v.* 891
Ohio; Padavick *v.* 1013
Ohio; Penson *v.* 75
Ohio; Poindexter *v.* 916
Ohio; Rucker *v.* 1013
Ohio; Stapleton *v.* 1007
Ohio; Taylor *v.* 942
Ohio Dept. of Rehabilitation and Correction; Brofford *v.* 970
Ohio Power Co. *v.* Thomas 901
Ohio Unemployment Compensation Bd. of Review; May *v.* 838,976

Page
Oil, Chemical & Atomic Workers *v.* Sinclair Oil Corp. 821
Oitker; Jones *v.* 973
O'Keefe; Battle *v.* 865
O'Keefe; De Young *v.* 958
Oklahoma; Arkansas *v.* 1000
Oklahoma; Broadus *v.* 970
Oklahoma; Davis *v.* 999
Oklahoma; Eastham *v.* 857
Oklahoma; Foster *v.* 884
Oklahoma; Gamble *v.* 835
Oklahoma; Hale *v.* 878
Oklahoma; Johnson *v.* 872
Oklahoma; Kinnard *v.* 858
Oklahoma; Mann *v.* 877
Oklahoma; Munson *v.* 1019
Oklahoma *v.* New Mexico 989
Oklahoma; Phillips *v.* 843,845
Oklahoma; Rojem *v.* 900
Oklahoma; Rose *v.* 847
Oklahoma; Shells *v.* 1046
Oklahoma; Thomas *v.* 910
Oklahoma; Webb *v.* 830
Oklahoma; Wyoming *v.* 921
Oklahoma Tax Comm'n *v.* Graham 816,979
Okure; Owens *v.* 235,886
Olden *v.* Kentucky 227
O'Leary; Coleman *v.* 972
O'Leary; Ortega *v.* 841
O'Leary *v.* Yarmosky 999
O'Leary's Estate *v.* Commissioner 818
Olinger; Linkous *v.* 929
Olitsky *v.* Spencer Gifts, Inc. 925
Ollett *v.* United States 996
Olson *v.* United States 850,995
O'Malley *v.* Xerox Corp. 848
Omni U. S. A., Inc. *v.* United States 817,961
$173,081.04 in U. S. Currency *v.* United States 850
Oneida Motor Freight, Inc. *v.* United Jersey Bank 967
O'Neil *v.* Blackstone Valley Electric Co. 995
O. N. E. Shipping, Ltd. *v.* Flota Mercante Grancolombiana, S. A. . 923
1250 Twenty-Fourth Street Associates Ltd.; Brown *v.* 956
Onondaga County; Baez *v.* 1014
Onwuasoanya *v.* United States 920
Operating Engineers *v.* Hester 1025

Page

Opfer; Arnold *v.* ... 890
Oppel *v.* Meachum ... 911
Oqueli-Hernandez *v.* United States ... 838
Orange *v.* Illinois ... 900
Orange County; Prenzler *v.* ... 1013
Orange County Bd. of Supervisors; Prenzler *v.* ... 857
Orchard *v.* United States ... 933
Oregon Meat Cutting School *v.* McLaughlin ... 806
Oregon Natural Resources Council; Marsh *v.* ... 810,886
Oregon State Bd. of Parole; Woolstrum *v.* ... 861
O'Reilly *v.* New York Times Co. ... 856
Orellanes *v.* United States ... 817
Oring *v.* State Bar of Cal. ... 590
Orkin Exterminating Co. *v.* Federal Trade Comm'n ... 1041
Orr; Rhinebarger *v.* ... 824
Orr; Smith *v.* ... 929
Ort; Tallman *v.* ... 813
Ortega *v.* O'Leary ... 841
Orynicz *v.* Veterans Administration ... 811
Osborn Transportation, Inc.; Bishop *v.* ... 832
Oscar *v.* Clovervale Foods Processing, Inc. ... 909
Oscar Daste & Sons, Inc.; Dobard *v.* ... 828
Ouimette *v.* United States ... 863
Overstreet; Team, Inc. *v.* ... 926
Owens; Dolenc *v.* ... 838,845
Owens *v.* Morris ... 1045
Owens *v.* Okure ... 235,886
Owens Ill. Inc.; Pollard *v.* ... 984
Oxford; Shelter Creek Development Corp. *v.* ... 851
Pacheco *v.* Dugger ... 1046
Pacheco *v.* United States ... 911
Pacific Resources, Inc.; Oahu Gas Service, Inc. *v.* ... 870
Pacindat Mut. Protection & Indem. Assn. *v.* Travelers Indem. Co. 891
Padavick *v.* Ohio ... 1013
Pagel *v.* United States ... 995
Paine, Webber, Jackson & Curtis, Inc.; Stephenson *v.* ... 926
Palacios-Martinez *v.* United States ... 844
Palazzolo *v.* United States ... 821
Palella *v.* United States ... 863
Palma *v.* Adler ... 968
Palmer *v.* Belmont County Children Services ... 958
Palmer College of Chiropractic; Krugman *v.* ... 944
Palughi *v.* Mobile ... 855
Panhandle Eastern Pipe Line Co. *v.* Illinois *ex rel.* Hartigan ... 986

Page
Panico *v.* United States 959
Panter *v.* American Synthetic Rubber Corp. 827
Paperworkers *v.* S. D. Warren Co. 992
Paradyne Corp. *v.* M/A-Com, Inc. 881
Parez *v.* Jones 836
Parez *v.* Lopez 836
Parez *v.* U. S. District Court 894
Parish. See name of parish.
Parke; Moronihaah *v.* 844
Parke; Nash *v.* 844
Parker *v.* Smith 830
Parker *v.* United States 912
Parks *v.* Parks 892
Park South Hotel; N. Y. Hotel Trades Coun. & Assn. Pens. Fd. *v.* 966
Parkus *v.* Missouri 900
Parkview Associates *v.* New York City 801
Parres *v.* Florida 957
Parrillo; Levin *v.* 893
Parungao *v.* Goerg 1034
Paster *v.* Curtiss Wright Corp. 1045
Path-Science Laboratories, Inc. *v.* Greene County Hospital 820
Patillo *v.* Georgia 948,1023
Patrolmen's Benevolent Assn. of New York City, Inc. *v.* Hughes .. 967
Patterson *v.* Kelley 858
Patterson *v.* Knight 839
Patuxent Institution; Harris *v.* 945
Paul, *In re* 989
Paul; Harden *v.* 967
Paul; Moore *v.* 970
Paul *v.* United States 1012
Payne *v.* Gannon 927
Payne *v.* Robinson 898
Payne's Estate *v.* Grant County Court 853
Peabody Coal Co.; Taylor *v.* 988
Peak *v.* United States 969
Pearl River County Bd. of Supervisors; Weigang *v.* 922
Pearson, *In re* 813
Pease *v.* Montana 1033
Peat Marwick Main & Co. *v.* Super. Court of Cal., Contra Costa Cty. 1028
Pekich; Prenzler *v.* 970
Pendleton *v.* Bureau of Prisons 995
Pendleton *v.* United States 983,1012
Pennington *v.* Gosselin 867
Pennsylvania; Barnhart *v.* 817
Pennsylvania *v.* Bruder 9

Page
Pennsylvania; Buckno *v.* ... 817
Pennsylvania; Buehl *v.* ... 871
Pennsylvania; Cohen *v.* ... 1035
Pennsylvania; Colozzi *v.* ... 1014
Pennsylvania; Garner *v.* ... 1009
Pennsylvania; Hoffman *v.* ... 928
Pennsylvania; Lehman *v.* ... 855
Pennsylvania; Luther *v.* ... 971,1051
Pennsylvania; McCaslin *v.* ... 830
Pennsylvania; Rider *v.* ... 993
Pennsylvania; Robinson *v.* ... 972
Pennsylvania; Ruza *v.* ... 826
Pennsylvania; Satterfield *v.* ... 837
Pennsylvania; Syre *v.* ... 853,976
Pennsylvania *v.* Union Gas Co. ... 810
Pennsylvania Public Television Network; Sagan *v.* ... 998
Pennsylvania P. U. C.; Kentucky W. Va. Gas Co. *v.* ... 941
Pennsylvania P. U. C. *v.* National Railroad Passenger Corp. ... 893
Pennsylvania Supreme Court; Szarewicz *v.* ... 958
Penrod Drilling Co.; Dixon *v.* ... 853
Penson *v.* Ohio ... 75
Penthouse International, Ltd.; Fudge *v.* ... 821
Peoples *v.* Alabama ... 972
Peoples; Castille *v.* ... 810
Peoples Natural Gas Co.; Richardson *v.* ... 942
Peppard *v.* United States ... 911
Perales *v.* United States ... 897
Perez *v.* Scripps-Howard Broadcasting Co. ... 870
Perholtz *v.* United States ... 821
Periodical Marketing & Consulting Co. *v.* ARA Services, Inc. ... 855
Perkinson *v.* Manion ... 851
Perotti *v.* Seiter ... 1045
Perrera *v.* United States ... 837
Perry *v.* Howes ... 982
Perry *v.* Leeke ... 272
Personnel Bd. of Jefferson County *v.* Wilks ... 810,938
Perumal *v.* Saddleback Valley Unified School Dist. ... 933
Peterman *v.* United States ... 1004
Peters Publishing Co.; Friedgood *v.* ... 1042
Pet, Inc. *v.* Buckner ... 819
Petroleum Helicopters, Inc.; Fournier *v.* ... 909
Petroleum Operation Support Service, Inc. *v.* Grinter ... 969
Petsock; Rogers *v.* ... 896
Petty; Cimo *v.* ... 1009

Page
Phelps; Juras *v.* 831
Philadelphia *v.* Concerned Citizens of Bridesburg 853
Philadelphia; McDevitt *v.* 811
Philadelphia Naval Shipyard; Lucas *v.* 892
Phillips, *In re* 814,950,953
Phillips *v.* Oklahoma 843,845
Phillips *v.* Totco 967
Phillips *v.* United States 893
Phillips Petroleum Co. *v.* Brown 822
Phillips Petroleum Co.; E. I. du Pont de Nemours & Co. *v.* 986
Phoenix Canada Oil Co. *v.* Texaco Petroleum Co. 908
Phoenix Canada Oil Co.; Texaco Petroleum Co. *v.* 916
Phone-Mate, Inc. *v.* Fortel Corp. 848
Pierce County District Court Probation Office *v.* Elliott 909
Pierson *v.* Illinois 925
Pilarowski *v.* Macomb County 850
Pineman *v.* Fallon 824
Pine Mountain Club Property Owners' Assn.; Kaschak *v.* 827,975
Pinney Dock & Transport Co. *v.* Norfolk & Western R. Co. 880
Pinson *v.* Jones 829
Pirovolos *v.* United States 857
Pisoni Fabbrica Accessori Instrumenti Musicali *v.* United States .. 819
Pitts *v.* Turner & Boisseau 1030
Pittsburgh *v.* American Civil Liberties Union 816,991
Pittsburgh & L. E. R. Co.; Interstate Commerce Comm'n *v.* 965
Pittsburgh & L. E. R. Co. *v.* Railway Labor Executives' Assn. 965,1001
Pittston Coal Group *v.* Sebben 105
Plain Dealer Publishing Co.; Cleveland Newspaper Guild *v.* 899
Planned Parenthood Assn. of Atlanta Area, Inc.; Williams *v.* 880,987,1025
Plasterers; Matson Plastering, Inc. *v.* 994
Platt; Grogan *v.* 981
Plazinich *v.* Lynaugh 1031
Plourde; Connecticut *v.* 1034
Plumbers *v.* J. A. Jones Construction Co. 881
Plunkett; Hammock *v.* 943
Plyler *v.* Evatt 897
Poe *v.* Haydon 1007
Poindexter *v.* Ohio 916
Poindexter *v.* Rocky Mount 968
Polk; Central Columbia School Dist. *v.* 1030
Pollard *v.* Owens Ill. Inc. 984
Pollio *v.* New Jersey 817
Pollock *v.* Marshall 897,987
Pollution Control Bd.; Alton Packaging Corp. *v.* 891

Page
Polyak *v.* Buford Evans & Sons 962,1035
Polyak *v.* Hamilton 803,961
Polyak *v.* Hulen 802,961,999
Polychron *v.* United States 851
Ponterio *v.* Morris 938
Pontiac; Huron Valley Hospital, Inc. *v.* 942
Poole *v.* Gresham 978
Poole *v.* Jones 996
Poole *v.* United States 817
Portee *v.* Dugger 1045
Porter *v.* Illinois 837
Portland; Koplow *v.* 843,862
Post *v.* Regan 1043
Postmaster General; Malone *v.* 819
Postmaster General *v.* Minnesota Newspaper Assn., Inc. 815,1001
Postmaster General; Minnesota Newspaper Assn., Inc. *v.* 815,998
Pote, *In re* 814
Potts; Florida *v.* 870
Powell *v.* Fulcomer 866
Powell *v.* North Carolina 830
Powers; Lemeron *v.* 924
Poyner *v.* Bair 871
Praet *v.* Kingsley 849
Prantil *v.* California 861
Pratt *v.* United States 863
Prelesnik; Atkins *v.* 1046
Prenzler *v.* Department of Health and Human Services 862
Prenzler *v.* Orange County 1013
Prenzler *v.* Orange County Bd. of Supervisors 857
Prenzler *v.* Pekich 970
Prenzler *v.* Superior Court of Cal. 930
President of United States; Smith *v.* 954
Presley; Missouri *v.* 975
Presnell *v.* Kemp 1050
Preston; Vermont *v.* 934
Price *v.* San Marcos 961
Prince *v.* Illinois 824
Prince George's County; Sellner *v.* 985
Prioleau *v.* United States 836,1033
Priovolos *v.* Heart of Cedar Lane, Inc. 962
Pritchard *v.* Board of Comm'rs of Calvert County 881
Pritchard; N & C Properties *v.* 856
Procter *v.* Butler 888
Proctor; Abdul-Akbar *v.* 958

Page
Proctor; Davis *v.* ... 958
Production Credit Assn. of Northern Ohio *v.* Farm Credit Admin. . 851
Production Finishing Corp.; Shields *v.* ... 955
Prows *v.* Kastner ... 941
Prudential-Bache Securities, Inc. *v.* Finn ... 917
Pruett *v.* Alaska ... 959
Pruett; Fields *v.* ... 978
Prunty *v.* Internal Revenue Service ... 1045
Prunty *v.* Walters ... 846
Prymer *v.* Rockford ... 1013
Public Citizen *v.* Department of Justice ... 979
Public Citizen; Liggett Group, Inc. *v.* ... 1030
Public Employees Retirement System of Ohio *v.* Betts ... 907
Public Service Co. of N. H. *v.* New Hampshire ... 1035
Public Service Co. of N. H.; Rye *v.* ... 981
Public Service Co. of Okla.; Lease Lights, Inc. *v.* ... 1019
Public Services Comm'n of V. I.; Atlantic Tele-Network Co. *v.* ... 981
Public Utility Comm'n of Tex.; Houston Lighting & Power Co. *v.* . 805
Puiatti *v.* Florida ... 871
Pulitzer Publishing Co. *v.* Duggan ... 1009
Punchard *v.* U. S. District Court ... 929
Pung; West *v.* ... 834
Purolator, Inc.; Sheehan *v.* ... 891
Pyles *v.* Texas ... 986
Pyrodyne Corp.; Pyrotronics Corp. *v.* ... 968
Pyrotronics Corp. *v.* Pyrodyne Corp. ... 968
Quansah *v.* Department of Justice ... 834
Quincy *v.* United States ... 935
Quintana *v.* United States ... 944
Qureshi *v.* Commissioner ... 852
Radin; Sinnott *v.* ... 980
Radke; California *v.* ... 1034
Rado *v.* Connecticut ... 927
Radvan-Ziemnowicz, *In re* ... 814,923,950,1023
Rafferty; Rivera *v.* ... 840
Ragland; Tony and Susan Alamo Foundation *v.* ... 852
Rahdert, Anderson & Richardson; Smith *v.* ... 970
Railroad Comm'n of Tex. *v.* Missouri Pacific R. Co. ... 1009
Railway Labor Executives' Assn. *v.* Chicago & N. W. Transp. 812,966,1051
Railway Labor Executives' Assn.; Consolidated Rail Corp. *v.* ... 815
Railway Labor Executives' Assn.; Pittsburgh & L. E. R. Co. *v.* 965,1001
Rainey; Beech Aerospace Services, Inc. *v.* ... 153
Rainey; Beech Aircraft Corp. *v.* ... 153
Rains; Scott *v.* ... 806

Page
Rajaram *v.* Typographical Union 1009
Rakovich *v.* Wade 968
Rakowski *v.* United States 925
Ramirez *v.* Lynaugh 841
Ramirez *v.* United States 943
Ramos *v.* United States 943
Ramos-Lopez *v.* United States 1014
Rampp *v.* Gleco 882
Ranck *v.* Florida 969
Randle; Simanonok *v.* 1033
Rankin *v.* United States 946
Ransom *v.* Bowen 968
Rasco *v.* United States 959
Ray *v.* Texas 802
Ray *v.* United States 1010
Rayborn *v.* Scully 1032
Reading; Sindram *v.* 935
Reagan; Smith *v.* 954
Reagin *v.* Terry 905
Reardon *v.* Miller 1031
Reaves, *In re* 1026
Rechnitzer; Mortgage Mart, Inc. *v.* 892
Redden, *In re* 814
Redding *v.* Allen 864
Reddy *v.* Coombe 929
Redevelopment Agency of San Jose; Boone *v.* 965
Red Fox *v.* United States 1012
Redgrave *v.* Boston Symphony Orchestra, Inc. 1043
Redken Laboratories, Inc.; Levin *v.* 852
Redken Laboratories, Inc.; Levin Beauty Supply *v.* 852
Redman; Carr *v.* 845
Redman; Hill *v.* 996
Redman *v.* Michigan State Univ. 945
Reed; Carpenter *v.* 857
Reed *v.* Mannhalt 908
Reed *v.* Transportation Union 319
Rees; Koehler *v.* 896
Rees; Ringo *v.* 837
Refiners Transport & Terminal Corp.; Harris *v.* 823,975
Regan *v.* New Jersey 985
Regan; Post *v.* 1043
Regents of Univ. of Cal.; Frigard *v.* 1025
Regents of Univ. of Cal.; Levy *v.* 893
Regional Postmaster General; Glaude *v.* 839,976

Page
Reid; Community for Creative Non-Violence *v.* 940,1027
Reidt, *In re* 964
Reilly *v.* Blue Cross & Blue Shield United of Wis. 856
Reinhard *v.* Conner 856
Reinhardt *v.* United States 1017
Reinisch *v.* United States 824
Reliance Ins. Co. *v.* Glados, Inc. 999
Reliford *v.* United States 1009
Remas; Eilrich *v.* 819
Rembert *v.* Dugger 969
Remeta *v.* Florida 871
Renna; Ficarotta *v.* 968
Rentschler, *In re* 1002
Reppond; Burton *v.* 843
Reproductive Health Services; Webster *v.* 1003
Republican Party of Iowa; De Young *v.* 841
Reumont *v.* California 844
Reynolds; Diamond *v.* 955
Reynolds; Ellingsworth *v.* 960
Rhinebarger *v.* Orr 824
Rhoades *v.* Idaho 999
Rhodes *v.* Stewart 1
Rhyne Floral Supply Mfg. Co.; Brown *v.* 1045
Rice; Robbins *v.* 970
Rich *v.* California 1051
Rich *v.* United States 860
Richard; Firestone Tire & Rubber Co. *v.* 1042
Richards *v.* Hardy 931
Richards; Territorial Court of V. I. *v.* 955
Richardson *v.* Peoples Natural Gas Co. 942
Richardson *v.* United States 866
Richard T. *v.* California 986
Richmond *v.* J. A. Croson Co. 469
Richter *v.* Internal Revenue Service 861
Ricklefs; Swartz *v.* 846
Ricks *v.* Maryland 832
Rick's Texaco; Texaco Inc. *v.* 811
Riddick; Bintz *v.* 824
Riddick; Fisher *v.* 897
Rider *v.* Pennsylvania 993
Right to Life Advocates, Inc. *v.* Aaron Women's Clinic 824
Riley; Florida *v.* 445
Riley *v.* Wisconsin 864
Ringo *v.* Rees 837

Page

Rios *v.* United States 1031
Rivard *v.* Chicago Fire Fighters 909,987
Rivera *v.* Illinois 1046
Rivera *v.* Rafferty 840
Rivera *v.* United States 974
Rivera-Medina *v.* United States 862
Rivera-Ramirez *v.* United States 894
Rizk *v.* United States 832
Roach *v.* United States 1011
Robbins *v.* California 1034
Robbins *v.* Rice 970
Roberson *v.* United States 1033
Roberts, *In re* 814,976
Roberts *v.* United States 845,855,931,983,993
Robertson *v.* Eunice 1033
Robertson *v.* Methow Valley Citizens Council 810,886
Robertson *v.* United States 899
Robins Co. *v.* Maressa 826
Robinson; Black *v.* 985
Robinson *v.* Connecticut 899
Robinson; McConico *v.* 1045
Robinson; Payne *v.* 898
Robinson *v.* Pennsylvania 972
Robinson *v.* United States 834,1005
Robinson *v.* Williams 928
Rob J. *v.* Grant 1040
Rock Against Racism; Ward *v.* 816
Rockford; Prymer *v.* 1013
Rockwood; Schucker *v.* 995
Rockwood School Dist.; Missouri *v.* 825
Rocky Mount; Poindexter *v.* 968
Roden *v.* Moore 1032
Rodriguez *v.* Beyer 844
Rodriguez *v.* Illinois 858
Rodriguez *v.* Johnson 842
Rodriguez *v.* United States 888
Rodriguez; Whaley *v.* 944
Rodriguez-Delgado *v.* United States 912
Rodriguez de Quijas *v.* Shearson/American Express, Inc. 954
Rodriguez Diaz *v.* Florida 845
Rodriguez Diaz *v.* Mexicana de Avion, S. A. 826
Rodriguez-Quinones *v.* United States 911
Rodriguez-Suaraz *v.* United States 1045
Roemer *v.* Chisom 955

Page
Rogers; Fritts *v.* ... 971
Rogers; Hall *v.* ... 847
Rogers *v.* Illinois ... 1046
Rogers *v.* Petsock ... 896
Rogers *v.* United States ... 946
Roggio *v.* United States ... 921
Rojas *v.* Victoria Independent School Dist. ... 811
Rojem *v.* Oklahoma ... 900
Roman *v.* California ... 981
Roman *v.* Superior Court of Cal., Los Angeles County ... 981
Romann *v.* Securities and Exchange Comm'n ... 854,961
Romero *v.* United States ... 1016
Rosberg *v.* Jacob ... 984
Rose; Daloia *v.* ... 898
Rose *v.* Oklahoma ... 847
Rosengarten *v.* United States ... 1011
Rosenthal *v.* State Bar of Cal. ... 805,987
Ross *v.* Texas ... 910
Rothgerber; Buchanan *v.* ... 1013
Rott *v.* Metropolitan Federal Savings & Loan Assn. of James Town 804
Rousselle *v.* Louisiana ... 822
Roveda *v.* Hughes Aircraft Co. ... 951
Rowe *v.* Department of Army ... 951,1024
Rowen; Cannon *v.* ... 856,891
Rowland *v.* Alameda County Probation Dept. ... 982
Royster *v.* McMackin ... 1011
Rozay's Transfer; Freight Drivers *v.* ... 953
Rubio *v.* United States ... 974
Rubloff, Inc. *v.* Smith ... 890
Rucker *v.* Ohio ... 1013
Rudkin-Wiley Corp.; Uniroyal, Inc. *v.* ... 825
Ruffin *v.* Dugger ... 1044
Ruffin; Dugger *v.* ... 1047
Ruggiano *v.* United States ... 966
Ruggiero *v.* United States ... 966
Ruiz *v.* California ... 871
Ruiz *v.* Florida ... 1044
Rusco Industries, Inc. *v.* McLaughlin ... 889
Ruskin Hardware, Inc. *v.* Fleming Cos. ... 942
Rutland; Chaisson *v.* ... 818
Ruza *v.* Pennsylvania ... 826
Ryan; Brown *v.* ... 860
Ryan; Gillespie *v.* ... 833
Rye *v.* Public Service Co. of N. H. ... 981

	Page
Rzepka *v.* Jacobsen	890
S. *v.* California	928
Sable Communications of Cal., Inc. *v.* FCC	1003
Sable Communications of Cal., Inc.; FCC *v.*	1003
Sacco, *In re*	1026
Sachs, Greenbaum & Tayler; Crumb *v.*	842
Sacramento County; Soto *v.*	1012
Saddleback Valley Unified School Dist.; Perumal *v.*	933
Safari *v.* United States	945
Safir *v.* Interstate Commerce Comm'n	841,976
Sagan *v.* Pennsylvania Public Television Network	998
St. Hilaire *v.* Maine	919
St. Joseph State Hospital; Jackson *v.*	892
St. Louis; Jones *v.*	983
St. Paul Fire & Marine Ins. Co.; Spencer *v.*	993
St. Paul Mercury Ins. Co.; Gaunce *v.*	804,950
Sainz *v.* United States	973
Salaahuddin *v.* Dugger	972
Salamanca; John *v.*	850
Saldana *v.* New York	1029
Salinas *v.* United States	934
Samaan *v.* Niakan	986
Samad; Drake Publishers, Inc. *v.*	925
Samad; High Society Magazine *v.*	925
Samad *v.* Zimmerman	862
Samm *v.* Southeastern Univ.	837,976
Samson; Harris *v.*	967
San Antonio Metropolitan Transit Authority; Garcia *v.*	889
Sanchez *v.* United States	845
Sanchez *v.* Wyoming	862
Sanchez-Cebezas *v.* United States	1017
Sanda; Auburn National Bank *v.*	927
Sanders *v.* Campbell	833
Sanders *v.* Clarke	1025
San Diego County; Morrison *v.*	819
San Diego County Dept. of Social Services; McNamara *v.*	152,964
Sandness; McCabe *v.*	1032
Sandoval Vargas *v.* United States	912
San Francisco; Crocker National Bank *v.*	881
San Francisco; Guinnane *v.*	823
San Francisco County Democratic Central Committee; Eu *v.*	991
San Luis Obispo County; Lake Nacimiento Ranch Co. *v.*	827
San Marcos; Price *v.*	961
San Mateo County; Carlisle *v.*	827

Page
San Mateo County Transit Dist.; Cross *v.* ... 862
San Ramon Police Dept.; Davis *v.* ... 957
Sasso; Synergy Gas Corp. *v.* ... 994
Satterfield *v.* Allsbrook ... 957
Satterfield *v.* Pennsylvania ... 837
Savarese *v.* United States ... 864
Savings League of Wis., Ltd. *v.* Wisconsin Dept. of Revenue ... 806
Savinovich *v.* United States ... 943
Scarfo *v.* United States ... 910
Scartz *v.* United States ... 923
Scates *v.* United States ... 912
Schaffer; Jones *v.* ... 802
Schardar *v.* United States ... 932
Schiavone Construction Co. *v.* Merola ... 855
Schifferly *v.* Commissioner of Patents ... 823
Schmidt; Birdsell *v.* ... 932
Schneckenburger *v.* La. Comm'n on Ethics for Public Employees 829
Schneider *v.* Lynaugh ... 831
Schon; Allstate Ins. Co. *v.* ... 994
Schraer; Shirley *v.* ... 1041
Schroeder; Alter *v.* ... 891
Schucker *v.* Rockwood ... 995
Schukie; Hill *v.* ... 1014
Schwalb; Chesapeake & Ohio R. Co. *v.* ... 811
Sciambra *v.* ARA Services, Inc. ... 855
Scinto *v.* United States ... 973
Scott *v.* DeMenna ... 853
Scott *v.* Rains ... 806
Scott; Smith *v.* ... 983
Scott *v.* United States ... 959
Scribner *v.* Warren ... 830
Scripps-Howard Broadcasting Co.; Perez *v.* ... 870
Scroggy; Edwards *v.* ... 918
Scroggy; Gilliard *v.* ... 1019
Scruggs, *In re* ... 964
Scruggs *v.* Moellering ... 930,987
Scullin *v.* Marsten ... 967
Scully; Aimone *v.* ... 865
Scully; Ferkins *v.* ... 970
Scully; Green *v.* ... 945
Scully; Rayborn *v.* ... 1032
S. D. Warren Co.; Paperworkers *v.* ... 992
Seaboard System Railroad, Inc.; Thomas *v.* ... 823
Seabold; Ford *v.* ... 928

Page
Seabold; Harston *v.* 931
Seals *v.* United States 846
Seau *v.* United States 857
Seawinds Ltd. *v.* Nedlloyd Lines, B. V. 891
Sebben; McLaughlin *v.* 105
Sebben; Pittston Coal Group *v.* 105
Secretary, Dept. of Air Force; Smith *v.* 929
Secretary of Agriculture; Williams *v.* 956
Secretary of Army; Foley *v.* 980,1051
Secretary of Army; New Haven *v.* 848
Secretary of Army *v.* Oregon Natural Resources Council 810,886
Secretary of Army; Wolfe *v.* 942
Secretary of Commerce *v.* Center for Environmental Ed. 1004
Secretary of Defense; Bryant *v.* 806
Secretary of Defense *v.* Doe 93
Secretary of Ed. of Pa. *v.* Muth 815,921,1001
Secretary of HHS; Christian *v.* 922
Secretary of HHS; Dickey *v.* 834
Secretary of HHS *v.* Georgetown Univ. Hospital 204,809
Secretary of HHS *v.* Hudson 980,1027
Secretary of HHS; Hurvitz *v.* 968
Secretary of HHS; Kelly *v.* 833,976
Secretary of HHS; Kerr *v.* 1011
Secretary of HHS; Lawson *v.* 843
Secretary of HHS; Linquist *v.* 908
Secretary of HHS; Ransom *v.* 968
Secretary of HHS; Simmons *v.* 1044
Secretary of HHS; Sunshine Health Systems, Inc. *v.* 965
Secretary of HHS; Walker *v.* 835
Secretary of HHS; Wrenn *v.* 1028
Secretary of Interior; Fairchilde *v.* 929
Secretary of Interior; Jordan *v.* 1006
Secretary of Interior; Macharia *v.* 992
Secretary of Interior *v.* Muscogee (Creek) Nation 1010
Secretary of Labor; Citizens Bank of Clovis *v.* 829
Secretary of Labor; Claridge Hotel & Casino *v.* 925
Secretary of Labor; Davis *v.* 897,987
Secretary of Labor; Glassboro Service Assn., Inc. *v.* 821
Secretary of Labor; Ho Fat of Cal. *v.* 1040
Secretary of Labor; Ho Fat Seto *v.* 1040
Secretary of Labor; Industrial Steel Products Co. *v.* 993
Secretary of Labor; Lauritzen *v.* 898,987
Secretary of Labor; Lauritzen Farms *v.* 898,987
Secretary of Labor; Oregon Meat Cutting School *v.* 806

Page
Secretary of Labor *v.* Sebben 105
Secretary of Labor; Shirk *v.* 806
Secretary of Navy; Collins *v.* 841
Secretary of State of Cal.; Badham *v.* 804,953,1024
Secretary of State of Cal. *v.* San Fran. Cty. Dem. Central Comm. 991
Secretary of Transportation *v.* Mid-America Pipeline Co. 814
Secretary of Treasury; Humphrey *v.* 966
Secretary of Treasury; National Assn. of Counties *v.* 1005
Securities and Exchange Comm'n; Blinder, Robinson & Co. *v.* 869
Securities and Exchange Comm'n; Economou *v.* 850
Securities and Exchange Comm'n; Romann *v.* 854,961
Segura *v.* California 1046
Seiter; Aqueel *v.* 831
Seiter; Perotti *v.* 1045
Sellner *v.* Prince George's County 985
Sequoia Books, Inc. *v.* Illinois 868,869,960
Serrano *v.* Jones & Laughlin Steel Co. 988,1000
Serrano; Michigan *v.* 1008
Servidio *v.* United States 912
Seto v. McLaughlin 1040
Seybert Nicholas Printing Corp.; Lynch *v.* 857,977
Seymore *v.* Alabama 1018
Shaffer *v.* United States 837
Shamlin *v.* Arkansas 863
Shane *v.* Los Angeles Police Dept. 1045
Shank; Martin *v.* 833,950
Shanks *v.* Estes Park Bank 927,1023
Shannon; Ansell *v.* 966
Shannon *v.* Klincar 859
Shannon & Luchs Co.; Singer *v.* 821
Shapiro; Asam *v.* 1024
Sharif, *In re* 814
Sharp *v.* Texas 872
Shaver *v.* F. W. Woolworth Co. 856
Shaw *v.* New York 840
Shawano County; Larson *v.* 806
Shawmut Bank of Boston; Kuntz *v.* 952
Shea & Gould; Consolidated Capital Corp. *v.* 1006
Shearson/American Express, Inc.; Rodriguez de Quijas *v.* 954
Sheehan *v.* Purolator, Inc. 891
Sheet Metal Workers; Breininger *v.* 811
Sheet Metal Workers *v.* Lynn 347
Sheffield, *In re* 954
Sheffield *v.* United States 897

	Page
Sheftelman *v.* Standard Metals Corp.	881
Shell Oil Co. *v.* Department of Revenue of Fla.	951
Shell Oil Co. *v.* Iowa Dept. of Revenue	19
Shells *v.* Oklahoma	1046
Shelter Creek Development Corp. *v.* Oxford	851
Sherazee *v.* United States	895
Sheridan *v.* Lane	833
Sherman *v.* United States	974
Shewchun *v.* United States	857
Shibles *v.* Wisconsin	844
Shields *v.* Production Finishing Corp.	955
Shinn *v.* Department of Army	929,997
Shipka; Thomas *v.*	1036
Shirani; Mahdavi *v.*	971
Shirk *v.* McLaughlin	806
Shirley *v.* Schraer	1041
Shockey *v.* Tate	957
Shostak *v.* Federal Energy Regulatory Comm'n	942,1023
Shoulders *v.* McCracken County	951
Shughart; Martin *v.*	870,951
Sidebottom *v.* Missouri	975
Sidman *v.* Supreme Court of Fla.	890
Sierra Club; Simkins Industries, Inc. *v.*	992
Sierra Summit, Inc.; California State Bd. of Equalization *v.*	992
Silva *v.* California	1019
Silva; Grant *v.*	835
Silva *v.* United States	941
Silvaggio *v.* California	958,997
Silverman, *In re*	1027
Silverman *v.* Barry	956
Simanonok *v.* Randle	1033
Simkins Industries, Inc. *v.* Sierra Club	992
Simmons *v.* Bowen	1044
Simmons *v.* Burns	969
Simmons *v.* Marsh	996
Simmons *v.* Vogle	911
Simon; Dow Jones & Co. *v.*	946
Simon *v.* F/S Airlease II, Inc.	852
Simon *v.* United States	861
Simpson *v.* Upper Providence Police Dept.	847,987
Sims *v.* Illinois	844
Sims *v.* United States	957
Sinclair Oil Corp.; Oil, Chemical & Atomic Workers *v.*	821
Sindram *v.* Reading	935

Page
Sindram *v.* Taylor 911,987
Singer *v.* Shannon & Luchs Co. 821
Singleton *v.* Thigpen 1019
Sink *v.* United States 1012
Sinnott *v.* Radin 980
Siripongs *v.* California 1019
Sitka *v.* United States 827
Sitting Holy *v.* United States 910
Sivley *v.* Texas 977
Skatzes *v.* Morris 930,997
Skaw *v.* United States 854
Skibinski *v.* New York City Comm'n on Human Rights 847
Skirlick *v.* Fidelity & Deposit Co. of Md. 1007
Sky's the Limit *v.* Gravity Guidance, Inc. 1006
Slabaugh *v.* United States 1032
Slaughter *v.* Kentucky 841
Small *v.* Bennerson 845
Small *v.* Harris 837
Small Business Administration; Englert *v.* 858,977
Smith, *In re* 938,954,1038,1039
Smith; Alabama *v.* 1003
Smith; American Trucking Assns., Inc. *v.* 954
Smith; Armontrout *v.* 808,961
Smith *v.* Barrett 931
Smith; Bollman *v.* 957
Smith; Bounds *v.* 869
Smith *v.* California 835
Smith; Clinton *v.* 988
Smith *v.* First National Bank of Atlanta 821
Smith *v.* Florida 842,950
Smith; Holywell Corp. *v.* 850
Smith *v.* Indiana 934
Smith *v.* Missouri 978,1019
Smith *v.* Murray 958
Smith *v.* Nicklos Drilling Co. 956
Smith *v.* Orr 929
Smith; Parker *v.* 830
Smith *v.* Rahdert, Anderson & Richardson 970
Smith *v.* Reagan 954
Smith; Rubloff, Inc. *v.* 890
Smith *v.* Scott 983
Smith *v.* Sowders 866
Smith *v.* Sumner 930
Smith; Taylor *v.* 834

Page
Smith *v.* United States 843,858,859,888,931,974,1017
Smith *v.* Washington 838,1042
Smith *v.* Ylst 829
Smith Land & Improvement Corp.; Celotex Corp. *v.* 1029
Smithson *v.* United States 1004
Snaider; Vitale *v.* 821,997
Snavely *v.* Watson 803
Sno-King Village Assn., Inc.; Anderson *v.* 801
Snow; Bowens *v.* 910
Snyder *v.* Wilson 802
Sobol; Doe *v.* 850
Socey *v.* United States 858
Sochin *v.* Commissioner 824
Soens; De Young *v.* 853
Sohmer *v.* Freeman 931
Solem *v.* Vosburg 928
Soler *v.* G & U, Inc. 832
Solerwitz, *In re* 1004
Sosa *v.* United States 924
Soto *v.* Sacramento County 1012
Soucek, *In re* 1000
South Atlantic Canners, Inc.; Stephens *v.* 996
South Carolina *v.* Gathers 888,1002,1027,1039
South Carolina; Middleton *v.* 872,961
South Dakota; Lyerla *v.* 999
Southeastern Toyota Distributors, Inc.; Thompson *v.* 931,1023
Southeastern Univ.; Samm *v.* 837,976
Southeast Mo. Professional Standards Review Org.; Kwoun *v.* 880
Southern Ind. Gas & Electric Co. *v.* National Labor Relations Bd. 1031
Southern Md. Hospital; Brown *v.* 839
Southern Natural Gas Co. *v.* Fritz 887
Southern Ohio Coal Co.; Lechiara *v.* 864
Southern Pacific Transportation Co.; Mayon *v.* 925
Southern Pacific Transportation Co.; Vallier *v.* 880
Southern Satellite Systems, Inc.; Hubbard Broadcasting, Inc. *v.* .. 961
Sowders; Smith *v.* 866
Sox *v.* United States 817
Span *v.* Dugger 973
Spearman *v.* Lynaugh 841
Spears *v.* Thigpen 1046
Specht *v.* Jensen 1008
Spence *v.* United States 946
Spencer *v.* Danville Police Dept. 862
Spencer *v.* Illinois 841,950

Page
Spencer *v.* St. Paul Fire & Marine Ins. Co. ... 993
Spencer *v.* U. S. Court of Appeals ... 894
Spencer Gifts, Inc.; Olitsky *v.* ... 925
Sperrazza *v.* United States ... 827
Spillane *v.* Spillane ... 849
Spinelli *v.* Lynaugh ... 866
Spoor *v.* Bigford ... 822
Sprague *v.* Walter ... 988
Spreitzer *v.* Illinois ... 917
Spring Branch Mining Co. *v.* Mine Workers 1950 Pens. Tr. & Plan 1019
Squires *v.* Fleming ... 1044
Stalder; Kaltenbach *v.* ... 930
Stallworth; United Steel & Wire Co. *v.* ... 849
Stamler *v.* Zamboni ... 899
Standard Metals Corp.; Sheftelman *v.* ... 881
Standard Oil (Ind.); Young *v.* ... 981
Stanford *v.* Kentucky ... 887,906
Stanglin; Dallas *v.* ... 815,939,979
Stapleton *v.* Ohio ... 1007
Star Color Plate Service *v.* National Labor Relations Bd. ... 828
Starrett City Associates *v.* United States ... 946
State. See also name of State.
State Bar of Cal.; Oring *v.* ... 590
State Bar of Cal.; Rosenthal *v.* ... 805,987
State Bar of Tex.; Howell *v.* ... 982
State Corp. Comm'n of Kan.; Northwest Cent. Pipeline Corp. *v.* 808,886
State Estab., Ag. Prod. Trading; U. K. Mut. S. S. Assur. Assn. *v.* 916
State Ethics Comm'n of Pa.; Trinsey *v.* ... 927
State Farm Mut. Automobile Ins. Co.; Melnick *v.* ... 822
State Ins. Fund of N. Y.; Cross *v.* ... 943
Stauber *v.* Cline ... 817,975
Stebbins *v.* District of Columbia ... 929
Steele *v.* Felix Chevrolet ... 888,976
Steele *v.* United States ... 984
Steelworkers; Unimet Corp. *v.* ... 828
Stephens *v.* Kemp ... 872
Stephens *v.* South Atlantic Canners, Inc. ... 996
Stephens *v.* United States ... 965
Stephenson *v.* Paine, Webber, Jackson & Curtis, Inc. ... 926
Stephenson *v.* United States ... 931
Sterling *v.* Missouri ... 1014
Stern *v.* Leucadia National Corp. ... 852
Stern *v.* Nix ... 826
Sterner *v.* Jones ... 936

Page
Stetzer; Jupin *v.* ... 896
Stevenson Associates; Federal Savings and Loan Ins. Corp. *v.* ... 935
Steven W. *v.* United States ... 1012
Stewart *v.* Illinois ... 900,987
Stewart; Rhodes *v.* ... 1
Stickrath; Garrett *v.* ... 845
Stillwell *v.* United States ... 973
Stinson; Hornsby *v.* ... 959
Stitsinger; Mahlerwein *v.* ... 803,976
Stitt Spark Plug Co. *v.* Champion Spark Plug Co. ... 890
Stockton *v.* Lansiquot ... 891
Stokes *v.* Armontrout ... 1019
Stoll, *In re* ... 885
Stone Container Corp.; Minizza *v.* ... 908
Storts, *In re* ... 963,1051
Stout *v.* A. M. Sunrise Construction Co. ... 1030
Strable *v.* U. S. Treasury ... 972
Strader *v.* Doe ... 864
Strand *v.* United States ... 928
Straub; Hardin *v.* ... 887,953
Streater *v.* Williams ... 895
Stringer *v.* Johnson ... 1013
Struebin; Illinois *v.* ... 851
Stuart *v.* Metropolitan Life Ins. Co. ... 968
Stubblefield *v.* Wilkenson ... 1033
Sullivan; Aaron *v.* ... 907
Sullivan *v.* Crawford ... 910
Sullivan *v.* Freeman ... 830
Sullivan; Leyba *v.* ... 969
Sullivan; McDonald *v.* ... 1033
Sullivan *v.* Sullivan ... 812,939,1036
Sullivan; Sykes *v.* ... 861
Summa Corp. *v.* Trans World Airlines, Inc. ... 853
Summers *v.* Thompson ... 977
Summit County *v.* Akron ... 1005
Sumner; Cranford *v.* ... 971
Sumner; Smith *v.* ... 930
Sumner; Taylor *v.* ... 837
Sunshine Health Systems, Inc. *v.* Bowen ... 965
Sun-Tek Industries, Inc. *v.* Kennedy Sky-Lites, Inc. ... 1009
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Ct. of Cal.; Prenzler *v.* ... 930
Superior Ct. of Cal., Contra Costa Cty.; Peat Marwick Main & Co. *v.* 1028

Page
Superior Ct. of Cal., Kern Cty.; Kaschak *v.* 827,975
Superior Ct. of Cal., Los Angeles Cty.; Roman *v.* 981
Superior Ct. of Cal., Sacramento Cty.; Hines *v.* 896
Superior Ct. of Cal., San Bernardino Cty.; Hartenstine *v.* 899
Supreme Ct. of Fla.; Sidman *v.* 890
Svee *v.* Wisconsin 838
Swartz *v.* Ricklefs 846
Sweet; Goldberg *v.* 252,979,1001
Sweet; GTE Sprint Communications Corp. *v.* 252,979,1001
Swinson *v.* U. S. Parole Comm'n 861
Swinson; Weichert *v.* 1015
Swofford, *In re* 989
Sykes *v.* Sullivan 861
Syme *v.* Weckesser 834
Syndor *v.* Zimmerman 838
Synergy Gas Corp. *v.* Sasso 994
Synpol, Inc.; Bodnar *v.* 908
Syre *v.* Pennsylvania 853,976
Szarewicz *v.* Flaherty 843
Szarewicz *v.* Gardner 864
Szarewicz *v.* Joyce 896
Szarewicz *v.* Pennsylvania Supreme Court 958
Szarewicz *v.* Zimmerman 1045
Szemborski *v.* Bonanza Investment Co. 910
Szemborski *v.* First Wis. National Bank of Milwaukee 866
T. *v.* California 986
Tallahassee Branch, NAACP *v.* Leon County 960
Tallman *v.* Kelley 1025
Tallman *v.* Northwest Acute Care Corp. 813
Tallman *v.* Northwest Hospital 813
Tallman *v.* Ort 813
Tallman *v.* United States 813
Tam *v.* United States 867
Tampa Wholesale Co.; Greco *v.* 1006
Tansy; James *v.* 928
Tarantino *v.* United States 867
Tarkanian; National Collegiate Athletic Assn. *v.* 179
Tarleton State Univ.; De Wiest *v.* 927
Tarpley *v.* Dugger 837
Tate; Dodrill *v.* 1044
Tate; Ferrell *v.* 932
Tate; Shockey *v.* 957
Taub *v.* Kentucky 870
Tax Analysts; Department of Justice *v.* 1003,1039

Page
Taylor; Bigford *v.* ... 851
Taylor *v.* Bunge Corp. ... 910
Taylor *v.* California ... 931
Taylor; Chavez *v.* ... 860
Taylor *v.* Desmond ... 861
Taylor; Maulick *v.* ... 866
Taylor *v.* Ohio ... 942
Taylor *v.* Peabody Coal Co. ... 988
Taylor; Sindram *v.* ... 911,987
Taylor *v.* Smith ... 834
Taylor *v.* Sumner ... 837
Taylor *v.* Taylor Wine Co. ... 960
Taylor Wine Co.; Taylor *v.* ... 960
T. B. *v.* Iowa Dept. of Human Services ... 896,977
Team, Inc. *v.* Overstreet ... 926
Teamsters; Chipman Freight Services *v.* ... 848
Teamsters; Herman Brothers, Inc. *v.* ... 848
Teamsters *v.* Union Oil Co. of Cal. ... 1043
Teamsters Pension Trust Fund of Philadelphia *v.* Wooleyhan ... 955
Tease; Duffy *v.* ... 833
Tedders *v.* Lord ... 962,1051
Teeter *v.* Gravity Guidance, Inc. ... 1006
Telepo *v.* New Jersey ... 1014
Tendrich; Broida *v.* ... 1042
Tenneco Oil Co. *v.* Kern Oil & Refining Co. ... 948
Tennessee; Barber *v.* ... 900
Tennessee; Cone *v.* ... 871
Tennessee; Cooker *v.* ... 871
Tennessee; Duncan *v.* ... 934
Tennessee; Horner *v.* ... 853
Tennessee; Wright *v.* ... 1034
Terco, Inc. *v.* Federal Mine Safety and Health Review Comm'n ... 818
Terminal Railroad Assn. of St. Louis; Hammond *v.* ... 921
Terrebonne Parish School Bd.; Liner *v.* ... 827
Territorial Court of V. I. *v.* Richards ... 955
Terry; Reagin *v.* ... 905
Terrydale Liquidating Trust *v.* Barness ... 927
Testerman; Fields *v.* ... 978
Tew *v.* Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. 854
Texaco Inc. *v.* Hasbrouck ... 811
Texaco Inc. *v.* Rick's Texaco ... 811
Texaco Petroleum Co. *v.* Phoenix Canada Oil Co. ... 916
Texaco Petroleum Co.; Phoenix Canada Oil Co. *v.* ... 908
Texarkana Trawlers *v.* United States ... 943

Page
Texas; Allridge *v.* 1026
Texas; Andrews *v.* 871,976
Texas; Barta *v.* 951
Texas; Briddle *v.* 986
Texas; Cassell *v.* 847
Texas; Colston *v.* 980
Texas; Cook *v.* 807
Texas; Culverhouse *v.* 863
Texas; Eisenhauer *v.* 848
Texas; Ellis *v.* 850
Texas; Gardner *v.* 1034
Texas; Gilley *v.* 944
Texas; Interstate Commerce Comm'n *v.* 821
Texas; Jimenez *v.* 837
Texas *v.* Johnson 884,907
Texas; Johnson *v.* 930
Texas; Landry *v.* 989,1018
Texas; Little *v.* 934
Texas; Maddux *v.* 1032
Texas; Matlock *v.* 893
Texas; Mattias *v.* 831
Texas; McKibbon *v.* 859
Texas *v.* Modgling 898
Texas *v.* New Mexico 808,917,921
Texas; Nichols *v.* 1019
Texas; Pyles *v.* 986
Texas; Ray *v.* 802
Texas; Ross *v.* 910
Texas; Sharp *v.* 872
Texas; Sivley *v.* 977
Texas Bd. of Corrections; Nubine *v.* 863,950
Texas Bd. of Pardons and Paroles; Empey *v.* 896
Texas Court of Criminal Appeals; Moody *v.* 985
Texas Dept. of Corrections; Johnson *v.* 931
Texas Employment Comm'n; Child, Inc. *v.* 849
Texas Extrusion Corp. *v.* Lockheed Corp. 926
Texas Monthly, Inc. *v.* Bullock 906
Texas State Teachers Assn. *v.* Garland Independent School Dist. 815
Thame *v.* United States 928
Thanh Van Vo; Thanh Vong Hoai *v.* 1008
Thanh Vong Hoai *v.* Thanh Van Vo 1008
Tharp *v.* Tharp 853
Thayer *v.* Maine 970
Thigpen; Dunkins *v.* 963

Page
Thigpen; Singleton *v.* 1019
Thigpen; Spears *v.* 1046
Thissen *v.* United States 1017
Thomas; Alabama Power Co. *v.* 888
Thomas; Jones *v.* 1003
Thomas; Ohio Power Co. *v.* 901
Thomas *v.* Oklahoma 910
Thomas *v.* Seaboard System Railroad, Inc. 823
Thomas *v.* Shipka 1036
Thomas *v.* U. S. Postal Service 844
Thompkins *v.* Illinois 871,977
Thompson *v.* Alabama 834
Thompson *v.* California 844,960
Thompson; Church *v.* 1045
Thompson *v.* Housewright 866
Thompson *v.* Kentucky 836
Thompson *v.* Louisiana 871,976
Thompson *v.* Lynaugh 1014
Thompson; Merlino Enterprises, Inc. *v.* 1024
Thompson *v.* Southeastern Toyota Distributors, Inc. 931,1023
Thompson; Summers *v.* 977
Thompson; Townes *v.* 857
Thompson *v.* United States 832,1016
Thompson *v.* U. S. Postal Service 892
Thornburgh; Harmon *v.* 934
Thornburgh; Hernandez *v.* 977
Thornburgh; Herrmann *v.* 867
Thornburgh; Michigan *v.* 980
Thornburgh; Mitchell *v.* 841,976
Thornburgh; Wrenn *v.* 1039
Thornbury *v.* W. D. D., Inc. 892
Thorne *v.* Bailey 984
Thorstenn; Barnard *v.* 921
Thorstenn; Virgin Islands Bar Assn. *v.* 921
Thrush *v.* Thrush 825
Thurman; Graves *v.* 843,897
Tibbs *v.* United States 974
Tibbs; Wankoff *v.* 1007
Ticktin; Federal Savings & Loan Ins. Corp. *v.* 815
Ticktin *v.* United States 1010
Tierney; Neron *v.* 832
Tillamook County; Hallstrom *v.* 811
Tilley; Mead Corp. *v.* 815,906
Times Mirror Co. *v.* Doe 1036

Page
Tingling *v.* United States 941
Tobey; McDonald *v.* 971
Toledo *v.* United States 889
Tony and Susan Alamo Foundation *v.* Ragland 852
Toombs; Whiteshield *v.* 862
Topley *v.* Dugger 837
Torres *v.* Dugger 833,837
Torres *v.* J. F. Enterprises, Inc. 890
Torres-Arboledo *v.* Florida 901
Totco; Phillips *v.* 967
Town. See name of town.
Townes *v.* Thompson 857
Trademasters International, Inc.; A. E. C. Trading Co. *v.* 982
Trahan *v.* Nebraska 995
TransAmerican Natural Gas Corp. *v.* Department of Interior 819
Transportation Union; Interstate Commerce Comm'n *v.* 969
Transportation Union; Reed *v.* 319
Trans World Airlines, Inc.; Alvarez *v.* 1043
Trans World Airlines, Inc.; Machinists *v.* 820
Trans World Airlines, Inc. *v.* National Mediation Bd. 820
Trans World Airlines, Inc.; Summa Corp. *v.* 853
Traub; Lepiscopo *v.* 865
Travelers Indemnity Co.; Pacindat Mut. Prot. & Indem. Assn. *v.* .. 891
Treadwell *v.* Withrow 846
Treasury Employees *v.* Von Raab 886
Treharne; McGee *v.* 994
Trenton Resins Credit Union; Davis *v.* 836
Triangle Industries, Inc. *v.* Zulkowski 994
Tri-Bio Laboratories, Inc. *v.* United States 818
Trickey; Wheat *v.* 971
Trinsey *v.* State Ethics Comm'n of Pa. 927
Tripati *v.* Brimmer 858
Tripati *v.* Henman 982,1035
Tripati *v.* United States 1015
Triplett *v.* United States 945
Troche *v.* Hoffa 844
Trotz *v.* U. S. District Court 1015
Trujillo *v.* United States 1005
Tseng; Lemberg *v.* 984
Tubbs *v.* Butler 971
Tucker *v.* Northeast Savings 1007
Tucker *v.* United States 984
Tucson; Davis *v.* 1032

Page
Tullock; Michigan *v.* ... 825
Turks *v.* U. S. Postal Service ... 1031
Turner *v.* Armontrout ... 928
Turner; Booss *v.* ... 1012
Turner; Carter *v.* ... 888
Turner *v.* Hoffman ... 862
Turner *v.* McMahon ... 818
Turner; Noll *v.* ... 945
Turner *v.* United States ... 1033,1041
Turner *v.* U. S. Postal Service ... 969,1023
Turner & Boisseau; Pitts *v.* ... 1030
Turner Broadcasting System, Inc.; Law Firm of Daniel P. Foster *v.* 994
Turnpaugh *v.* Foltz ... 996
Twitty *v.* Maass ... 897
Tyco Industries, Inc.; Lego Systems, Inc. *v.* ... 955
Tydings *v.* Virginia ... 846
Tyler *v.* Cline ... 996
Typographical Union; Rajaram *v.* ... 1009
Tyson; Martin *v.* ... 863
Ulmer *v.* United States ... 946
Unimet Corp. *v.* Steelworkers ... 828
Union. For labor union, see name of trade.
Union Gas Co.; Pennsylvania *v.* ... 810
Union Oil Co. of Cal.; Teamsters *v.* ... 1043
Union Pacific R. Co. *v.* Moritz ... 899
Uniroyal, Inc. *v.* Rudkin-Wiley Corp. ... 825
Unisys Corp. *v.* United States ... 854,986
United. For labor union, see name of trade.
United Artists Theatre Circuit *v.* Harkins Amusement Enterprises 1019
United Gas Pipe Line Co. *v.* Louisiana Power & Light Co. ... 917
United Inter-Mountain Telephone Co.; Communications Workers *v.* 993
United Jersey Bank; Oneida Motor Freight, Inc. *v.* ... 967
United Kingdom Mut. S. S. Assur. Assn. *v.* State Ag. Prod. Estab. 916
United States. See name of other party.
U. S. Army; Mandell *v.* ... 946
U. S. Court of Appeals; Spencer *v.* ... 894
U. S. District Court; Aqeel *v.* ... 894
U. S. District Court; Balawajder *v.* ... 894
U. S. District Court; Forbes *v.* ... 835
U. S. District Court; Mallard *v.* ... 815
U. S. District Court; Parez *v.* ... 894
U. S. District Court; Punchard *v.* ... 929
U. S. District Court; Trotz *v.* ... 1015
U. S. District Court; Vallier *v.* ... 880

Page
U. S. District Court; Wilkes *v.* ... 967
U. S. District Judge; Faison *v.* ... 841,950
United States Fidelity & Guaranty Co.; Lakes *v.* ... 842
United States Fire Ins. Co.; Howell *v.* ... 943
U. S. Parole Comm'n; Ferrell *v.* ... 972
U. S. Parole Comm'n; Swinson *v.* ... 861
U. S. Postal Service; Cirocco *v.* ... 945
U. S. Postal Service; Delumen *v.* ... 927
U. S. Postal Service; Gulley *v.* ... 835
U. S. Postal Service; Marshburn *v.* ... 1017
U. S. Postal Service; Thomas *v.* ... 844
U. S. Postal Service; Thompson *v.* ... 892
U. S. Postal Service; Turks *v.* ... 1031
U. S. Postal Service; Turner *v.* ... 969,1023
U. S. Postal Service; Williams *v.* ... 831,976
U. S. Treasury; Strable *v.* ... 972
United Steel & Wire Co. *v.* Stallworth ... 849
United Technologies Corp.; Boyle *v.* ... 886,994
University of Cal.; Chou *v.* ... 875,1012
University of Cal. at Berkeley; Chou *v.* ... 1012
University of Kan.; Willner *v.* ... 1011,1031
University of Medicine & Dentistry of N. J. *v.* Fuchilla ... 826
University of Medicine & Dentistry of N. J.; Khalil *v.* ... 851
University of Pa. *v.* Equal Employment Opportunity Comm'n ... 992
University of Puerto Rico; Garcia-Caban *v.* ... 820
University of Tenn. at Martin; Jain *v.* ... 827
University of Tex. at El Paso; Levitt *v.* ... 984
Unsecured Creditors' Committee *v.* First National Bank & Trust Co. 817
Untemeyer *v.* Valhi, Inc. ... 868
Upper Providence Police Dept.; Simpson *v.* ... 847,987
Ureste *v.* United States ... 850
Urrutia; Valero Energy Corp. *v.* ... 829
U. S. Aluminum Corp./Tex.; Alumax Inc. *v.* ... 822
U. S. Robotics, Inc.; Business Computer Corp. *v.* ... 1035
Vacanti *v.* United States ... 821
Vail Village Inn Associates *v.* Benet ... 1042
Vail Village Inn Associates *v.* Giralt ... 1042
Valenzuela *v.* Goldsmith ... 865
Valero Energy Corp. *v.* Urrutia ... 829
Valhi, Inc.; Untemeyer *v.* ... 868
Valles *v.* Lynaugh ... 808,952
Valley National Bank of Des Moines; Walker *v.* ... 1035
Valley Neurosurgical Assn.; Kerpa *v.* ... 971
Valley Neurosurgical Assn.; Lawson *v.* ... 971

	Page
Vallier *v.* Southern Pacific Transportation Co.	880
Vallier *v.* U. S. District Court	880
Vamos *v.* United States	1028
VanCaspel *v.* Corwin	924
Vance *v.* United States	893
Van Cleave *v.* Indiana	1019
Vandemark; Adams *v.*	1042
Vandercreek *v.* Florida	1009
VanderWeyst *v.* First State Bank of Benson	943
Vane's Estate *v.* Fair, Inc.	1008
VanMatre *v.* Illinois	839
Vannelli *v.* National Collegiate Athletic Assn.	956
Van Vo; Thanh Vong Hoai *v.*	1008
Van Voorhis & Skaggs *v.* Federal Savings & Loan Ins. Corp.	848
Vasquez *v.* United States	1034
Vassar; Blakey *v.*	1014
Vassar; Essex *v.*	969
Vattle *v.* United States	1033
Vaughn *v.* Wilson	889
VECO International, Inc. *v.* Alaska Public Offices Comm'n	919
Vella, *In re*	814
Vence *v.* United States	867
Verity *v.* Center for Environmental Ed.	1004
Vermont *v.* Brunell	1047
Vermont; Gallagher *v.*	995
Vermont *v.* Preston	934
Vest *v.* United States	812,965
Veterans Administration; Andrews *v.*	817
Veterans Administration; Feiss *v.*	849
Veterans Administration; Orynicz *v.*	811
Victoria Independent School Dist.; Rojas *v.*	811
Vielle *v.* Baisley	917
Vilanova *v.* United States	1016
Village Inn Plaza *v.* Benet	1042
Village Inn Plaza *v.* Giralt	1042
Virginia *v.* American Booksellers Assn., Inc.	905
Virginia; Blackwelder *v.*	851
Virginia; DePriest *v.*	985
Virginia; O'Dell *v.*	871,977
Virginia; Tydings *v.*	846
Virgin Islands Bar Assn. *v.* Thorstenn	921
Vitale *v.* Snaider	821,997
Vitiello *v.* I. Kahlowsky & Co.	849
Vo; Thanh Vong Hoai *v.*	1008

Page
Voge *v.* United States 941
Vogle; Simmons *v.* 911
Vogler *v.* United States 1006
Vogt *v.* Abishi 891
Vong Hoai *v.* Thanh Van Vo 1008
Vonhof *v.* Washington 1008
Von Langsdorff Licensing Ltd.; Demaco Corp. *v.* 956
Von Marschner *v.* United States 1011
Von Raab; Treasury Employees *v.* 886
Vosburg; Solem *v.* 928
VSL Corp. *v.* Conmar Corp. 1010
W. *v.* United States 1012
Waco Tribune Herald *v.* Guinn 1041
Wade *v.* California 900
Wade *v.* Goodwin 854
Wade; Rakovich *v.* 968
Wade *v.* United States 866
Wadley *v.* Georgia 1043
Wakefield *v.* Beyer 1033
Waldhart *v.* United States 829
Waldrop *v.* Alabama 871
Walker *v.* Bello 851
Walker; Bello *v.* 868
Walker *v.* Bowen 835
Walker *v.* Endell 926
Walker; Endell *v.* 981
Walker; Martin *v.* 1008
Walker *v.* Maryland Public Defender Office 895
Walker *v.* Neal 971
Walker *v.* United States 1015
Walker *v.* Valley National Bank of Des Moines 1035
Wallace *v.* United States 845,867,982
Wallis, *In re* 1038
Walls *v.* Missouri 871
Walter; Sprague *v.* 988
Walters; Prunty *v.* 846
Wankoff *v.* Tibbs 1007
Ward; LeGrand *v.* 958
Ward *v.* Rock Against Racism 816
Ward *v.* United States 820,959
Ward; Williams *v.* 1020
Wardell *v.* Diamond Farms Condominium 855
Warden. See also name of warden.
Warden; Fleek *v.* 836

Page
Warden; White *v.* ... 839
Warden, Conn. Correctional Institution; Flowers *v.* ... 995,1051
Ware *v.* United States ... 959
Warg; Dudosh *v.* ... 942
Warner Amex Cable Communications; May *v.* ... 931,1023
Warner Cable Communications, Inc. *v.* Niceville ... 825
Warren, *In re* ... 885
Warren *v.* Cabana ... 1012
Warren *v.* Connecticut ... 1030
Warren; Scribner *v.* ... 830
Warren Co.; Paperworkers *v.* ... 992
Washington *v.* Butler ... 857
Washington; Cravens *v.* ... 957
Washington *v.* Electrical Apprentice. & Training Comm. of No. Va. 944
Washington; Giakovmis *v.* ... 1013
Washington *v.* Hooper ... 941
Washington; Jeffries *v.* ... 948
Washington *v.* Lane ... 861
Washington; Mak *v.* ... 871
Washington; Smith *v.* ... 838,1042
Washington *v.* United States ... 974
Washington; Vonhof *v.* ... 1008
Washington Legal Foundation *v.* Department of Justice ... 979
Washington Metro. Area Transit Comm'n; D. C. Transit System *v.* 1043
Washington Pub. Power Supply Sys.; Am. Express Travel Servs. *v.* 805
Washington Pub. Power Supply Sys.; Haberman *v.* ... 805
Washington State Electrical Contractors Assn., Inc. *v.* Forrest ... 806
Washington Water Power Co.; Empire Lumber Co. *v.* ... 892
Waterhouse; Dugger *v.* ... 869
Waterhouse *v.* Florida ... 846
Water Technologies Corp.; Calco, Ltd. *v.* ... 968
Watkins, *In re* ... 885
Watkins *v.* United States ... 957
Watson *v.* Alabama ... 864
Watson *v.* Illinois ... 863
Watson *v.* New Jersey ... 983
Watson; Snavely *v.* ... 803
Watson *v.* United States ... 845
Watts *v.* Bunnell ... 957
Watts *v.* Marine Corps ... 836
Watts *v.* United States ... 928
Waul *v.* Henderson ... 984
WCCO Radio, Inc. *v.* National Labor Relations Bd. ... 824
W. D. D., Inc.; Thornbury *v.* ... 892

Page
Weatherly, *In re* 906
Weaver *v.* Anderson County Fiscal Court 855
Weaver *v.* New York 968
Webb *v.* Oklahoma 830
Webster *v.* Reproductive Health Services 1003
Webster County Comm'n; Allegheny Pittsburgh Coal Co. *v.* 335
Webster County Comm'n; East Ky. Energy Corp. *v.* 335
Weckesser; Syme *v.* 834
Wedinger *v.* Goldberger 850
Weeks; Alabama *v.* 851
Weeks; Myer *v.* 833
Wehringer *v.* Disciplinary Comm., 1st Judicial Department 988
Wehringer *v.* New Hampshire 964
Weichert *v.* Swinson 1015
Weichert *v.* United States 1017
Weigang *v.* Pearl River County Bd. of Supervisors 922
Weigner *v.* New York City 1005
Weinberg, *In re* 952,1038
Weinberger; Mangan *v.* 1013
Weinreich *v.* Campbell 984
Wells; Cole *v.* 928
Wells *v.* United States 1029
Wells Real Estate, Inc. *v.* Greater Lowell Bd. of Realtors 955
West *v.* Maryland 858
West *v.* Pung 834
West Coast Truck Lines, Inc. *v.* Arcata Community Recycling Center 856
Western Grain Co.; Marshall *v.* 852
Western Paving Construction Co.; Colorado *v.* 870
Western Pa. Teamsters & Employers Pens. Fd. *v.* Colteryahn Dairy 1041
Western Union Corp. *v.* Indiana Dept. of Revenue 1035
Western Weighing and Inspection Bureau; Hayes *v.* 953
West Indian Co.; Gjessing *v.* 802,976
West Indian Co.; Legislature of V. I. *v.* 802,976
Westinghouse Electric Corp. *v.* Bhaya 1004
Westinghouse Electric Corp. *v.* West Virginia Dept. of Highways . 855
West Linn; Betka *v.* 999
Westmoreland *v.* United States 820
Westover *v.* United States 864
West Penn Power Co. *v.* Engle 965
West Penn Power Co. *v.* Engle's Holiday Harbor 965
West Virginia; Worley *v.* 895
West Virginia Dept. of Highways; Westinghouse Electric Corp. *v.* 855
West Virginia Dept. of Welfare; Dailey *v.* 923,997
Weyerhaeuser Co. *v.* Bracamontes 854

Page
Whaley *v.* Rodriguez 944
Wharton; Gilstrap *v.* 970
Wheat *v.* Trickey 971
White; Carroll *v.* 1013
White *v.* Dugger 871
White *v.* Jones 842
White *v.* Judicial Inquiry and Review Bd. of Pa. 805
White *v.* North Carolina 958
White *v.* United States 911,984,987
White *v.* Warden 839
Whitehead *v.* United States 983
Whitehorn *v.* Murphy 997
White Industries, Inc. *v.* Cessna Aircraft Co. 856
Whiteshield *v.* Toombs 862
Whitfield *v.* Lynaugh 845
Whitley; Fixel *v.* 864
Whitmore *v.* United States 974
Whitten *v.* United States 933
Whittington *v.* Mississippi 923
Wicks *v.* United States 831,950
Wiggins *v.* Murray 838
Wiley *v.* California 832
Wilkenson; Stubblefield *v.* 1033
Wilkerson; Allied Van Lines Inc. *v.* 827
Wilkes *v.* U. S. District Court 967
Wilkins *v.* Missouri 887
Wilkinson *v.* Confed. Tribes & Bands of Yakima Indian Nation .. 886,939
Wilkinson; Frazier *v.* 842
Wilks; Arrington *v.* 810,938
Wilks; Martin *v.* 810,938
Wilks; Personnel Bd. of Jefferson County *v.* 810,938
Will *v.* Michigan Dept. of State Police 1039
Wille; Geter *v.* 1043
Williams, *In re* 978
Williams *v.* Abshire 842
Williams *v.* Armontrout 972,996
Williams *v.* Arn 1044
Williams *v.* Barwick 902
Williams *v.* California 900,975,1050
Williams *v.* Delaware 969
Williams *v.* Dutton 847
Williams *v.* Georgia 891,942
Williams *v.* Hazelhurst 984
Williams *v.* Hepting 851

Page
Williams; Kendall *v.* ... 1032
Williams; Lane *v.* ... 1047
Williams *v.* Lyng ... 956
Williams; Neitzke *v.* ... 816,939,991
Williams *v.* Planned Parenthood Assn. of Atlanta Area, Inc. 880,987,1025
Williams; Robinson *v.* ... 928
Williams; Streater *v.* ... 895
Williams *v.* United States ... 959,965,1011
Williams *v.* U. S. Postal Service ... 831,976
Williams *v.* Ward ... 1020
Williams; Winslow *v.* ... 820,1023
Williams *v.* Zant ... 988
Williams-Igwonobe *v.* United States ... 974
Willner *v.* Budig ... 1031
Willner *v.* University of Kan. ... 1011,1031
Willoughby *v.* United States ... 1033
Wilson; Bruegging *v.* ... 1009
Wilson *v.* Garraghty ... 1013
Wilson *v.* Harleson ... 917
Wilson *v.* Illinois ... 902
Wilson; Ingram *v.* ... 972
Wilson *v.* Kuenzi ... 893
Wilson *v.* Mann ... 929
Wilson; Oakley *v.* ... 864
Wilson; Snyder *v.* ... 802
Wilson *v.* United States ... 1041
Wilson; Vaughn *v.* ... 889
Wine & Spirits Wholesalers of Conn. *v.* Beer Institute ... 954,1039
Winfrey *v.* Armontrout ... 833
Winnebago County Dept. of Social Services; DeShaney *v.* ... 808
Winslow *v.* Williams ... 820,1023
Winstead *v.* Indiana Ins. Co. ... 1030
Winter *v.* Interstate Commerce Comm'n ... 925
Wintjen *v.* Bonacker ... 996
Wisconsin; Dorn *v.* ... 981
Wisconsin; Doud *v.* ... 1032
Wisconsin; Mislivecek *v.* ... 847
Wisconsin; Riley *v.* ... 864
Wisconsin; Shibles *v.* ... 844
Wisconsin; Svee *v.* ... 838
Wisconsin; Wolske *v.* ... 1010
Wisconsin Dept. of Revenue; Savings League of Wis., Ltd. *v.* ... 806
Wisniewski *v.* New Jersey ... 818
Wisseh *v.* United States ... 911

Page
Witherspoon *v.* United States 858
Withrow; Treadwell *v.* 846
Witschen *v.* Boswell 1010
Wohlford *v.* Department of Agriculture 941,1023
Wolf *v.* United States 807,923
Wolfe *v.* Marsh 942
Wolfson *v.* United States 846
Wolske *v.* Wisconsin 1010
Wood *v.* Connecticut 895
Wood Dawson Smith & Hellman *v.* Haberman 805
Woods *v.* Butler 970
Woods *v.* Florida 919
Wool *v.* Hinkel 802,976
Wool *v.* Horwitz 802,976
Wooleyhan; Teamsters Pension Trust Fund of Philadelphia *v.* 955
Woolstrum *v.* Oregon State Bd. of Parole 861
Woolworth Co.; Shaver *v.* 856
Woon Tam *v.* United States 867
Workmen's Compensation of Industrial Comm'n of Ohio; Filipas *v.* 846,961
Worley *v.* West Virginia 895
Wougamon *v.* United States 960
Wren *v.* United States 857
Wrenn *v.* Bowen 1028
Wrenn *v.* Thornburgh 1039
Wright, *In re* 1002
Wright *v.* Bank of Louisville 1046
Wright; Mirabile *v.* 1030
Wright *v.* Tennessee 1034
Wright Contracting Co.; Colonial Pipeline Co. *v.* 805
Wrigley; Greanias *v.* 850
W. S. Kirkpatrick & Co. *v.* Environmental Tectonics Corp. 921
W. S. Libbey Co.; McNulty *v.* 968
Wyatt *v.* Jouflas 890
Wyoming *v.* Oklahoma 921
Wyoming; Sanchez *v.* 862
Wyoming *v.* United States 1040
Xerox Corp.; O'Malley *v.* 848
Yakima Cty. *v.* Confed. Tribes & Bands of Yakima Indian Nation 886,939
Yanez *v.* United States 1044
Yarbrough *v.* United States 866
Yarmosky; O'Leary *v.* 999
Yelardy *v.* United States 973
Yellow Bus Lines, Inc. *v.* Drivers, Chauffeurs & Helpers 926
Ylst; Smith *v.* 829

Page
Yonkers; Yonkers Racing Corp. *v.* 978
Yonkers Racing Corp. *v.* Yonkers 978
York Bank & Trust Co. *v.* Federal Savings & Loan Ins. Corp. 1005
Young *v.* Alabama 834,950
Young *v.* Coughlin 985
Young *v.* General Foods Corp. 1004
Young; Kammer *v.* 919
Young *v.* Langley 898
Young *v.* Standard Oil (Ind.) 981
Youngberg *v.* United States 943
Youngblood; Arizona *v.* 51,1051
Youngs *v.* Lawyers Surety Corp. 945,1051
Youngs-Settle, *In re* 923,1051
Youts, *In re* 906
Yukon Energy Corp. *v.* Hagerman 820
Zamboni; Stamler *v.* 899
Zant; High *v.* 886
Zant; Williams *v.* 988
Zavala *v.* United States 831
Zavala-Serra *v.* United States 933
Zimmerman; Bey *v.* 838
Zimmerman; King *v.* 845
Zimmerman; Larkins *v.* 867
Zimmerman; Samad *v.* 862
Zimmerman; Snydor *v.* 838
Zimmerman; Szarewicz *v.* 1045
Zipes; Flight Attendants *v.* 1029
Zolin; United States *v.* 907
Zon; Headley *v.* 836,976
Zook; Martin *v.* 972,1024
Zoological Society of San Diego; Bradshaw *v.* 945,1023
Zosky *v.* Boyer 1042
Zukowski *v.* United States 868
Zulkowski; Triangle Industries, Inc. *v.* 994

TABLE OF CASES CITED

Page

Abney v. United States, 431 U.S. 651 587
Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 222, 225
Adickes v. S. H. Kress & Co., 398 U.S. 144 197, 200
Adkins v. International Union of Electrical, Radio & Machine Workers, AFL–CIO, 769 F. 2d 330 332
Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 323–325, 327, 334
A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 373, 416
Albertson v. Subversive Activities Control Bd., 382 U.S. 70 1304
Alley v. Dodge Hotel, 163 U.S. App. D. C. 320 250
Allied Stores of Ohio v. Bowers, 358 U.S. 522 343, 344
Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 193
Aloha Airlines, Inc. v. Director of Taxation of Haw., 464 U.S. 7 25
Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380 150
Amalgamated Meat Cutters and Butcher Workmen of North America v. Connally, 337 F. Supp. 737 416
American Power & Light Co. v. SEC, 329 U.S. 90 373, 376
American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266 259, 261, 264–266, 269–271
Anders v. California, 386 U.S. 738 77, 80–83, 86, 87, 89–92

Page

Anderson v. Bessemer City, 470 U.S. 564 178
Argersinger v. Hamlin, 407 U.S. 25 286
Arizona v. New Mexico, 425 U.S. 794 990
Arlosoroff v. NCAA, 746 F. 2d 1019 182, 202
Armco Inc. v. Hardesty, 467 U.S. 638 261
Ashurst v. State, 424 So. 2d 691 278
Associated General Contractors of Cal. v. City and Cty. of San Francisco, 813 F. 2d 922 477, 491, 502
Associated Students, Inc. v. NCAA, 493 F. 2d 1251 182
Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 151
Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 324, 329
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 268
Bailey v. Redman, 657 F. 2d 21 277
Bailey v. State, 422 A. 2d 956 278
Baker v. Elcona Homes Corp., 588 F. 2d 551 162
Baltimore & Susquehanna R. Co. v. Nesbit, 10 How. 395 223
Banks v. Chesapeake & Potomac Tel. Co., 256 U.S. App. D. C. 22 242
Bates v. State Bar of Ariz., 433 U.S. 350 194
Bazemore v. Friday, 478 U.S. 385 503, 509, 524, 525
Beame v. Friends of the Earth, 434 U.S. 1310 1308
Benton v. Maryland, 395 U.S. 784 38

Page

Berger v. United States, 295 U.S. 78 64
Berkemer v. McCarty, 468 U.S. 420 9–14, 884
Blackledge v. Perry, 417 U.S. 21 568, 574, 575, 581–583, 585
Bluefield Water Works & Improvement Co. v. Public Service Comm'n of W. Va., 262 U.S. 679 311, 314
Blum v. Yaretsky, 457 U.S. 991 182, 202
Blumenthal v. United States, 332 U.S. 539 583
Boag v. MacDougall, 454 U.S. 364 14
Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 538
Board of Regents of State Colleges v. Roth, 408 U.S. 564 193
Board of Regents, Univ. of N. Y. v. Tomanio, 446 U.S. 478 239
Bob Jones Univ. v. United States, 461 U.S. 574 538
Bolling v. Sharpe, 347 U.S. 497 558
Bonner v. Pritchard, 661 F. 2d 1206 160
Booth v. Maryland, 482 U.S. 496 878
Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 268
Bova v. Dugger, 858 F. 2d 1539 277
Bova v. State, 410 So. 2d 1343 278
Bowen v. City of New York, 476 U.S. 467 123
Bowsher v. Synar, 478 U.S. 714 380, 382, 384, 393, 399, 409, 411, 412, 423
Boyd v. United States, 116 U.S. 616 462
Boykin v. Alabama, 395 U.S. 238 570
Boyle v. Illinois, 488 U.S. 898 914

Page

Bradley v. School Bd. of Richmond, 462 F. 2d 1058 544, 545
Brady v. Maryland, 373 U.S. 83 55–57, 62–64, 1020–1022
Brady v. United States, 397 U.S. 742 571, 574, 581
Braverman v. United States, 317 U.S. 49 570, 580, 586
Breechen v. Oklahoma, 485 U.S. 909 878, 879
Brest v. Ciccone, 371 F. 2d 981 364
Brimstone R. Co. v. United States, 276 U.S. 104 208
Briscoe v. LaHue, 460 U.S. 325 249
Brown v. Board of Ed., 347 U.S. 483 545
Brown v. Board of Ed., 349 U.S. 294 522
Brown v. Chaney, 469 U.S. 1090 1022
Brown v. Herald Co., 464 U.S. 928 812, 813, 922, 939, 940, 953, 964, 992, 1002, 1028, 1040
Brown v. Ohio, 432 U.S. 161 586
Brown v. United States, 359 U.S. 41 390
Brown-Forman Co. v. Kentucky, 217 U.S. 563 344
Buchanan v. Stanships, Inc., 485 U.S. 265 5, 12, 234
Buckley v. Valeo, 424 U.S. 1 381, 382, 385, 386
Bullard v. Estelle, 665 F. 2d 1347 48
Bullington v. Missouri, 451 U.S. 430 38
Bumper v. North Carolina, 391 U.S. 543 465
Burks v. United States, 437 U.S. 1 38–50
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 212
Burnett v. Grattan, 468 U.S. 42 243, 251, 327
Burton v. Wilmington Parking Authority, 365 U.S. 715 191, 192, 195, 196

Page

Cafeteria Workers v. McElroy, 367 U.S. 886 99
Caldwell v. Mississippi, 472 U.S. 320 874, 875, 916, 937, 1037, 1038
California v. ARC America Corp., 488 U.S. 814 914
California v. Beheler, 463 U.S. 1121 10
California v. Byers, 402 U.S. 424 1304
California v. Ciraolo, 476 U.S. 207 449, 450, 452–454, 458, 460, 468
California v. Greenwood, 486 U.S. 35 460
California v. Ramos, 463 U.S. 992 878
California v. Riegler, 449 U.S. 1319 1303
California v. Trombetta, 467 U.S. 479 56, 57, 60, 62–69, 71
Camara v. Municipal Court, 387 U.S. 523 462
Cannon v. Berry, 727 F. 2d 1020 89
Carlson v. Hong, 707 F. 2d 367 913
Carroll v. Wilkerson, 782 F. 2d 44 242
Cary v. Curtis, 3 How. 236 433
Cass v. United States, 417 U.S. 72 146
Castaneda v. Partida, 430 U.S. 482 554
Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 260, 264
Certain Complaints Under Investigation, In re, 783 F. 2d 1488 390
Chandler v. Judicial Council, 398 U.S. 74 388, 406
Chapman v. California, 386 U.S. 18 85, 86, 88, 89, 279, 950
Charleston Fed. Savings & Loan Assn. v. Alderson, 324 U.S. 182 343
Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc., 470 U.S. 116 212

Page

Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 113, 125, 150, 212
Chrysler Corp. v. Brown, 441 U.S. 281 218
Citizens to Save Spencer County v. EPA, 195 U.S. App. D. C. 30 224
City. See name of city.
Claridge Apartments Co. v. Commissioner, 323 U.S. 141 208
Clark v. Arizona Interscholastic Assn., 695 F. 2d 1126 193
Clark v. Jeter, 486 U.S. 456 70
Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 514, 515
Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 192
Cleveland Newspaper Guild v. Plain Dealer Publishing Co., 488 U.S. 899 914
Clift v. Int'l Union, United Auto, Aerospace & Ag. Implement Workers of Am., 818 F. 2d 623 323
Cochran v. United States, 157 U.S. 286 584
Cody v. Morris, 623 F. 2d 101 913
Cohen v. Pennsylvania PUC, 90 Pa. Commw. 98 305
Cole v. Young, 351 U.S. 536 102
CBS Inc. v. Young, 522 F. 2d 234 948
Columbus Bd. of Ed. v. Penick, 443 U.S. 449 523–525
Commissioner v. McCoy, 484 U.S. 3 5, 12, 234
Commissioner of Internal Revenue. See Commissioner.
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 382, 383, 393
Commonwealth. See also name of Commonwealth.
Commonwealth v. Mattingly, 722 S. W. 2d 288 41
Commonwealth v. Meyer, 488 Pa. 297 11, 13

Page

Commonwealth v. Taylor, 383 Mass. 272 41
Commonwealth Edison Co. v. Montana, 453 U.S. 609 259, 260, 267
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 257–260, 264–267
Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 261, 262, 264
Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384 265
Cooper v. Aaron, 358 U.S. 1 523
Coughlan v. Director, OWCP, 757 F. 2d 966 113
Coulter v. Louisville & Nashville R. Co., 196 U.S. 599 343
County. See name of county.
Cousins v. City Council of Chicago, 466 F. 2d 830 516
Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578 307
Cox Broadcasting Corp. v. Cohn, 420 U.S 469 306, 307, 317, 318
Coy v. Iowa, 487 U.S. 1012 282
Craig v. Boren, 429 U.S. 190 514, 554
Crenshaw v. United States, 134 U.S. 99 99
Croson Co. v. Richmond, 779 F. 2d 181 479, 484, 492
Crowell & Moring v. Department of Defense, 703 F. Supp. 1004 1310
Crutchfield v. Wainwright, 803 F. 2d 1103 277
Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa., 284 U.S. 23 345, 346
Daugherty v. Florida, 488 U.S. 936 1037
Daughters of Miriam Center for Aged v. Mathews, 590 F. 2d 1250 210
Davis v. Alaska, 415 U.S. 308 231

Page

Davis v. United Auto, Aerospace and Agricultural Implement Workers of America, 765 F. 2d 1510 323, 331, 333
Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 525
DeFunis v. Odegaard, 416 U.S. 312 527
Delaware v. Van Arsdall, 475 U.S. 673 231–233
DelCostello v. Teamsters, 462 U.S. 151 322–324, 326–330, 332, 333
Dennis v. Sparks, 449 U.S. 24 197, 200, 202, 203
Department of Navy v. Egan, 484 U.S. 518 103
Devier v. Kemp, 484 U.S. 948 873
D. H. Holmes Co. v. McNamara, 486 U.S. 24 260, 262, 264, 266, 267
Dorszynski v. United States, 418 U.S. 424 364
Doty v. Sewall, 784 F. 2d 1 323, 327, 331
Douglas v. California, 372 U.S. 353 79, 83, 84, 86, 89, 90
Dow Chemical Co. v. United States, 476 U.S. 227 459
Duckworth v. Eagan, 488 U.S. 888 915
Duncan v. State, 254 Ark. 449 45, 46
Eddings v. Oklahoma, 455 U.S. 104 1022
Edwards v. United States, 564 F. 2d 652 913
Egan v. Department of Navy, 802 F. 2d 1563; 28 M. S. P. R. 509 104
Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc., 459 U.S. 916 933
Ellis v. International Playtex, Inc., 745 F. 2d 292 162
Ellis v. United States, 356 U.S. 674 83
EEOC v. FLRA, 476 U.S. 19 7

Page

Euroquilt, Inc. v. Scandia Down Corp., 475 U.S. 1147 933
Evitts v. Lucey, 469 U.S. 387 85, 89
Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 146
Ex parte. See name of party.
Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 31
Fahey v. Mallonee, 332 U.S. 245 373
Fairfax Nursing Center, Inc. v. Califano, 590 F. 2d 1297 210
Fasano v. Hall, 615 F. 2d 555 913
Feaster v. United States, 488 U.S. 898 914
Fedders Corp. v. FTC, 494 F. Supp. 325 1309
FERC v. Mississippi, 456 U.S. 742 544, 546
FPC v. Hope Natural Gas Co., 320 U.S. 591 310, 312, 314–317, 343, 373
FPC v. Natural Gas Pipeline Co., 315 U.S. 575 308
FPC v. Texaco Inc., 417 U.S. 380 308, 316, 317
Federal Radio Comm'n v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 417
Federal Savings & Loan Ins. Corp. v. Ticktin, 488 U.S. 815 914
Felder v. Casey, 487 U.S. 131 243, 249
Field v. Clark, 143 U.S. 649 372, 418, 420
Filartiga v. Pena-Irala, 630 F. 2d 876 433, 436
Finley v. United States, 488 U.S. 815 914
Finnegan v. Leu, 456 U.S. 431 325, 348, 351–354, 356, 359, 360
Fisher v. United States, 425 U.S. 391 1304

Page

Flast v. Cohen, 392 U.S. 83 385
Florida v. Meyers, 466 U.S. 380 13, 14
Foley Brothers v. Filardo, 336 U.S. 281 440
Foster v. Neilson, 2 Pet. 253 442
Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264 167
Franklin v. Skelly Oil Co., 141 F. 2d 568 166
Freels v. Hills, 843 F. 2d 958 89
Fronterio v. Richardson, 411 U.S. 677 508
Fullilove v. Klutznick, 448 U.S. 448 477, 480, 484, 486–489, 491, 504, 505, 507, 508, 511, 517, 518, 521, 522, 528–537, 539, 543, 546–552, 555, 558, 561
Furman v. Georgia, 408 U.S. 238 1020
Furniture Moving Drivers v. Crowley, 467 U.S. 526 352
Ganey v. Edwards, 759 F. 2d 337 7
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 546
Garland, Ex parte, 4 Wall. 333 45
Garrity v. Sununu, 752 F. 2d 727 8
Gates v. Spinks, 771 F. 2d 916 241
Geders v. United States, 425 U.S. 80 273–277, 279, 280, 284–286, 288–294
General Telephone Co. of Southwest v. United States, 449 F. 2d 846 220
Geraghty v. United States Parole Comm'n, 719 F. 2d 1199 365
Gideon v. Wainwright, 372 U.S. 335 84, 89, 279, 286
Giglio v. United States, 405 U.S. 150 62, 949
Gilmore v. City of Montgomery, 417 U.S. 556 537
Glasser v. United States, 315 U.S. 60 279, 290
Goodman v. Lukens Steel Co., 482 U.S. 656 326

Page

Gould, Inc. v. GSA, 688 F. Supp. 689 1309
Graham v. NCAA, 804 F. 2d 953 182, 202
Greater Boston Television Corp. v. FCC, 143 U.S. App. D. C. 383 217
Greathouse v. United States, 655 F. 2d 1032 913
Green v. Arn, 809 F. 2d 1257 287
Green v. New Kent County School Bd., 391 U.S. 430 524
Green v. United States, 355 U.S. 184 44, 48
Greene v. Massey, 437 U.S. 19 39, 40, 44, 45, 48
Greene v. McElroy, 360 U.S. 474 231
Greene v. United States, 376 U.S. 149 208
Gregg v. Georgia, 428 U.S. 153 872, 873, 876–879, 900–902, 916, 917, 919, 934–936, 948, 949, 961, 975, 986, 989, 998, 1020, 1034, 1037, 1047, 1051, 1052
Gregory v. FDIC, 470 F. Supp. 1329 1309
Gregory-Portland Independent School Dist. v. United States, 448 U.S. 1342 1308
Griffin v. Illinois, 351 U.S. 12 90
Griffin v. Prince Edward County School Bd., 377 U.S. 218 523
Griffin v. State, 383 So. 2d 873 289
Griffin v. West, 791 F. 2d 1578 89
Griffith v. Kentucky, 479 U.S. 314 902–904
Gruenholz v. United States, 488 U.S. 898 914
Gubiensio-Ortiz v. Kanahele, 857 F. 2d 1245 371, 378, 413
Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 29
Hale v. Oklahoma, 488 U.S. 878 879
Hall v. Cole, 412 U.S. 1 325, 326, 355

Page

Hall v. State, 244 Ga. 86 41
Halon v. Director, OWCP, 713 F. 2d 21 108, 134
Hampton, Jr., & Co. v. United States, 276 U.S. 394 313, 372, 415, 419
Hanna v. Plumer, 380 U.S. 460 388, 392
Hansen v. Petrone, 124 App. Div. 2d 782 243
Hardin v. Straub, 488 U.S. 887 914
Harris v. State, 284 Ark. 247 41
Hartenstine v. Superior Court, 488 U.S. 899 914
Haskins v. Virginia, 484 U.S. 1037 913
Hatcher v. USPS, 556 F. 2d 105 1309
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 544
Hayburn's Case, 2 Dall. 409 385, 394, 402, 403
Hazelwood School Dist. v. United States, 433 U.S. 299 501, 502, 541, 542
Head Money Cases, 112 U.S. 580 442
Heckler v. Ringer, 466 U.S. 602 121
Hensley v. Eckerhart, 461 U.S. 424 2
Herb v. Pitcairn, 324 U.S. 117 1314
Hernandez v. Texas, 347 U.S. 475 523
Herring v. New York, 422 U.S. 853 291
Hester v. United States, 265 U.S. 57 459
Hewitt v. Helms, 482 U.S. 755 2–4, 6, 7
Hicks v. Feiock, 479 U.S. 1305 1311
Hilliard v. Spalding, 719 F. 2d 1443 68, 69
Hillsborough v. Cromwell, 326 U.S. 620 345, 346
Hitchcock v. Dugger, 481 U.S. 393 1049

Page

Holmberg v. Armbrecht, 327 U.S. 392 324
Holmes Co. v. McNamara, 486 U.S. 24 260, 262, 264, 266, 267
Hoover v. Ronwin, 466 U.S. 558 194, 195
Howard Univ. v. NCAA, 166 U.S. App. D. C. 260 182
Hudson v. Louisiana, 450 U.S. 40 39, 44
Huff v. White Motor Corp., 609 F. 2d 286 178
Humphrey's Executor v. United States, 295 U.S. 602 380, 386, 410, 411, 420, 423–425
Hustler Magazine v. Falwell, 485 U.S. 46 249
Illinois v. Batchelder, 463 U.S. 1112 13
INS v. Cardoza-Fonseca, 480 U.S. 421 163
INS v. Chadha, 462 U.S. 919 382, 386
Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 373
In re. See name of party.
Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 433
Investment Company Institute v. Camp, 401 U.S. 617 212
Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 346
Jackson v. Ashton, 8 Pet. 148 306
Jackson v. Metropolitan Edison Co., 419 U.S. 345 191, 192, 199
J. A. Croson Co. v. Richmond, 779 F. 2d 181 479, 484, 492
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 264
Jenkins v. Anderson, 447 U.S. 231 1038
Jenkins v. Coombe, 821 F. 2d 158 89
Jenkins v. Whittaker Corp., 785 F. 2d 720 162
Jerry Parks Equipment Co. v. Southeast Equipment Co., 817 F. 2d 340 281

Page

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 239
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 502, 527, 542, 556
Johnson v. Zerbst, 304 U.S. 458 286, 573
Jones v. Alabama, 470 U.S. 1062 876
Jones v. Barnes, 463 U.S. 745 88
Jones v. Preuit & Maudlin, 763 F. 2d 1250 241
Jones v. United States, 362 U.S. 257 455, 466
Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 38
J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 313, 372, 415, 419
Kahn v. Avnet, Inc., 488 U.S. 898 914
Karamanos v. Baker, 816 F. 2d 258 182, 202
Karcher v. Daggett, 462 U.S. 725 516
Katz v. United States, 389 U.S. 347 449, 452, 454, 456, 457, 459, 460
Katzenbach v. Morgan, 384 U.S. 641 487, 490, 491, 557
Kehm v. Procter & Gamble Mfg. Co., 724 F. 2d 613 162
Keim v. United States, 177 U.S. 290 99
Kerr v. Finkbeiner, 474 U.S. 929 913
Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 523, 525
Killen v. Logan County Comm'n, ___ W. Va. ___ 342
Killian v. United States, 368 U.S. 231 56, 65
Kimmelman v. Morrison, 477 U.S. 365 84, 87
Kline v. North Tex. State Univ., 782 F. 2d 1229 241
K mart Corp. v. Cartier, Inc., 486 U.S. 281 125

Page

Korematsu v. United States, 323 U.S. 214 501
Koster v. Chase Manhattan Bank, 609 F. Supp. 1191 243
Kreisher v. Mobil Oil Corp., 488 U.S. 899 914
Krulewitch v. United States, 336 U.S. 440 583
Kyle v. Director, OWCP, 819 F. 2d 139 108
Lauritzen v. McLaughlin, 488 U.S. 898 914
Lauro Lines s. r. l. v. Chasser, 488 U.S. 887 914
Lee v. Washington, 390 U.S. 333 520, 521
Lego v. Illinois, 488 U.S. 902 902
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 344
Levine v. United States District Court, 764 F. 2d 590 947
Lichter v. United States, 334 U.S. 742 373
Linder v. Berge, 739 F. 2d 686 332
Linkletter v. Walker, 381 U.S. 618 904
Lisenba v. California, 314 U.S. 219 58
Local 1397, United Steelworkers of Am., AFL–CIO v. United Steelworkers of Am., 748 F. 2d 180 323, 329, 330
Local 32, American Federation of Government Employees v. FLRA, 248 U.S. App. D. C. 198 217
Lockett v. Ohio, 438 U.S. 586 1022, 1049
Lockhart v. McCotter, 782 F. 2d 1275 89
Lorance v. AT&T Technologies, Inc., 488 U.S. 887 914
Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F. 2d 224 193
Lovinger v. Circuit Court for 19th Judicial Dist., 652 F. Supp. 1336 289

Page

Lugar v. Edmondson Oil Co., 457 U.S. 922 182, 190, 191, 194, 199, 202
Mabry v. Johnson, 467 U.S. 504 574
Maine v. Thiboutot, 448 U.S. 1 146
Mansfield C. & L. M. R. Co. v. Swan, 111 U.S. 379 306
Manson v. Brathwaite, 432 U.S. 98 72
Mapp v. Ohio, 367 U.S. 643 462
Marshall v. Barlow's, Inc., 436 U.S. 307 462
Maryland v. Louisiana, 451 U.S. 725 27, 30, 260
Massachusetts v. Morash, 488 U.S. 815 915
Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 501
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 324, 329
McAllister v. United States, 141 U.S. 174 412
McCarthy v. United States, 394 U.S. 459 570
McCormack v. NCAA, 845 F. 2d 1338 182, 202
McCoy v. Court of Appeals of Wis., 486 U.S. 429 82, 83, 88
McDaniel v. Barresi, 402 U.S. 39 525, 536, 538, 559
McDonald v. Oliver, 525 F. 2d 1217 357
McDonnell Douglas Corp. v. Green, 411 U.S. 792 509
McFadden v. State, 424 So. 2d 918 278
McGautha v. California, 402 U.S. 183 875
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 262
McKay v. Hammock, 730 F. 2d 1367 242
McKenzie v. Montana, 449 U.S. 1050 901
McLaughlin v. Florida, 379 U.S. 184 500

Page

McMann v. Richardson, 397 U.S. 759 572, 581
Mead Corp. v. Tilley, 488 U.S. 815 914
Meade v. Grubbs, 841 F. 2d 1512 242
Mellon Bank, N. A. v. United States, 475 U.S. 1032 899
Melville v. American Home Assurance Co., 584 F. 2d 1306 162
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 478
Menna v. New York, 423 U.S. 61 568, 573–575, 581–583, 585
Michigan v. Long, 463 U.S. 1032 448, 1313, 1314
Michigan Road Builders Assn., Inc. v. Milliken, 834 F. 2d 583 477
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 260, 264
Milanovich v. United States, 275 F. 2d 716 281
Miller v. Florida, 482 U.S. 423 393
Miller v. United States, 294 U.S. 435 208
Miller v. Youakim, 440 U.S. 125 151
Milliken v. Bradley, 418 U.S. 717 505, 525
Mills v. Alabama, 384 U.S. 214 307
Minnesota Rate Cases, 230 U.S. 352 313
Miranda v. Arizona, 384 U.S. 436 10–12, 14, 1305
Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 407
Missouri v. Jenkins, 488 U.S. 888 915
Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1 1313
Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n, 262 U.S. 276 309
Mobile v. Bolden, 446 U.S. 55 516

Page

Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U.S. 425 31, 260
Moers v. Reading, 21 Pa. 188 418
Monroe v. Pape, 365 U.S. 167 191, 250
Montana v. Hall, 481 U.S. 400 5
Mooney v. Holohan, 294 U.S. 103 63
Moore v. Illinois, 408 U.S. 786 55
Moorman Mfg. Co. v. Bair, 437 U.S. 267 23, 24, 261, 264
Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467 166
Morrison v. Olson, 487 U.S. 654 380, 382, 383, 385, 389, 394, 396, 402, 406, 409, 411, 421, 424, 426
Morrissey v. Brewer, 408 U.S. 471 364
Morton v. Mancari, 417 U.S. 535 438
Morton v. State, 284 Md. 526 41
Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 151
Mudd v. United States, 255 U.S. App. D. C. 78 277, 296
Mulligan v. Hazard, 777 F. 2d 340 241
Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 108, 114, 123, 147
Murdock v. City of Memphis, 20 Wall. 590 1313
Muskrat v. United States, 219 U.S. 346 385
Myers v. United States, 272 U.S. 52 386
Nardone v. United States, 308 U.S. 338 455
Nashville C. & S. L. R. Co. v. Browning, 310 U.S. 362 345
National Assn. of Independent Television Producers and Distributors v. FCC, 502 F. 2d 249 220

Page

National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 263
National Broadcasting Co. v. United States, 319 U.S. 190 374, 378, 416
National Cable Television Assn. v. United States, 415 U.S. 336 373
NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 198
National Helium Corp. v. FEA, 569 F. 2d 1137 224
NLRB v. Bell Aerospace Co., 416 U.S. 267 224
NLRB v. Federbush Co., 121 F. 2d 954 25
NLRB v. Wyman-Gordon Co., 394 U.S. 759 221
Naupe v. Illinois, 360 U.S. 264 57, 62
Nebraska Press Assn. v. Stuart, 427 U.S. 539 946, 947
Neitzke v. Williams, 488 U.S. 816 914
New England Medical Center Hospital v. NLRB, 548 F. 2d 377 1309
New York v. Kleppe, 429 U.S. 1307 1309
New York v. Quarles, 467 U.S. 649 1305
New York Central Securities Corp. v. United States, 287 U.S. 12 416
New York State Club Assn. v. New York City, 487 U.S. 1 509, 538
Nickols v. Gagnon, 454 F. 2d 467 82
Nixon v. Administrator of General Services, 433 U.S. 425 380, 381, 383, 396, 409
North Carolina v. Alford, 400 U.S. 25 570
North Carolina v. Pearce, 395 U.S. 711 38
North Carolina Bd. of Ed. v. Swann, 402 U.S. 43 538, 559
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 382, 409, 410

Page

North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 192
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 263
Norwood v. Harrison, 413 U.S. 455 492, 503, 537
O'Brien v. Skinner, 414 U.S. 524 1313
Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355 239, 324
Ohio Contractors Assn. v. Keip, 713 F. 2d 167 477, 502, 503
Oliver v. United States, 466 U.S. 170 453, 454, 459
Olmstead v. United States, 277 U.S. 438 459
Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labor, 312 U.S. 126 372
Oregon v. Kennedy, 456 U.S. 667 36
Owens v. Okure, 488 U.S. 235 323, 326, 327, 334
Palmer v. Hoffman, 318 U.S. 109 167
Palmore v. Sidoti, 466 U.S. 429 520
Panama Refining Co. v. Ryan, 293 U.S. 388 372, 373, 416
Parish v. NCAA, 506 F. 2d 1028 182
Parker v. Brown, 317 U.S. 341 194
Parks Equipment Co. v. Southeast Equipment Co., 817 F. 2d 340 281
Parratt v. Taylor, 451 U.S. 527 250
Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 525
Pennsylvania v. Bruder, 488 U.S. 9 233
Pennsylvania v. Ritchie, 480 U.S. 39 1021, 1022
Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 265
Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717 223

Page

Penson v. Ohio, 488 U.S. 75 280, 291
People v. Britz, 112 Ill. 2d 314 903
People v. Brown, 40 Cal. 3d 512 1048–1050
People v. Erickson, 117 Ill. 2d 271 904
People v. Hagen, 86 App. Div. 2d 617 279
People v. Harris, 123 Ill. 2d 113 903–905
People v. Hill, 103 Cal. App. 3d 525 1312
People v. Myers, 43 Cal. 3d 250 1050
People v. Nation, 26 Cal. 3d 169 68
People v. Pendleton, 75 Ill. App. 3d 580 289
People v. Rios, 163 Cal. App. 3d 852 41
People v. Savvides, 1 N. Y. 2d 554 62
People v. Sisneros, 44 Colo. App. 65 41
People v. Stroner, 104 Ill. App. 3d 1 278, 284
People v. Taylor, 76 Ill. 2d 289 41
People v. Zehr, 103 Ill. 2d 472 903, 904
Perez v. University of Puerto Rico, 600 F. 2d 1 7
Permian Basin Area Rate Cases, 390 U.S. 747 308, 313, 314
Perrin v. Anderson, 784 F. 2d 1040 162
Philadelphia v. Philadelphia Electric Co., 504 Pa. 312 302
Philadelphia Electric Co. v. Pennsylvania PUC, 61 Pa. Commw. 325 311
Plessy v. Ferguson, 163 U.S. 537 521
Plymouth, The, 3 Wall. 20 440
Pointer v. Texas, 380 U.S. 400 231
Polk County v. Dodson, 454 U.S. 312 84, 91, 196, 291

Page

Powell v. Alabama, 287 U.S. 45 84, 286, 298
President's Comm'n on Organized Crime, In re, 783 F. 2d 370 400
Preston v. Florida, 487 U.S. 1265 936, 938
Preuit & Mauldin v. Jones, 474 U.S. 1105 241
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 306
Radio & Television News Assn. v. United States District Court, 781 F. 2d 1443 947
Rakas v. Illinois, 439 U.S. 128 454
Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M., 458 U.S. 832 30
Raney v. Board of Ed. of Gould School Dist., 391 U.S. 443 525
Ratterman v. Western Union Tel. Co., 127 U.S. 411 265
Red Rock v. Henry, 106 U.S. 596 438
Reed v. Transportation Union, 488 U.S. 319 352
Regents of Univ. of Cal. v. Heckler, 771 F. 2d 1182 210, 213
Regents of Univ. of Minn. v. NCAA, 560 F. 2d 352 182
Rendell-Baker v. Kohn, 457 U.S. 830 182, 202
Renton v. Playtime Theatres, Inc., 475 U.S. 41 505, 547
Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB, 151 U.S. App. D. C. 209 207
Rhodes v. Stewart, 488 U.S. 1 12, 234
Richmond v. United States, 422 U.S. 358 544
Ricketts v. Adamson, 483 U.S. 1 568, 582, 588
Rifai v. United States Parole Comm'n, 586 F. 2d 695 364
Rio v. Presbyterian Hospital in City of New York, 561 F. Supp. 325 243

Page

Roach v. State, 255 Ark. 773 46
Roberts v. Louisiana, 431 U.S. 633 1049
Roberts v. United States Jaycees, 468 U.S. 609 538
Robinson v. Connecticut, 488 U.S. 899 914
Rock v. Arkansas, 483 U.S. 44 290
Rodonich v. House Wreckers Union Local 95, 817 F. 2d 967 323
Roeder v. State, 688 S. W. 2d 856 41
Rogers v. Lodge, 458 U.S. 613 516
Rome v. United States, 446 U.S. 156 557
Rose v. Clark, 478 U.S. 570 1048
Ross v. Moffitt, 417 U.S. 600 90
Rostker v. Goldberg, 448 U.S. 1306 1303, 1308, 1309
Roviaro v. United States, 353 U.S. 53 62
Runkle v. United States, 122 U.S. 543 425
Runyon v. McCrary, 427 U.S. 160 538
Russell v. United States, 369 U.S. 749 584
St. Paul-Ramsey Medical Center v. Bowen, 816 F. 2d 417 210
Salsburg v. Maryland, 346 U.S. 545 345
Sanabria v. United States, 437 U.S. 54 584, 586
San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 494, 553, 554
Sanders v. Clarke, 856 F. 2d 1134 89
Sanders v. Lane, 861 F. 2d 1033 277, 286, 288, 296
San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 198
Santissima Trinidad, The, 7 Wheat. 283 437
Satterwhite v. Texas, 486 U.S. 249 88, 950

Page

Schechter Poultry Corp. v. United States, 295 U.S. 495 373, 416
Schmerber v. California, 384 U.S. 757 462, 1304
Schonfeld v. Penza, 477 F. 2d 899 356
Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 29
SEC v. Chenery Corp., 332 U.S. 194 220, 221, 224
Seymore v. Alabama, 846 F. 2d 1355 913
Sheet Metal Workers v. EEOC, 478 U.S. 421 507, 521, 539
Shelley v. Kraemer, 334 U.S. 1 191, 493, 537
Shigemura v. United States, 726 F. 2d 380 913
Short v. United States, 91 F. 2d 614 584
Sibbach v. Wilson & Co., 312 U.S. 1 387, 417
Siebold, Ex parte, 100 U.S. 371 389
Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 345, 346
Skoda v. Fontani, 646 F. 2d 1193 7
Slaughter-House Cases, 16 Wall. 36 491, 560
Small v. Inhabitants of Belfast, 796 F. 2d 544 242, 250
Smith v. Ithaca Corp., 612 F. 2d 215 160, 161, 163
Smyth v. Ames, 169 U.S. 466 308–310
South Carolina v. Katzenbach, 383 U.S. 301 490, 557, 558
Southern R. Co. v. Mayfield, 340 U.S. 1 1313
South Fla. Chapter, Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade Cty., 723 F. 2d 846 477
Southwestern Bell Tel. Co. v. Public Service Comm'n, 262 U.S. 276 309
Spath v. NCAA, 728 F. 2d 25 182
Spaziano v. Florida, 468 U.S. 447 876

Page

Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 259, 260
Springdale Convalescent Center v. Mathews, 545 F. 2d 943 210
Stamler v. Zamboni, 488 U.S. 899 914
Standard Oil Co. of N. J. v. United States, 221 U.S. 1 417
State. See also name of State.
State v. Davis, 51 Ore. App. 827 459
State v. Escalante, 153 Ariz. 55 54, 56
State v. Gray, 200 Conn. 523 41
State v. Lamorie, 610 P. 2d 342 41
State v. Mebane, 204 Conn. 585 278
State v. Van Isler, 168 W. Va. 185 41
State v. Wood, 596 S. W. 2d 394 41
Steadman v. SEC, 450 U.S. 91 218
Steelworkers v. Sadlowski, 457 U.S. 102 325, 332, 352, 355
Steelworkers v. Weber, 443 U.S. 193 542, 547, 549
Strickland v. Washington, 466 U.S. 668 85, 86, 88, 89, 91, 276, 279, 280, 291, 297
Strike v. Director, OWCP, 817 F. 2d 395 108, 134
Stubbs v. Bordenkircher, 689 F. 2d 1205 276, 277
Sumner v. Shuman, 483 U.S. 66 1049
Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 343, 345
Sun Oil Co. v. Wortman, 486 U.S. 717 392
Sunshine Coal Co. v. Adkins, 310 U.S. 381 379
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 514, 523
Synar v. United States, 626 F. Supp. 1374 373
Tallahassee Memorial Regional Medical Center v. Bowen, 815 F. 2d 1435 209

Page

Teamsters v. United States, 431 U.S. 324 501, 509, 516, 541, 542
Tedder v. State, 322 So. 2d 908 1037
Texas v. Modgling, 488 U.S. 898 914
Texas Co. v. Cooper, 236 La. 380 29
Texas State Teachers Assn. v. Garland Independent School Dist., 488 U.S. 815 914
Thomas v. O'Leary, 856 F. 2d 1011 89
Thompson v. Oklahoma, 487 U.S. 815 877
Three Affiliated Tribes v. Wold Engineering, P. C., 467 U.S. 138 904
Tibbs v. Florida, 457 U.S. 31 42, 44, 49
Tollett v. Henderson, 411 U.S. 258 572–574
Torres-Arboledo v. Florida, 488 U.S. 901 914
Town. See name of town.
Tucker v. Kemp, 480 U.S. 911 878
Tucker v. Kemp, 802 F. 2d 1293 875
Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, 483 U.S. 232 262, 264, 268, 271
Udall v. Tallman, 380 U.S. 1 151
UGI Corp. v. Pennsylvania PUC, 49 Pa. Commw. 69 311
Union Pacific R. Co. v. Moritz, 488 U.S. 899 914
United Air Lines, Inc. v. Mahin, 410 U.S. 623 263
United Brotherhood of Carpenters & Joiners v. Brown, 343 F. 2d 872 357
United Brotherhood of Carpenters & Joiners v. Dale, 118 LRRM 3160 357
United Jewish Organizations v. Carey, 430 U.S. 144 559
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 330, 332
United States v. Addonizio, 442 U.S. 178 365, 390

Page

United States v. Agurs, 427 U.S. 97 55, 56, 60, 62–64, 66, 71
United States v. Allen, 542 F. 2d 630 276, 278, 289, 292, 297
United States v. American Tel. & Tel. Co., 552 F. Supp. 131 255
United States v. Ash, 413 U.S. 300 298
United States v. Atkins, 834 F. 2d 426 585
United States v. Bagley, 473 U.S. 667 1022
United States v. Ball, 163 U.S. 662 38, 44
United States v. Bibbero, 749 F. 2d 581 41
United States v. Brown, 381 U.S. 437 365
United States v. Bryant, 545 F. 2d 1035 278
United States v. California, 332 U.S. 19 27, 441
United States v. Carolene Products Co., 304 U.S. 144 495
United States v. Chambless, 680 F. Supp. 793 379
United States v. Classic, 313 U.S. 299 191
United States v. Conway, 632 F. 2d 641 278
United States v. Cronic, 466 U.S. 648 84, 88, 89, 276, 279, 280, 286, 291, 297
United States v. DiFrancesco, 449 U.S. 117 42
United States v. DiLapi, 651 F. 2d 140 278, 283, 290
United States v. Doe, 465 U.S. 605 1303, 1304
United States v. Ferreira, 13 How. 40 385, 394, 395, 402–404
United States v. Frank, 864 F. 2d 992 371
United States v. Gonzalez-Sanchez, 825 F. 2d 572 41
United States v. Grapp, 653 F. 2d 189 178
United States v. Grayson, 438 U.S. 41 364

Page

United States v. Greschner, 802 F. 2d 373 281
United States v. Grimaud, 220 U.S. 506 418
United States v. Harmon, 632 F. 2d 812 41
United States v. Hodges, 770 F. 2d 1475 41
United States v. Hollywood Motor Car Co., 458 U.S. 263 7
United States v. Jackson, 390 U.S. 570 571
United States v. Johnson, 457 U.S. 537 904
United States v. Johnston, 578 F. 2d 1352 281
United States v. Key, 725 F. 2d 1123 41
United States v. Kissel, 218 U.S. 601 580
United States v. Korfant, 771 F. 2d 660 585
United States v. Locke, 471 U.S. 84 146
United States v. Louisiana, 339 U.S. 699 26
United States v. Lovasco, 431 U.S. 783 57, 66
United States v. Magnolia Petroleum Co., 276 U.S. 160 208
United States v. Maine, 420 U.S. 515 27
United States v. Mandel, 591 F. 2d 1347 41
United States v. Marion, 404 U.S. 307 57, 66
United States v. Marshall, 762 F. 2d 419 41
United States v. Montgomery Bd. of Ed., 395 U.S. 225 522
United States v. Morgan, 307 U.S. 183 222
United States v. Morrison, 449 U.S. 361 298
United States v. Munsingwear, Inc., 340 U.S. 36 920
United States v. Nixon, 418 U.S. 683 380, 383, 398

Page

United States v. Paradise, 480 U.S. 149 507, 514, 521, 536, 539
United States v. Peters, 732 F. 2d 1004 178
United States v. Rabinowitz, 339 U.S. 56 464
United States v. Raddatz, 447 U.S. 667 425
United States v. Ragins, 840 F. 2d 1184 585
United States v. Robel, 389 U.S. 258 372
United States v. Romano, 736 F. 2d 1432 277
United States v. Ross, 456 U.S. 798 297
United States v. Sarmiento-Perez, 667 F. 2d 1239 41
United States v. Scott, 437 U.S. 82 42
United States v. Tateo, 377 U.S. 463 38, 39, 44, 48–50
United States v. Texas, 339 U.S. 707 26
United States v. Tranowski, 702 F. 2d 668 41, 48
United States v. Tynen, 11 Wall. 88 438
United States v. Valenzuela-Bernal, 458 U.S. 858 55, 57, 62, 64
United States v. Vasquez, 732 F. 2d 846 277
United States v. Wade, 388 U.S. 218 72, 286
United States v. White, 401 U.S. 745 464
United States v. Williams, 615 F. 2d 585 913
United States v. Wiltberger, 5 Wheat. 76 364
United States, Ex parte, 242 U.S. 27 364
United States ex rel. Lovinger v. Circuit Court for 19th Judicial Dist., 652 F. Supp. 1336 289
United States ex rel. Thomas v. O'Leary, 856 F. 2d 1011 89
U. S. Parole Comm'n v. Geraghty, 445 U.S. 388 365, 385

Page

University of Cal. Regents v. Bakke, 438 U.S. 265 484, 493, 494, 496, 497, 506, 512, 535, 536, 540, 550, 552, 559
University of Nev. v. Tarkanian, 95 Nev. 389 188, 201
U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 146
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 149, 223
Vaughn v. Rosen, 157 U.S. App. D. C. 340 1307–1309
Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 434, 435
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 218
Village. See name of village.
Virginia, Ex parte, 100 U.S. 339 490, 521, 522
Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 436
Von Moltke v. Gillies, 332 U.S. 708 87
Wardair Canada Inc. v. Florida Dept. of Revenue, 477 U.S. 1 260
Washington Dept. of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 260
Watkins v. Sowders, 449 U.S. 341 72
Wayman v. Southard, 10 Wheat. 1 387, 389, 391, 417
Webb v. Keohane, 804 F. 2d 413 913
Webster v. Duckworth, 767 F. 2d 1206 41
Weinberger v. Rossi, 456 U.S. 25 441
Weinberger v. Wiesenfeld, 420 U.S. 636 495, 500
West v. Atkins, 487 U.S. 42 192, 195
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 260, 264

Page

Western Union Tel. Co. v. Pennsylvania, 128 U.S. 39 265
Whitecliff, Inc. v. United States, 210 Ct. Cl. 53 213
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 30
Williams v. Lynaugh, 484 U.S. 935 873
Williams v. New York, 337 U.S. 241 365
Williams v. United States, 1 How. 290 424
Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 500
Wilson v. Garcia, 471 U.S. 261 236–238, 240–242, 248–251, 323, 325, 326
Winship, In re, 397 U.S. 358 73
Wirtz v. Hotel Employees, 391 U.S. 492 355
Wisconsin v. FPC, 373 U.S. 294 315–317
Wolf v. Colorado, 338 U.S. 25 462
Wolsey v. Chapman, 101 U.S. 755 424
Wood v. United States, 16 Pet. 342 438
Wooten-Bey v. State, 76 Md. App. 603 278

Page

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 477, 485, 486, 492, 494, 495, 497, 498, 500, 501, 506, 510–513, 520, 535, 539, 546, 547, 549, 552, 556
Yakus v. United States, 321 U.S. 414 373, 378, 379, 416
Yick Wo v. Hopkins, 118 U.S. 356 523
York R. Co. v. Driscoll, 331 Pa. 193 313
Youakim v. Miller, 425 U.S. 231 444
Young v. Community Nutrition Institute, 476 U.S. 974 212
Young v. Langley, 488 U.S. 898 914
Young v. United States ex rel. Vuitton et Fils S. A., 481 U.S. 787 390, 426
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 381, 386, 401, 408
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 1313
Zant v. Stephens, 462 U.S. 862 878
Zerbst v. Kidwell, 304 U.S. 359 363

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1988

RHODES ET AL. *v.* STEWART

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

No. 88–139. Decided October 17, 1988

While in the custody of the Ohio Department of Rehabilitation and Correction, respondent Stewart and one Reese filed a suit in the District Court under 42 U. S. C. § 1983 alleging violations of their First and Fourteenth Amendment rights by prison officials. After entering a judgment for the plaintiffs, the court entered an award of attorney's fees pursuant to 42 U. S. C. § 1988. On appeal defendant argued that, because Reese had died and Stewart had been released, neither plaintiff had been in the State's custody on the day that the District Court had entered its underlying judgment. Nonetheless, the Court of Appeals upheld the fees award, concluding that the claim's mootness when the judgment was issued did not undermine Stewart's status as a prevailing party since he had won a declaratory judgment. It distinguished this Court's holding in *Hewitt* v. *Helms*, 482 U. S. 755—that a plaintiff must receive some relief on the merits of his claim before he can be said to have prevailed within the meaning of § 1988—on the ground that the plaintiff in *Hewitt*, unlike Stewart, had not won such a judgment.

Held: Stewart was not a prevailing party under the rule set forth in *Hewitt* v. *Helms*, *supra*, and therefore was not entitled to an award of fees pursuant to § 1988. Nothing in *Hewitt* suggested that the entry of a declaratory judgment in a party's favor automatically renders that party prevailing. A declaratory judgment, like any other judgment, constitutes relief only if it affects the behavior of the defendant towards the plaintiff. There was no such result in this case, since the lawsuit was

not brought as a class action, and since Stewart could not benefit from any changes in prison policies caused by his lawsuit.

Certiorari granted; 845 F. 2d 327, reversed.

PER CURIAM.

After entry of a judgment for the plaintiffs in a suit by two prisoners under 42 U. S. C. § 1983, the District Court for the Southern District of Ohio, Eastern Division, ordered the defendants to pay the plaintiffs' attorney's fees pursuant to 42 U. S. C. § 1988. There is no entitlement to attorney's fees, however, unless the requesting party prevails; and by the time the District Court entered its judgment in the underlying suit one of the plaintiffs had died and the other was no longer in custody. In this posture, the plaintiffs were not prevailing parties under the rule we set forth in *Hewitt* v. *Helms*, 482 U. S. 755 (1987), and the Court of Appeals for the Sixth Circuit erred in affirming the award of fees by the District Court.

I

On January 17, 1978, while in the custody of the Ohio Department of Rehabilitation and Correction, Albert Reese and Larry Stewart filed a complaint alleging violations of their First and Fourteenth Amendment rights by officials who refused them permission to subscribe to a magazine. On April 2, 1981, the District Court issued an opinion and an order, later amended in respects no longer pertinent to the case. The court ruled that correctional officials had not applied the proper procedural and substantive standards in denying the inmates their request, and ordered compliance with those standards.

Two months later, the District Court entered an award of fees in favor of the attorneys for Reese and Stewart in the amount of $5,306.25. The Court of Appeals for the Sixth Circuit affirmed. 703 F. 2d 566 (1982). We granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). *Rhodes* v.

Stewart, 461 U. S. 952 (1983). On remand from the Court of Appeals, the District Court confirmed its earlier award.

None of the opinions or orders cited thus far made reference to, or showed awareness of, two salient facts: Reese died on February 18, 1979; and Stewart, the sole respondent now before us, was paroled on March 15, 1978, and given a final release from parole on January 17, 1980. In consequence, when the District Court issued its original order on April 2, 1981, neither plaintiff was in the State's custody. For reasons that remain unexplained, petitioners here did not raise this matter until their appeal of the District Court's order after remand.

A divided Court of Appeals upheld the award of fees, concluding that the mootness of the claim when the judgment was issued did not undermine respondent's status as a prevailing party eligible for attorney's fees. Affirmance order, 845 F. 2d 327 (1988). In an unpublished opinion, the majority characterized the relief plaintiffs had received as declaratory relief. The panel majority noted our recent holding in *Hewitt* v. *Helms*, *supra*, that a plaintiff must receive some relief on the merits of his claim before he can be said to have prevailed within the meaning of § 1988. It observed, however, that the plaintiff in *Hewitt*, unlike Stewart, had not won a declaratory judgment, and concluded that the declaratory judgment issued in this case justified the granting of attorney's fees.

II

The Court of Appeals misapprehended our holding in *Hewitt*. Although the plaintiff in *Hewitt* had not won a declaratory judgment, nothing in our opinion suggested that the entry of such a judgment in a party's favor automatically renders that party prevailing under § 1988. Indeed, we confirmed the contrary proposition:

> "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the

> defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" 482 U. S., at 761 (emphasis in original).

A declaratory judgment, in this respect, is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff. In this case, there was no such result. The lawsuit was not brought as a class action, but by two plaintiffs. A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order. This case is thus controlled by our holding in *Hewitt*, where the fact that the respondent had "long since been released from prison" and "could not get redress" from any changes in prison policy caused by his lawsuit compelled the conclusion that he was ineligible for an award of fees. 482 U. S., at 763. The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees.

Certiorari is granted, and the decision of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions

to reverse a decision summarily without the benefit of full briefing on the merits of the question decided. *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265, 269–270 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7–8 (1987) (MARSHALL, J., dissenting); *Montana* v. *Hall*, 481 U. S. 400, 405–410 (1987) (MARSHALL, J., dissenting).

The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking review by this Court and deprives them of the opportunity to argue the merits of their claim before judgment. Moreover, briefing on the merits leads to greater accuracy in our decisions and helps this Court to reduce as much as is humanly possible the inevitable incidence of error in our opinions. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

It is my view that when the Court is considering summary disposition of a case, it should, at the very least, so inform the litigants and invite them to submit supplemental briefs on the merits. I remain unconvinced that this slight modification of our practice would unduly burden the Court. The benefits of increasing the fairness and accuracy of our decisionmaking and the value of according greater respect to our colleagues on this and other courts more than outweigh any burden associated with such a modest accommodation.

I dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

Because courts usually do not award remedies in cases that are moot, the novel legal issues presented here do not require this Court's plenary consideration, at least at this time. I therefore would just deny the petition for certiorari. Inasmuch, however, as the Court has chosen to grant the peti-

tion, I would give the case plenary consideration with full briefing and argument. Because I believe that summary reversal is inappropriate, I dissent.

The Court summarily reverses the Court of Appeals' judgment for being contrary to "our holding in *Hewitt* [v. *Helms*, 482 U. S. 755 (1987)]," *ante*, at 3. That case clearly does not control here. In *Hewitt*, the plaintiff never obtained a "formal judgment in his favor," 482 U. S., at 761, and the question there was whether he nonetheless could qualify as a "prevailing party," thereby making him eligible for attorney's fees under 42 U. S. C. § 1988. The Court ruled that he could not because nothing about his lawsuit changed the defendants' behavior towards him.

Here, however, respondent did obtain a "formal judgment in his favor," although he no longer was incarcerated at the time. Thus, this case presents the question whether to be a "prevailing party" it is enough to win one's lawsuit. *Hewitt* did not decide this question, nor could it have, since it did not concern a plaintiff who had obtained "all or some of the relief he sought through a judgment." 482 U. S., at 760.

The Court quotes a passage from *Hewitt* and construes it as stating that the entry of a declaratory judgment, without practical consequences, would not suffice for the purposes of § 1988. *Ante*, at 3–4. In context, however, this passage simply bolsters the Court's point about when a nonfinal "statement of law" in a judicial opinion may be deemed the functional "equivalent of declaratory relief" under § 1988. 482 U. S., at 761. Indeed, it would be ironic if this passage purported to resolve a question not before the Court in *Hewitt*, as it extols the "judicial pronouncement" limited to resolving the particular "case or controversy" at hand rather than rendering an "advisory opinion" on a question not presented by the facts of the immediate dispute. *Ibid.* Thus, I believe that the *Hewitt* opinion was not meant to tell us, or the Court of Appeals, how to decide this case. But even if it did, I would not summarily reverse the Court of Appeals on

this basis for the very reason that our own pronouncements lose their controlling authority when they attempt to decide questions not before the Court at the time.[1]

Quite apart from the Court's interpretation of *Hewitt*, I have doubts about its interpretation of the term "prevailing party" in § 1988. In ordinary usage, "prevailing" means winning. In the context of litigation, winning means obtaining a final judgment or other redress in one's favor. While the victory in this case may have been an empty one, it was a victory nonetheless. In the natural use of our language, we often speak of victories that are empty, hollow, or Pyrrhic. Thus, there is nothing anomalous about saying that respondent prevailed although he derived no tangible benefit from the judgment entered in his favor. Certainly the language of the statute does not so obviously compel a contrary conclusion as to warrant summary reversal.[2]

It is true that respondent here should not have obtained his judgment, since his case had become moot. But the fact that a party should not have "prevailed" ordinarily would not deprive him of attorney's fees.[3] Perhaps an exception should be made when the defect in the judgment goes to the court's jurisdiction, as mootness does, but the resolution of this issue

---

[1] See *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 272, 275 (1982) (dissenting opinion) (summary reversal is inappropriate when this Court's prior precedents do not "mandate" or "compel" reversal). See also *EEOC* v. *FLRA*, 476 U. S. 19, 26, n. 5 (1986) (STEVENS, J., dissenting) (this Court customarily reserves summary dispositions for settled issues of law).

[2] See *Ganey* v. *Edwards*, 759 F. 2d 337, 340 (CA4 1985) (plaintiff is entitled to attorney's fees simply because judgment was entered in his favor). In addition, other Courts of Appeals have held that a judgment of nominal damages suffices for § 1988. *E. g.*, *Skoda* v. *Fontani*, 646 F. 2d 1193 (CA7 1981); *Perez* v. *University of Puerto Rico*, 600 F. 2d 1 (CA1 1979).

[3] For example, if a defendant failed to raise a statute of limitations defense and the court entered a judgment for the plaintiff, and that judgment became final, I assume that the defendant later could not object to an award of attorney's fees on the ground that the plaintiff should not have prevailed because his claim was barred by the statute of limitations.

is not obvious.[4] It surely is not one that should be decided without benefit of briefing and oral argument.

I dissent from the Court's summary disposition of this case.

---

[4] Cf. *Garrity* v. *Sununu*, 752 F. 2d 727, 736, n. 8, 738 (CA1 1984) (an Eleventh Amendment issue not previously raised may not be used "to collaterally attack the court's judgment solely for the purpose of avoiding payment of the fees award") (footnote omitted).

PENNSYLVANIA *v.* BRUDER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

No. 88–161. Decided October 31, 1988

After his vehicle was stopped by a police officer, respondent Bruder took field sobriety tests and, in answer to questions, stated that he had been drinking. He failed the tests and was then arrested and given *Miranda* warnings. At his trial, his statements and conduct before arrest were admitted into evidence, and he was convicted of driving while under the influence of alcohol. The Pennsylvania Superior Court reversed the conviction on the ground that the statements that Bruder uttered during the roadside questioning were elicited through custodial interrogation and should have been suppressed for lack of *Miranda* warnings.

Held: Bruder was not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to questioning were admissible. The rule of *Berkemer* v. *McCarty*, 468 U. S. 420—that ordinary traffic stops do not involve custody for the purposes of *Miranda*—governs this case. Although unquestionably a seizure, this stop had the same noncoercive aspects as the *Berkemer* detention: a single police officer asking Bruder a modest number of questions and requesting him to perform simple tests in a location visible to passing motorists.

Certiorari granted; 365 Pa. Super. 106, 528 A. 2d 1385, reversed.

PER CURIAM.

Because the decision of the Pennsylvania Superior Court in this case is contrary to *Berkemer* v. *McCarty*, 468 U. S. 420 (1984), we grant the petition for a writ of certiorari and reverse.

In the early morning of January 19, 1985, Officer Steve Shallis of the Newton Township, Pennsylvania, Police Department observed respondent Thomas Bruder driving very erratically along State Highway 252. Among other traffic violations, he ignored a red light. Shallis stopped Bruder's vehicle. Bruder left his vehicle, approached Shallis, and when asked for his registration card, returned to his car to obtain it. Smelling alcohol and observing Bruder's stumbling movements, Shallis administered field sobriety tests,

including asking Bruder to recite the alphabet. Shallis also inquired about alcohol. Bruder answered that he had been drinking and was returning home. Bruder failed the sobriety tests, whereupon Shallis arrested him, placed him in the police car, and gave him *Miranda* warnings. Bruder was later convicted of driving under the influence of alcohol. At his trial, his statements and conduct prior to his arrest were admitted into evidence. On appeal, the Pennsylvania Superior Court reversed, 365 Pa. Super. 106, 528 A. 2d 1385 (1987), on the ground that the above statements Bruder had uttered during the roadside questioning were elicited through custodial interrogation and should have been suppressed for lack of *Miranda* warnings. The Pennsylvania Supreme Court denied the State's appeal application.

In *Berkemer* v. *McCarty*, *supra*, which involved facts strikingly similar to those in this case, the Court concluded that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Id.*, at 440. The Court reasoned that although the stop was unquestionably a seizure within the meaning of the Fourth Amendment, such traffic stops typically are brief, unlike a prolonged station house interrogation. Second, the Court emphasized that traffic stops commonly occur in the "public view," in an atmosphere far "less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself." *Id.*, at 438–439. The detained motorist's "freedom of action [was not] curtailed to 'a degree associated with formal arrest.'" *Id.*, at 440 (citing *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983)). Accordingly, he was not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to questioning were admissible.[1]

[1] We did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not "delay formally arresting detained motorists, and . . . subject them to sustained

The facts in this record, which Bruder does not contest, reveal the same noncoercive aspects as the *Berkemer* detention: "a single police officer ask[ing] respondent a modest number of questions and request[ing] him to perform a simple balancing test at a location visible to passing motorists." 468 U. S., at 442 (footnote omitted).[2] Accordingly, *Berkemer*'s rule, that ordinary traffic stops do not involve custody for purposes of *Miranda*, governs this case.[3] The judgment of the Pennsylvania Superior Court that evidence was inadmissible for lack of *Miranda* warnings is reversed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I agree with JUSTICE STEVENS that the Court should not disturb the decision of the court below, and accordingly I join his dissent. I write separately to note my continuing belief that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to reverse a decision summarily without the benefit of full briefing on the merits of

---

and intimidating interrogation at the scene of their initial detention." *Berkemer* v. *McCarty*, 468 U. S. 420, 440 (1984).

[2] Reliance on the Pennsylvania Supreme Court's decision in *Commonwealth* v. *Meyer*, 488 Pa. 297, 412 A. 2d 517 (1980), to which we referred in *Berkemer*, see 468 U. S., at 441, and n. 34, is inapposite. *Meyer* involved facts which we implied might properly remove its result from *Berkemer*'s application to ordinary traffic stops; specifically, the motorist in *Meyer* could be found to have been placed in custody for purposes of *Miranda* safeguards because he was detained for over half an hour, and subjected to questioning while in the patrol car. Thus, we acknowledged *Meyer*'s relevance to the unusual traffic stop that involves prolonged detention. We expressly disapproved, however, the attempt to extrapolate from this sensitivity to uncommon detention circumstances any general proposition that custody exists whenever motorists think that their freedom of action has been restricted, for such a rationale would eviscerate *Berkemer* altogether. See *Berkemer*, *supra*, at 436–437.

[3] We thus do not reach the issue whether recitation of the alphabet in response to custodial questioning is testimonial and hence inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

the question decided. *Rhodes* v. *Stewart*, *ante*, p. 1 (MARSHALL, J., dissenting); *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265, 269 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7 (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the decision below.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Court explains why it reverses the decision of the Superior Court of Pennsylvania in this drunken driving case, but it does not explain why it granted certiorari.

In *Berkemer* v. *McCarty*, 468 U. S. 420, 440–442 (1984), the Court concluded that *Miranda* warnings are not required during a traffic stop unless the citizen is taken into custody; that there is no bright-line rule for determining when detentions short of formal arrest constitute custody; and that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation," 468 U. S., at 442. The rule applied in Pennsylvania is strikingly similar to this Court's statement in *Berkemer*. As the Pennsylvania Superior Court explained in this case:

> "In Pennsylvania, 'custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest. . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted.' *Commonwealth* v. *Meyer*, 488 Pa. 297, 307, 412 A. 2d 517, 521 (1980) (quoting *Commonwealth* v. *Brown*, 473 Pa. 562, 570, 375 A. 2d 1260, 1264 (1977). . . .
>
> "In *Commonwealth* v. *Meyer*, the Pennsylvania Supreme Court ruled that the driver of a car involved in an accident who was suspected of driving under the influence of alcohol and who was told by police to wait at the scene until additional police arrived was in custody for

> purposes of *Miranda*. The *Meyer* court reasoned that because the defendant had a reasonable belief that his freedom of action had been restricted, statements elicited before he received his *Miranda* warnings should have been suppressed. 488 Pa. at 307, 412 A. 2d at 522." 365 Pa. Super. 106, 111–112, 528 A. 2d 1385, 1387 (1987).

In its *Berkemer* opinion, this Court cited the Pennsylvania Supreme Court's opinion in *Commonwealth* v. *Meyer*, 488 Pa. 297, 412 A. 2d 517 (1980), with approval. 468 U. S., at 441, n. 34. Thus, there appears to be no significant difference between the rule of law that is generally applied to traffic stops in Pennsylvania and the rule that this Court would approve in other States.

There is, however, a difference of opinion on the question whether the rule was correctly applied in this case. The Superior Court of Pennsylvania was divided on the issue. See 365 Pa. Super., at 117, 528 A. 2d, at 1390 (Rowley, J., concurring and dissenting). It was therefore quite appropriate for the prosecutor to seek review in the Supreme Court of Pennsylvania. That court summarily denied review without opinion. See 518 Pa. 635, 542 A. 2d 1365 (1988). That action was quite appropriate for the highest court of a large State like Pennsylvania because such a court is obviously much too busy to review every arguable misapplication of settled law in cases of this kind.

For reasons that are unclear to me, however, this Court seems to welcome the opportunity to perform an error-correcting function in cases that do not merit the attention of the highest court of a sovereign State. See, *e. g.*, *Florida* v. *Meyers*, 466 U. S. 380 (1984) *(per curiam)*; *Illinois* v. *Batchelder*, 463 U. S. 1112 (1983) *(per curiam)*. Although there are cases in which "there are special and important reasons" for correcting an error that is committed by another court, see this Court's Rule 17.1, this surely is not such a case. The Court does not suggest that this case involves an

important and unsettled question of federal law or that there is confusion among the state and federal courts concerning what legal rules govern the application of *Miranda* to ordinary traffic stops. Rather, the Court simply holds that the Superior Court of Pennsylvania misapplied our decision in *Berkemer* to "[t]he facts in this record." *Ante*, at 11. In my judgment this Court's scarce resources would be far better spent addressing cases that are of some general importance "beyond the facts and parties involved," *Boag* v. *MacDougall*, 454 U. S. 364, 368 (1982) (REHNQUIST, J., dissenting), than in our acting as "self-appointed . . . supervisors of the administration of justice in the state judicial systems," *Florida* v. *Meyers*, 466 U. S., at 385 (STEVENS, J., dissenting).

Accordingly, because I would not disturb the decision of the Supreme Court of Pennsylvania—which, incidentally, is the court to which the petitioner asks us to direct the writ of certiorari—I respectfully dissent.

Syllabus

TOWN OF HUNTINGTON ET AL. *v.* HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

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

No. 87–1961. Decided November 7, 1988

The town of Huntington, N. Y., has a zoning classification permitting, *inter alia*, private construction of multifamily housing projects, but only in the town's urban renewal area, where 52% of the residents are minorities. A private developer, after acquiring an option to purchase a site in a 98% white section of town zoned for single-family residences, requested the town board to amend the code to permit multifamily rental construction by private developers townwide. The board rejected this request. Appellees filed a complaint in the District Court against appellants alleging, among other things, that appellants had violated Title VIII of the Civil Rights Act of 1968 by refusing to amend the zoning code and by refusing to rezone the proposed building site. Appellants conceded that the facial challenge to the code should be evaluated under a disparate-impact standard. The District Court rejected appellees' claims. However, the Court of Appeals reversed as to both claims, holding, with regard to the town's failure to amend the zoning code, that appellees had established a prima facie case of discriminatory impact, which appellants had failed to rebut. It ordered the town to strike the zoning limitation from the code and to rezone the project site.

Held:

1. This Court expressly declines to review the judgment below insofar as it relates to the refusal to rezone the project site, because that portion of the case does not implicate this Court's mandatory jurisdiction.

2. Since appellants conceded the applicability of the disparate-impact test, this Court does not decide whether that test is the appropriate one. Assuming that test applies, the Court is satisfied on this record that appellees have shown that the zoning restriction has a disparate impact, and that the justification proffered by appellants to rebut the prima facie case is inadequate.

844 F. 2d 926, affirmed.

PER CURIAM.

The motion of New York Planning Federation for leave to file a brief as *amicus curiae* is granted.

The town of Huntington, N. Y., has about 200,000 residents, 95% of whom are white and less than 4% black. Almost three-fourths of the black population is clustered in six census tracts in the town's Huntington Station and South Greenlawn areas. Of the town's remaining 42 census tracts, 30 are at least 99% white.

As part of Huntington's urban renewal effort in the 1960's, the town created a zoning classification (R–3M Garden Apartment District) permitting construction of multifamily housing projects, but by § 198–20 of the Town Code, App. to Juris. Statement 94a, restricted private construction of such housing to the town's "urban renewal area"—the section of the town in and around Huntington Station, where 52% of the residents are minorities. Although § 198–20 permits the Huntington Housing Authority (HHA) to build multifamily housing townwide, the only existing HHA project is within the urban renewal area.

Housing Help, Inc. (HHI), a private developer interested in fostering residential integration, acquired an option to purchase a site in Greenlawn/East Northport, a 98% white section of town zoned for single-family residences. On February 26, 1980, HHI requested the town board to commit to amend § 198–20 of the Town Code to permit multifamily rental construction by a private developer. On January 6, 1981, the board formally rejected this request. On February 23, 1981, HHI, the Huntington Branch of the National Association for the Advancement of Colored People (NAACP), and two black, low-income residents of Huntington (appellees) filed a complaint against the town and members of the town board (appellants) in the Federal District Court for the Eastern District of New York, alleging, *inter alia*, that they had violated Title VIII of the Civil Rights Act of 1968 by (1) refusing to amend the zoning code to allow for

private construction of multifamily housing outside the urban renewal zone and (2) refusing to rezone the proposed site to R–3M. Appellees asserted that both of these claims should be adjudicated under a disparate-impact standard. Appellants agreed that the facial challenge to the ordinance should be evaluated on that basis, but maintained that the decision not to rezone the proposed project site should be analyzed under a discriminatory-intent standard.

Following a bench trial, the District Court rejected appellees' Title VIII claims. 668 F. Supp. 762 (EDNY 1987). The Court of Appeals for the Second Circuit reversed as to both claims. 844 F. 2d 926 (1988). The Court of Appeals held that, in order to establish a prima facie case, a Title VIII plaintiff need only demonstrate that the action or rule challenged has a discriminatory impact. As to the failure to amend the zoning ordinance (which is all that concerns us here), the court found discriminatory impact because a disproportionately high percentage of households that use and that would be eligible for subsidized rental units are minorities, and because the ordinance restricts private construction of low-income housing to the largely minority urban renewal area, which "significantly perpetuated segregation in the Town." *Id.*, at 938. The court declared that in order to rebut this prima facie case, appellants had to put forth "bona fide and legitimate" reasons for their action and had to demonstrate that no "less discriminatory alternative can serve those ends." *Id.*, at 939. The court found appellants' rationale for refusal to amend the ordinance—that the restriction of multifamily projects to the urban renewal area would encourage developers to invest in a deteriorated and needy section of town—clearly inadequate. In the court's view, that restriction was more likely to cause developers to invest in towns other than Huntington than to invest in Huntington's depressed urban renewal area, and tax incentives would have been a more efficacious and less discriminatory means to the desired end.

After concluding that appellants had violated Title VIII, the Court of Appeals directed Huntington to strike from § 198–20 the restriction of private multifamily housing projects to the urban renewal area and ordered the town to rezone the project site to R–3M.

Huntington seeks review pursuant to 28 U. S. C. § 1254(2) on the basis that, in striking the zoning limitation from the Town Code, the Court of Appeals invalidated "a State statute . . . as repugnant to" Title VIII, a "la[w] of the United States." Viewing the case as involving two separate claims, as presented by the parties and analyzed by the courts below, we note jurisdiction, but limit our review to that portion of the case implicating our mandatory jurisdiction. Thus, we expressly decline to review the judgment of the Court of Appeals insofar as it relates to the refusal to rezone the project site.

Since appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one. Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate. The other points presented to challenge the court's holding with regard to the ordinance do not present substantial federal questions. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set the case for oral argument.

Syllabus

SHELL OIL CO. *v.* IOWA DEPARTMENT OF REVENUE

APPEAL FROM THE SUPREME COURT OF IOWA

No. 87–984. Argued October 4, 1988—Decided November 8, 1988

Between tax years 1977 and 1980, a portion of Shell Oil Company's gross revenues was derived from the sale of oil and natural gas extracted from the Outer Continental Shelf (OCS). Shell sold all of its OCS gas directly at the OCS wellhead platform, but piped most of its OCS crude oil inland, where it was either sold to third parties or refined, which typically involved commingling it with non-OCS oil. Shell's principal business in Iowa during the years at issue was the sale of oil and chemical products which were manufactured and refined elsewhere and included commingled OCS oil. In computing its Iowa corporate income taxes for those years, Shell adjusted the apportionment formula the State uses to calculate in-state taxable income—under which that portion of overall net income that is "reasonably attributable to the trade or business within the state" is taxed—to exclude a figure which Shell claimed reflected income earned from the OCS. The Iowa formula had previously been upheld against Due Process and Commerce Clause challenges in *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267. The Iowa Department of Revenue rejected Shell's modification of the formula and found the tax payments deficient, which decision was affirmed by a County District Court and by the Iowa Supreme Court. Both courts rejected Shell's contention that the Outer Continental Shelf Lands Act (OCSLA) pre-empts Iowa's apportionment formula and therefore prevents the State from taxing income earned from the sale of OCS oil and gas.

Held: The OCSLA does not prevent Iowa from including income earned from the sale of OCS oil and gas in its apportionment formula. In adopting for the OCS the civil and criminal laws of "each adjacent state," the OCSLA does provide that "[s]tate taxation laws shall not apply" and further specifies that such adoption "shall never be interpreted as a basis for [a State's] claiming any interest in [the OCS] or the revenues therefrom." However, the above-quoted provisions, when read in the context of the *entire* section in which they appear, and the background and legislative history of the OCSLA, establish that Congress was exclusively concerned with preventing adjacent States from asserting, on the basis of territorial claims, jurisdiction to assess on the OCS those direct taxes commonly imposed by States adjacent to offshore production sites, and did not intend to prohibit a State from taxing income from OCS-derived oil and gas provided that it does so pursuant to a constitu-

tionally permissible apportionment scheme such as Iowa's. The inclusion of OCS-derived income in the unitary tax base of such a formula does not amount to extraterritorial taxation prohibited by the OCSLA. Shell's argument that, even if the OCSLA allows a State to include in its preapportioned tax base the sales of OCS crude oil which occur off the OCS, the taxing State may not include in that base the value of the natural gas sales made at the OCS wellhead is rejected since, on its face, the OCSLA makes no such distinction and, in general, it is irrelevant for the makeup of the apportionment formula's unitary tax base that third-party sales occur outside of the State. Pp. 24–31.

414 N. W. 2d 113, affirmed.

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

Kenneth S. Geller argued the cause for appellant. With him on the briefs were *Mark I. Levy*, *Steven C. Stryker*, *William D. Peltz*, and *James W. Hall*.

Harry M. Griger, Special Assistant Attorney General of Iowa, argued the cause for appellee. With him on the brief was *Thomas J. Miller*, Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Richard J. Lazarus*, and *Richard Farber*.*

---

*Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *Cary Edwards*, Attorney General of New Jersey, *James J. Ciancia*, Assistant Attorney General, and *Mary R. Hamill* and *John P. Miscione*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *Duane Woodard* of Colorado, *James T. Jones* of Idaho, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Robert Abrams* of New York, *Nicholas J. Spaeth* of North Dakota, *Dave Frohnmayer* of Oregon, and *T. Travis Medlock* of South Carolina; for the Florida Department of Revenue by *Robert A. Butterworth*, Attorney General of Florida, *Joseph C. Mellichamp III*, Assistant Attorney General, and *Sharon A. Zahner;* and for the Multistate Tax Commission by *Eugene F. Corrigan*.

John K. Van de Kamp, Attorney General of California, *Robert F. Tyler*, Supervising Deputy Attorney General, and *Robert D. Milam*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae*.

JUSTICE MARSHALL delivered the opinion of the Court.

In this appeal, we must decide whether the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* (1982 ed. and Supp. III), prevents Iowa from including income earned from the sale of oil and gas extracted from the Outer Continental Shelf (OCS) in the apportionment formula it uses to calculate in-state taxable income. We hold that it does not.

I

Shell Oil Company (Shell) is a unitary business,[1] incorporated in Delaware. Its activities include producing, transporting, and marketing oil and gas and the products that are made from them. Shell extracts oil and gas not only within various States but also on the OCS, which is defined by the OCSLA as all those submerged lands three or more geographical miles from the United States coastline.[2] Between 1977 and 1980, the tax years at issue in this case, a portion of Shell's gross revenues was derived from the sale of oil and gas extracted from the OCS and the sale of products made from OCS oil and gas.

During the years at issue, Shell sold all of its OCS natural gas directly at the wellhead platform located above the OCS. Nearly all of its OCS crude oil, by contrast, was transferred via pipelines to the continental United States, where Shell either sold it to third parties or refined it. The refining process typically involves the commingling of OCS crude oil with crude oil purchased or drawn by Shell from other places.

---

[1] The Iowa Code defines a unitary business as one which is "carried on partly within and partly without a state where the portion of the business carried on within the state depends on or contributes to the business outside the state." Iowa Code § 422.32(5) (1987).

[2] The OCS includes "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title." 43 U. S. C. § 1331. "[L]ands beneath navigable waters" include all submerged lands within three geographical miles of the coastline of the United States. § 1301.

Thus, the original source of oil in any Shell-refined product is indeterminable.

Shell's principal business in the State of Iowa during the years at issue was the sale of oil and chemical products which it had manufactured and refined outside of Iowa. These products included OCS crude oil that had been commingled with non-OCS crude oil.

Iowa imposes an income tax on corporations doing business in Iowa. Iowa Code § 422.33(2) (1987). For a unitary business like Shell, that income tax is determined by a single-factor apportionment formula based on sales. Under that formula, Iowa taxes the share of a corporation's overall net income that is "reasonably attributable to the trade or business within the state." *Ibid.*[3] We have previously upheld Iowa's sales-based apportionment formula against

---

[3] Iowa Code § 422.33(2) (1987) provides, in pertinent part, as follows:

"(2) If the trade or business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income, but if the trade or business is carried on partly within and partly without the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net income attributable to the state to be determined as follows:

. . . . . .

"(b)(4) Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales."

Iowa defines income by reference to federal taxable income which it then adjusts under Iowa law. Iowa Code §§ 422.32(6) and (11) (1987).

Described as a formula, the method for calculating the portion of Shell's total income which is subject to Iowa income tax is as follows:

$$\left(\frac{\text{Iowa Gross Sales}}{\text{Total Gross Sales}}\right) \times \left(\begin{array}{l}\text{Federal Taxable}\\ \text{Income Adjusted}\\ \text{per Iowa Law}\end{array}\right) = \text{Iowa Income.}$$

Due Process and Commerce Clause challenges in *Moorman Manufacturing Co.* v. *Bair*, 437 U. S. 267 (1978).

Between 1977 and 1980, Shell filed Iowa tax returns in which it adjusted the Iowa formula to exclude a figure which it stated reflected "income earned" from the OCS.[4] The Iowa Department of Revenue audited Shell's returns and rejected this modification. Accordingly, the Iowa Department of Revenue found Shell's tax payment deficient. Shell challenged that determination, claiming at a hearing before the Iowa Department of Revenue that inclusion of OCS-derived income in the tax base of Iowa's apportionment formula violated the OCSLA. The hearing officer rejected that contention. Shell appealed to the Polk County District Court, which affirmed the administrative decision, No. AA952 (Oct. 3, 1986), App. to Juris. Statement 15a (Polk County opinion), and to the Iowa Supreme Court, which also affirmed. *Kelly-Springfield Tire Co.* v. *Iowa State Board of Tax Review*, 414 N. W. 2d 113 (1987).[5] Both courts concluded, based upon an examination of the text and history of the OCSLA, that the OCSLA did not pre-empt Iowa's apportionment formula. We noted probable jurisdiction, 484 U. S. 1058 (1988), and now affirm.

---

[4] Shell adjusted the Iowa formula, set out above, see n. 3, as follows:

$$\left(\frac{\text{Iowa Gross Sales}}{\text{Total Gross Sales minus OCS "sales"}}\right) \times \left(\text{Non-OCS Federal Taxable Income}\right) = \text{Iowa Income.}$$

The OCS "sales" which Shell sought to deduct from the denominator of the sales ratio included both actual sales at the wellhead, which occur only in the case of gas, and, "sales" of oil, which, measured by an internal Shell accounting technique, record transfers between Shell divisions. Shell also sought to deduct the income from such sales from the income multiplier.

[5] Shell's appeal before the Iowa Supreme Court was consolidated with a tax appeal by Kelly-Springfield Tire.

II

We have previously held that Iowa's apportionment formula is permissible under the Commerce Clause. *Moorman Manufacturing Co.* v. *Bair, supra.* Shell's argument here is purely one of federal statutory pre-emption. It contends that, in passing the OCSLA, Congress intended to impose stricter requirements on a taxing State's apportionment formula than those imposed by the operation of the Commerce Clause alone. Shell points to the text and history of the OCSLA which it believes evince a clear congressional intent to preclude States from including in their apportionment formulas income arising from the sale of OCS oil and gas. In assessing this claim, we review first the text and then the history of the OCSLA.

Shell's argument is that the plain language of the OCSLA enacts an "absolute and categorical" prohibition on state taxation of income arising from sales of OCS gas and oil. Brief for Appellant 13. Shell relies specifically on subsections 1333(a)(2)(A) and (a)(3) which provide, in pertinent part, as follows:

> "(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . , the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . . All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. *State taxation laws shall not apply to the outer Continental Shelf.*
>
> . . . . .

"(3) The provisions of this section for adoption of State law as the law of the United States *shall never be interpreted as a basis for claiming any interest in* or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, *or the property and natural resources thereof or the revenues therefrom.*" 43 U. S. C. §§ 1333(a)(2)(A) and (a)(3) (emphasis added).

It is, of course, well settled that "when a federal statute unambiguously forbids the States to impose a particular kind of tax . . . , courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted." *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 464 U. S. 7, 12 (1983). But the meaning of words depends on their context.[6] Shell reads the italicized language above without reference to the statutory context when it argues that these statutory words ban States from including income from OCS oil and gas in an apportionment formula.

We believe that § 1333(a)(2)(A), read in its entirety, supports a narrower interpretation. Subsection 1333(a)(2)(A) begins by clarifying which laws will apply to offshore activity on the OCS. It declares that the civil and criminal laws of the States adjacent to OCS sites will apply. Subsection 1333(a)(2)(A) goes on to create an exception to this general incorporation. It is highly significant to us that § 1333(a)(2)(A) refers specifically to "*adjacent* State[s]," 43 U. S. C. § 1333(a)(2)(A) (emphasis added). The subsequent reference in the subsection to "state taxation laws" can only be read in light of this antecedent reference to "adjacent State[s]." It is clearly included lest this federal incorpora-

[6] As Judge Learned Hand so eloquently noted: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." *NLRB* v. *Federbush Co.*, 121 F. 2d 954, 957 (CA2 1941).

tion be deemed to incorporate as well the *tax codes* of adjacent States.

The ensuing subsection, 1333(a)(3), was similarly drafted to prevent tax claims by adjacent States. It states that the incorporation of state law "as the law of the United States" is never to be interpreted by the States whose law has been incorporated to give them jurisdiction over the property or revenues of the OCS.[7] Reading the statutory provisions in the context of the *entire* section in which they appear, we therefore believe that in enacting subsections 1333(a)(2)(A) and 1333(a)(3), Congress had the more limited purpose of prohibiting adjacent States from claiming that it followed from the incorporation of their civil and criminal law that their tax codes were also directly applicable to the OCS.

The background and legislative history of the OCSLA confirm this textual reading and refute Shell's view of broader pre-emption. The OCSLA grew out of a dispute, which first developed in the 1930's, between the adjacent States and the Federal Government over territorial jurisdiction and ownership of the OCS and, particularly, the right to lease the submerged lands for oil and gas exploration. S. Rep. No. 133, 83d Cong., 1st Sess., 21 (1953). The adjacent States claimed jurisdiction over the submerged lands and their rich oil, gas, and mineral deposits, *id.*, at 6, and some had even extended their territorial boundaries as far as the outer edge of the OCS. *Id.*, at 11. After this Court, in a series of opinions, ruled that the Federal Government, and not the adjacent States, had exclusive jurisdiction over the OCS, *United States* v. *Louisiana*, 339 U. S. 699, 705 (1950); *United States*

[7] There is, in any event, evidence that the Senate thought that § 1333(a)(2)(A) was intended to duplicate § 1333(a)(3)'s prohibition on adjacent state claims of interest in or jurisdiction over the OCS. The floor manager of the Senate bill, Senator Cordon, explained that the language of § 1333(a)(2)(A) stating that "[s]tate taxation laws shall not apply to the outer Continental Shelf" was requested by the House conferees "in a superabundance of caution." 99 Cong. Rec. 10471–10472 (1953). According to Senator Cordon, the language "adds nothing to and took nothing from the bill as it passed the Senate." *Ibid.*

v. *Texas*, 339 U. S. 707, 717–718 (1950); *United States* v. *California*, 332 U. S. 19, 38–39 (1947), Congress, in 1953, passed the OCSLA.

In passing the OCSLA, Congress intended to provide "for the orderly development of offshore resources." *United States* v. *Maine*, 420 U. S. 515, 527 (1975). Congress was concerned with defining territorial jurisdiction between the adjacent States and the Federal Government as to the submerged lands, particularly with reference to leasing oil and gas rights. The OCSLA 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 . . . ." 43 U. S. C. § 1332. Thus, "[b]y passing the OCS Act, Congress 'emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit . . . .'" *Maryland* v. *Louisiana*, 451 U. S. 725, 752–753, n. 26 (1981) (quoting *United States* v. *Maine*, *supra*, at 526).

Once the Court ruled that the OCS was subject to the exclusive jurisdiction and control of the Federal Government, Congress was faced with the problem of which civil and criminal laws should govern activity on the OCS sites. The Constitution and the laws of the United States were extended to cover the OCS. 43 U. S. C. § 1333(a)(2)(A). Congress recognized, however, that because of its interstitial nature, federal law would not provide a sufficiently detailed legal framework to govern life on "the miraculous structures which will rise from the sea bed of the [OCS]." Christopher, The Outer Continental Shelf Lands Act: Key to a New Frontier, 6 Stan. L. Rev. 23, 37 (1953).[8] The problem before Congress was to incorporate the civil and criminal laws of the adjacent

---

[8] Christopher noted that the "whole circle of legal problems" typically resolved under state law could arise on the OCS, because the large crews working on the great offshore structures would "die, leave wills, and pay taxes. They will fight, gamble, borrow money, and perhaps even kill. They will bargain over their working conditions and sometimes they will be injured on the job." 6 Stan. L. Rev., at 37.

States, and yet, at the same time, reflect the strong congressional decision against allowing the adjacent States a direct share in the revenues of the OCS, by making it clear that state taxation codes were not to be incorporated. *Id.*, at 37, 41.

In debates over the OCSLA, representatives of the adjacent States had argued that, despite exclusive federal jurisdiction over the OCS, their States should retain an interest in direct revenues from the OCS, and that they should be allowed the power to tax OCS production and activity extraterritorially. In particular, Senator Long of Louisiana argued that the adjacent States should have a share of OCS revenues since they would be providing services to OCS workers. S. Rep. No. 411, 83d Cong., 1st Sess., 67 (1953) (minority report of Sen. Long); see also 99 Cong. Rec. 7261 (1953) (remarks of Sen. Long).

Opponents of such adjacent-state extraterritorial taxation argued that extending the adjacent States' power to tax beyond their borders would be "unconstitutional," 99 Cong. Rec. 2506 (1953) (remarks of Rep. Celler); *id.*, at 2524 (remarks of Rep. Machrowicz); *id.*, at 2571–2572 (remarks of Rep. Keating), and that it would confer a windfall benefit upon the few adjacent States at the expense of the inland States. *Id.*, at 2523 (remarks of Rep. Rodino); *id.*, at 2524 (remarks of Rep. Machrowicz).

In the House, the Representatives of the adjacent States pressed for the inclusion of language in the OCSLA authorizing them to collect severance and production taxes. The House version of the bill, as reported out of Subcommittee No. 1 of the House Judiciary Committee, contained the present language prohibiting direct taxation by adjacent States. See 99 Cong. Rec. 2571 (1953) (remarks of Rep. Keating). The House Judiciary Committee amended the subsection to allow adjacent States to collect severance and production taxes. *Ibid.* See also, H. R. 4198, 83d Cong., 1st Sess. § 8(a) (1953). On the House floor, however, that provision was deleted and replaced by the prohibition on state taxation

which appears in 43 U. S. C. § 1333(a)(2)(A). 99 Cong. Rec. 2569, 2571–2573 (1953).

There is no reliable support in the legislative history of the OCSLA for Shell's view that state income taxes are pre-empted. During a long speech criticizing the OCSLA because it prevented the adjacent States from imposing severance and production taxes, Senator Long mentioned, in passing, that employers on the OCS would not be subject to the state corporate profits tax. See S. Rep. No. 411, *supra*, at 67; see also 99 Cong. Rec. 7261 (1953). Shell, however, is unable to point to any other reference in the legislative history to corporate income taxes beyond this one remark by a vocal opponent of the OCSLA. This Court does not usually accord much weight to the statements of a bill's opponents. "'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 483 (1981) (quoting *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394 (1951)). Moreover, Senator Long's remarks were apparently premised on the assumption that the private lessees on the OCS would not also engage in business activities within the taxing State's borders. See 99 Cong. Rec. 7261 (1953); S. Rep. No. 411, *supra*, at 67. Finally, it is entirely possible that Senator Long was referring to a corporate income tax which, unlike Iowa's, was not measured by an apportionment formula. See *Texas Co.* v. *Cooper*, 236 La. 380, 107 So. 2d 676 (1958) (Louisiana tax collector has statutory power to determine an oil company's income by separate accounting rather than statutory apportionment method). We therefore find that Shell's reliance on an isolated statement by Senator Long is misplaced.

In sum, the language, background, and history of the OCSLA leave no doubt that Congress was exclusively concerned with preventing the adjacent States from asserting, on the basis of territorial claims, jurisdiction to assess direct

taxes on the OCS.[9] We believe that Congress primarily intended to prohibit those direct taxes commonly imposed by States adjacent to offshore production sites: for example, severance and production taxes. See *Maryland* v. *Louisiana*, 451 U. S., at 753, n. 26 ("It is clear that a State has no valid interest in imposing a severance tax on federal OCS land").[10] This prohibition is a far cry from prohibiting a State from including income from OCS-derived oil and gas in a constitutionally permissible apportionment scheme.

Shell's argument hinges on the mistaken premise that including OCS-derived income in the preapportionment tax base is tantamount to the direct taxation of OCS production. But income that is included in the preapportionment tax base is not, by virtue of that inclusion, taxed by the State. Only the fraction of total income that the apportionment formula determines (by multiplying the income tax base by the apportionment fraction) to be attributable to Iowa's taxing jurisdiction is taxed by Iowa. As our Commerce Clause analysis of apportionment formulas has made clear, the inclusion of in-

---

[9] Shell's reliance on the fact that the OCS is an exclusive federal enclave is misplaced. Iowa is not attempting to tax property within the OCS. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980). Nor does any policy of the OCSLA prevent States from including OCS-derived income in a constitutionally permissible apportionment formula. *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U. S. 832 (1982).

[10] Although aimed specifically at the adjacent States, the prohibition against direct taxes obviously also applies to inland States, like Iowa. Before this Court's rulings and passage of the OCSLA, the adjacent States could conceivably have claimed the right to impose a severance or production tax based on oil and gas removed from the OCS, on the grounds that their territorial boundaries extended, or should be deemed to extend, far out into the ocean. Iowa, or any landlocked State, would have appeared foolish in making such a claim. After the passage of the OCSLA, both the adjacent and the landlocked States are precluded from imposing such taxes on OCS activities. See Polk County opinion, at 4. Likewise, both adjacent and landlocked States may include income from OCS-derived oil and gas in an otherwise constitutionally permissible apportionment formula.

come in the preapportioned tax base of a state apportionment formula does not amount to extraterritorial taxation. This Court has repeatedly emphasized that the function of an apportionment formula is to determine the portion of a unitary business' income that can be fairly attributed to in-state activities. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 219 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 440 (1980). Thus, Shell's claim that Iowa is taxing income attributable to the OCS cannot be squared with its concession that Iowa's apportionment formula is consistent with the Commerce Clause.

A contrary result—forbidding the inclusion of income from OCS-derived oil and gas in Iowa's apportionment formula—would give oil companies doing business on the OCS a significant exemption from corporate income taxes in all States which measure corporate income with an apportionment formula. Congress has the power to confer such an exemption, of course, but we find no evidence that it intended to do so in the OCSLA.

Finally, we reject a secondary argument made by Shell. It argues that even if the OCSLA allows a State to include in its preapportioned tax base the sales of OCS crude oil which occur off the OCS, the taxing State may not include in that base income from the natural gas sales made at the OCS wellhead. On its face, the OCSLA makes no such distinction and, in general, it is irrelevant for the makeup of the apportionment formula's unitary tax base that third-party sales occur outside of the State. See *Exxon Corp.*, *supra*, at 228–229. Actual sales on the OCS (as opposed to internal accounting sales) are not taxed directly by any State because they are not included in the numerator of the sales ratio. See n. 3, *supra*. From the inclusion of such sales in the apportionment formula's tax base, it does not follow that the dollar amount derived from the formula (which is a fraction of the unitary tax base) includes income not fairly attributable to Iowa.

III

For the reasons set out above, we reject Shell's argument that Congress intended, when it passed the OCSLA, to prohibit the inclusion, in a constitutionally permissible apportionment formula, of income from OCS oil and gas. We hold that the OCSLA prevents any State, adjacent or inland, from asserting extraterritorial taxing jurisdiction over OCS lands but that the inclusion of income derived from the OCS in the unitary tax base of a constitutionally permissible apportionment formula does not amount to extraterritorial taxation by the taxing State. Accordingly, the judgment of the Iowa Supreme Court is hereby affirmed.

It is so ordered.

LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* NELSON

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

No. 87–1277. Argued October 3, 1988—Decided November 14, 1988

Arkansas' habitual criminal statute provides that a defendant who is convicted of a class B felony may be sentenced to an enhanced term of imprisonment if the State proves beyond a reasonable doubt, at a separate sentencing hearing, that he has at least four prior felony convictions. At respondent's sentencing hearing following his guilty plea to a class B felony, the State introduced certified copies of four prior felony convictions, one of which, unbeknownst to the prosecutor, had been pardoned by the Governor. The case was submitted to the jury, which found that the State had met its burden of proving four prior felony convictions and imposed an enhanced sentence. Several years later, respondent sought a writ of habeas corpus in the United States District Court, contending that the enhanced sentence was invalid because one of the convictions used to support it had been pardoned. The District Court determined that the conviction in question had in fact been pardoned and set aside the enhanced sentence. The District Court then held, in reliance on *Burks* v. *United States*, 437 U. S. 1 (1978), that the Double Jeopardy Clause prohibited the State from attempting to resentence respondent as a habitual offender on the basis of another prior conviction not offered or admitted at the initial sentencing hearing. The Court of Appeals affirmed, reasoning that the pardoned conviction was inadmissible under state law, and that the Double Jeopardy Clause forbade retrial because the remaining evidence adduced at trial was legally insufficient to sustain the jury's verdict of enhancement.

Held: When a reviewing court determines that a defendant's conviction must be set aside because certain evidence was erroneously admitted against him, and further finds that once that evidence is discounted, there is insufficient evidence to support the conviction, the Double Jeopardy Clause does not forbid his retrial so long as the sum of the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict. The general rule is that the Double Jeopardy Clause does not preclude the retrial of a defendant who succeeds in getting his conviction set aside for such "trial errors" as the incorrect receipt or rejection of evidence. The *Burks* exception to that rule is based on the view that a reversal for

evidentiary insufficiency is the functional equivalent of a trial court's granting a judgment of acquittal at the close of all the evidence. Because a trial court in passing on such a motion considers all of the evidence it has admitted, it must be this same quantum of evidence which is considered in deciding whether retrial is permissible under the Double Jeopardy Clause. Permitting retrial in this instance is not the sort of oppression at which the Double Jeopardy Clause is aimed, but simply affords the defendant an opportunity to obtain a fair adjudication of his guilt free from error. Pp. 38–42.

828 F. 2d 446, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 42.

J. Steven Clark, Attorney General of Arkansas, argued the cause for petitioner. With him on the briefs was *Clint Miller*, Assistant Attorney General.

John Wesley Hall, Jr., by appointment of the Court, 485 U. S. 956, argued the cause and filed a brief for respondent.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case a reviewing court set aside a defendant's conviction of enhanced sentence because certain evidence was erroneously admitted against him, and further held that the Double Jeopardy Clause forbade the State to retry him as a habitual offender because the remaining evidence adduced at trial was legally insufficient to support a conviction. Nothing in the record suggests any misconduct in the prosecutor's submission of the evidence. We conclude that in cases such as this, where the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.

Respondent Johnny Lee Nelson pleaded guilty in Arkansas state court to burglary, a class B felony, and misdemeanor theft. He was sentenced under the State's habitual criminal

statute, which provides that a defendant who is convicted of a class B felony and "who has previously been convicted of . . . [or] found guilty of four [4] or more felonies," may be sentenced to an enhanced term of imprisonment of between 20 and 40 years. Ark. Stat. Ann. § 41–1001(2)(b) (1977) (current version at Ark. Code Ann. § 5–4–501 (1987)). To have a convicted defendant's sentence enhanced under the statute, the State must prove beyond a reasonable doubt, at a separate sentencing hearing, that the defendant has the requisite number of prior felony convictions. § 41–1005 (current version at Ark. Code Ann. § 5–4–502 (1987)); § 41–1003 (current version at Ark. Code Ann. § 5–4–504 (1987)). Section 41–1003 of the statute sets out the means by which the prosecution may prove the prior felony convictions, providing that "[a] previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty," and that three types of documents, including "a duly certified copy of the record of a previous conviction or finding of guilt by a court of record," are "sufficient to support a finding of a prior conviction or finding of guilt." § 41–1003 (current version at Ark. Code Ann. § 5–4–504 (1987)).[1] The defendant is entitled to challenge the State's evidence of his prior convictions and to rebut it with evidence

---

[1] Ark. Stat. Ann. § 41–1003 (1977) provided as follows:

". . . A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. The following are sufficient to support a finding of a prior conviction or finding of guilt:

"(1) a duly certified copy of the record of a previous conviction or finding of guilt by a court of record; or

"(2) a certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendant, as they appear in the records of his office; or

"(3) a certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office."

of his own. § 41–1005(2) (current version at Ark. Code Ann. § 5–4–502(2) (1987)).

At respondent's sentencing hearing, the State introduced, without objection from the defense, certified copies of four prior felony convictions. Unbeknownst to the prosecutor, one of those convictions had been pardoned by the Governor several years after its entry. Defense counsel made no objection to the admission of the pardoned conviction, because he too was unaware of the Governor's action. On cross-examination, respondent indicated his belief that the conviction in question had been pardoned. The prosecutor suggested that respondent was confusing a pardon with a commutation to time served. Under questioning from the court, respondent agreed that the conviction had been commuted rather than pardoned, and the matter was not pursued any further.[2] The case was submitted to the jury,[3] which found that the State had met its burden of proving four prior convictions and imposed an enhanced sentence. The state courts upheld the enhanced sentence on both direct and collateral review, despite respondent's protestations that one of the convictions relied upon by the State had been pardoned.[4]

---

[2] There is no indication that the prosecutor knew of the pardon and was attempting to deceive the court. We therefore have no occasion to consider what the result would be if the case were otherwise. Cf. *Oregon* v. *Kennedy*, 456 U. S. 667 (1982).

[3] Prior to 1981, the Arkansas statute assigned responsibility for determining whether the State had proved the requisite number of prior convictions to the jury. Ark. Stat. Ann. § 41–1005 (1977). In 1981, the Arkansas General Assembly amended the statute to reassign this responsibility to the trial court. 1981 Ark. Gen. Acts 252 (Feb. 27, 1981) (codified at Ark. Stat. Ann. § 41–1005 (Supp. 1985) (current version at Ark. Code Ann. § 5–4–502 (1987))). Though respondent's trial took place after the 1981 amendments became effective, the trial court, evidently unaware of the amendments, permitted the jury to make the factual finding as to the number of prior convictions proved by the State. No objection was made by either side, and the error has no bearing on the double jeopardy issue before us.

[4] Respondent challenged the use of the pardoned conviction to enhance his sentence on direct appeal. The Arkansas Court of Appeals rejected

Several years later, respondent sought a writ of habeas corpus in the United States District Court, contending once again that the enhanced sentence was invalid because one of the prior convictions used to support it had been pardoned. When an investigation undertaken by the State at the District Court's request revealed that the conviction in question had in fact been pardoned, the District Court declared the enhanced sentence to be invalid. The State announced its intention to resentence respondent as a habitual offender, using another prior conviction not offered or admitted at the initial sentencing hearing, and respondent interposed a claim of double jeopardy. After hearing arguments from counsel, the District Court decided that the Double Jeopardy Clause prevented the State from attempting to resentence respondent as a habitual offender on the burglary charge. 641 F. Supp. 174 (ED Ark. 1986).[5] The Court of Appeals for the Eighth Circuit affirmed. 828 F. 2d 446 (1987). The Court of Appeals reasoned that the pardoned conviction was not admissible under state law, and that "[w]ithout [it], the state has failed to provide sufficient evidence" to sustain the enhanced sentence. *Id.*, at 449–450. We granted certiorari to review this interpretation of the Double Jeopardy Clause. 485 U. S. 904 (1988).[6]

---

this claim because of respondent's failure to make a contemporaneous objection to the use of that conviction. *Nelson* v. *State*, No. CA CR 83–150 (May 2, 1984), App. 13. Respondent later petitioned the Arkansas Supreme Court for postconviction relief, which was denied on the ground that respondent's "bare assertion" of a pardon, unsupported by any factual evidence, was an insufficient basis on which to grant relief. *Nelson* v. *State*, No. CR 84–133 (Nov. 19, 1984), App. 15.

[5] The District Court made clear, however, that the Double Jeopardy Clause did not prevent the State from resentencing respondent for the class B felony itself, under the sentencing rules applicable in the absence of proof of habitual criminal status. See 641 F. Supp., at 186.

[6] The State has attacked the ruling below on a single ground: that the defect in respondent's first sentence enhancement proceeding does not bar retrial. To reach this question, we would ordinarily have to decide two issues which are its logical antecedents: (1) whether the rule that the Double Jeopardy Clause limits the State's power to subject a defendant to suc-

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, see *Benton* v. *Maryland*, 395 U. S. 784 (1969), provides that no person shall "be subject for the same offence to be twice put in jeopardy." It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction. *United States* v. *Ball*, 163 U. S. 662 (1896) (retrial permissible following reversal of conviction on direct appeal); *United States* v. *Tateo*, 377 U. S. 463 (1964) (retrial permissible when conviction declared invalid on collateral attack). This rule, which is a "well-established part of our constitutional jurisprudence," *id.*, at 465, is necessary in order to ensure the "sound administration of justice":

> "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.*, at 466.

---

cessive capital sentencing proceedings, see *Bullington* v. *Missouri*, 451 U. S. 430 (1981), carries over to noncapital sentencing proceedings, see *North Carolina* v. *Pearce*, 395 U. S. 711, 720 (1969); and (2) whether the rule that retrial is prohibited after a conviction is set aside by an *appellate* court for evidentiary insufficiency, see *Burks* v. *United States*, 437 U. S. 1 (1978), is applicable when the determination of evidentiary insufficiency is made instead by a federal habeas court in a collateral attack on a state conviction, see *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294 (1984). The courts below answered both questions in the affirmative, and the State has conceded both in its briefs and at oral argument the validity of those rulings. We therefore assume, without deciding, that these two issues present no barrier to reaching the double jeopardy claim raised here.

Permitting retrial after a conviction has been set aside also serves the interests of defendants, for "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Ibid.*

In *Burks* v. *United States*, 437 U. S. 1 (1978), we recognized an exception to the general rule that the Double Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below. *Burks* held that when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict, the Double Jeopardy Clause bars a retrial on the same charge. *Id.*, at 18; see *Greene* v. *Massey*, 437 U. S. 19, 24 (1978); *Hudson* v. *Louisiana*, 450 U. S. 40, 42–43 (1981).

Burks was based on the view that an appellate court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury. *Burks*, 437 U. S., at 16–17. Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court *should* have entered a judgment of acquittal. *Id.*, at 10–11, 16. The fact that the determination of entitlement to a judgment of acquittal is made by the appellate court rather than the trial court should not, we thought, affect its double jeopardy consequences; to hold otherwise "would create a purely arbitrary distinction" between defendants based on the hierarchical level at which the determination was made. *Id.*, at 11.

The question presented by this case—whether the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction—was expressly reserved in *Greene* v. *Massey*, *supra*, at 26, n. 9, decided the same day as *Burks*. We think the logic of *Burks* requires that the question be answered in the affirmative.

Burks was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary "trial errors" as the "incorrect receipt or rejection of evidence." 437 U. S., at 14–16. While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial *process* which is defective in some fundamental respect." *Id.*, at 15 (emphasis added).

It appears to us to be beyond dispute that this is a situation described in *Burks* as reversal for "trial error"—the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly *with* that evidence, there was enough to support the sentence: the court and jury had before them certified copies of four prior felony convictions, and that is sufficient to support a verdict of enhancement under the statute. See Ark. Stat. Ann. § 41–1003 (1977) (current version at Ark. Code Ann. § 5–4–504 (1987)). The fact that one of the convictions had been later pardoned by the Governor vitiated its legal effect, but it did not deprive the certified copy of that conviction of its probative value under the statute.[7] It is quite clear from our opinion in

[7] We are not at all sure that the Court of Appeals was correct to describe the evidence of this conviction as "inadmissible," in view of the Ar-

Burks that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause—indeed, that was the *ratio decidendi* of *Burks*, see 437 U. S., at 16–17—and the overwhelming majority of appellate courts considering the question have agreed.[8] The basis for the *Burks* exception to the general rule is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court in passing on such a

---

kansas statutory provision and the colloquy between court, counsel, and defendant referred to above. Evidence of the disputed conviction was introduced, and it was mistakenly thought by all concerned that the conviction had not been pardoned. Several years later it was discovered that the conviction had in fact been pardoned; the closest analogy would seem to be that of "newly discovered evidence." For purposes of our decision, however, we accept the characterization of the Court of Appeals.

[8] See, *e. g.*, *United States* v. *Gonzalez-Sanchez*, 825 F. 2d 572, 588, n. 57 (CA1 1987); *United States* v. *Hodges*, 770 F. 2d 1475, 1477–1478 (CA9 1985); *Webster* v. *Duckworth*, 767 F. 2d 1206, 1214–1216 (CA7 1985); *United States* v. *Marshall*, 762 F. 2d 419, 423 (CA5 1985); *United States* v. *Bibbero*, 749 F. 2d 581, 586, n. 3 (CA9 1984); *United States* v. *Key*, 725 F. 2d 1123, 1127 (CA7 1984); *United States* v. *Tranowski*, 702 F. 2d 668, 671 (CA7 1983), cert. denied, 468 U. S. 1217 (1984); *United States* v. *Sarmiento-Perez*, 667 F. 2d 1239 (CA5), cert. denied, 459 U. S. 834 (1982); *United States* v. *Harmon*, 632 F. 2d 812 (CA9 1980); *United States* v. *Mandel*, 591 F. 2d 1347, 1373–1374 (CA4), rev'd on other grounds, 602 F. 2d 653 (1979), cert. denied, 445 U. S. 961 (1980); *Harris* v. *State*, 284 Ark. 247, 681 S. W. 2d 334 (1984); *People* v. *Rios*, 163 Cal. App. 3d 852, 870–871, 210 Cal. Rptr. 271, 283–284 (1985); *People* v. *Sisneros*, 44 Colo. App. 65, 606 P. 2d 1317 (1980); *State* v. *Gray*, 200 Conn. 523, 536–540, 512 A. 2d 217, 225–226 (1986); *Hall* v. *State*, 244 Ga. 86, 93–94, 259 S. E. 2d 41, 46–47 (1979); *People* v. *Taylor*, 76 Ill. 2d 289, 309, 391 N. E. 2d 366, 375 (1979); *Morton* v. *State*, 284 Md. 526, 397 A. 2d 1385 (1979); *Commonwealth* v. *Mattingly*, 722 S. W. 2d 288 (Ky. 1986); *Commonwealth* v. *Taylor*, 383 Mass. 272, 283–285, 418 N. E. 2d 1226, 1233–1234 (1981); *State* v. *Wood*, 596 S. W. 2d 394 (Mo.), cert. denied, 449 U. S. 876 (1980); *Roeder* v. *State*, 688 S. W. 2d 856, 859–860 (Tex. Crim. App. 1985); *State* v. *Lamorie*, 610 P. 2d 342, 346–349 (Utah 1980); *State* v. *Van Isler*, 168 W. Va. 185, 283 S. E. 2d 836 (1981).

motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.

Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to "obtai[n] a fair readjudication of his guilt free from error." *Burks*, *supra*, at 15; see *Tibbs* v. *Florida*, 457 U. S. 31, 40 (1982); *United States* v. *DiFrancesco*, 449 U. S. 117, 131 (1980); *United States* v. *Scott*, 437 U. S. 82, 91 (1978). Had the defendant offered evidence at the sentencing hearing to prove that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon. Cf. our discussion in *Burks*, *supra*, at 6–7.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

Under Arkansas law, a defendant who is convicted of a class B felony and "who has previously been convicted of . . . [or] found guilty of four [4] or more felonies" may be sentenced to an enhanced term of imprisonment ranging from 20 years to 40 years. Ark. Stat. Ann. § 41–1001(2)(b) (1977) (current version at Ark. Code Ann. § 5–4–501(b)(3) (1987)). At the March 1982 sentencing trial held after Johnny Lee Nelson pleaded guilty to the class B felony of burglary,[1] the State of Arkansas introduced evidence indicating that Nelson

[1] Nelson pleaded guilty to having taken $45.00 from a vending machine in 1979. See 641 F. Supp. 174, 175 (ED Ark. 1986).

had four prior felony convictions. Nelson protested that he had received a gubernatorial pardon for one of the convictions. The prosecutor and the trial judge disbelieved Nelson's claim, however, and the jury sentenced him to 20 years in prison. Three and a half years later—during which time Nelson, from jail, persistently implored Arkansas courts to investigate his pardon claim—a Federal District Court finally ordered the State to check its records. Lo and behold, it turned out that Nelson *had* been pardoned—and Arkansas soon announced its intention to try Nelson, once again, as a habitual offender.[2]

The majority holds today that, although Arkansas attempted once and failed to prove that Nelson had the four prior convictions required for habitual offender status, it does not violate the Double Jeopardy Clause for Arkansas to attempt again. I believe, however, that Nelson's retrial is squarely foreclosed by *Burks* v. *United States*, 437 U. S. 1

[2] The conviction for which Nelson was pardoned was a 1960 conviction for assault with intent to rape. He was pardoned in 1964 by Arkansas Governor Orval E. Faubus. App. 6 (text of pardon).

The record in this case shows that Nelson attempted unsuccessfully both during and after his trial to alert state authorities to this pardon. During the trial, Nelson stated that after serving three years in jail, he "had the case investigated and the governor at the time Faubus which *[sic]* gave me a pardon for my sentence." *Id.*, at 8 (abridged transcript of sentencing trial). He added: "[A]t my home I have documents of that pardon on that *[sic]*." *Id.*, at 9. The prosecutor did not question Nelson about this claim. Instead, the prosecutor moved to strike Nelson's testimony on the ground that Nelson was "confused as to the meaning of the pardon and a commutation." *Id.*, at 11. The prosecutor further stated: "I think the records are clear that are in the court . . . ." *Id.*, at 11–12. Ultimately, the trial judge, and Nelson's own defense counsel—who like the prosecutor had never investigated Nelson's claim of pardon—accepted this account. *Id.*, at 12.

After receiving the enhanced sentence, Nelson sought both on direct appeal and in state postconviction actions to have his claim investigated. Only after a Federal District Court ordered Arkansas to investigate Nelson's claim did Nelson's pardon finally come to light—in August 1985. *Id.*, at 1–4.

(1978), where we held that a State may not retry a defendant where it failed initially to present sufficient evidence of guilt. The majority rushes headlong past those facets of Nelson's case and of Arkansas law that reveal the prosecution's failure to present sufficient evidence of guilt in this case, in order to answer the open and narrow question of double jeopardy law on which the Court granted certiorari. By virtue of the majority's haste, Nelson now faces a new sentencing trial, and Arkansas will be able to augment the evidence it presented at Nelson's initial trial with evidence of prior convictions it opted not to introduce in the first place. Because this result embodies the classic double jeopardy evil of a State "honing its trial strategies and perfecting its evidence through successive attempts at conviction," *Tibbs* v. *Florida*, 457 U. S. 31, 41 (1982), I dissent.

I

The Double Jeopardy Clause is "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U. S. 184, 187 (1957). Reflecting this principle, we held in *Burks* that the prohibition against double jeopardy prevents retrial where a State's evidence at trial is found insufficient. See also *Hudson* v. *Louisiana*, 450 U. S. 40 (1981); *Greene* v. *Massey*, 437 U. S. 19 (1978). The *Burks* rule is based on the time-honored notion that the State should be given only "one fair opportunity to offer whatever proof it [can] assemble." *Burks*, *supra*, at 16. Unlike a finding of reversible trial error, which traditionally has not barred retrial, see *United States* v. *Tateo*, 377 U. S. 463 (1964); *United States* v. *Ball*, 163 U. S. 662 (1896), reversal for evidentiary insufficiency "constitute[s] a decision to the effect that the government has failed to prove its case." *Burks*, *supra*, at 15.

This case is troubling in a number of respects, not the least of which is that no one in the Arkansas criminal justice system seems to have taken Nelson's pardon claim at all seri-

ously. At bottom, however, this case is controlled by the *Burks* insufficiency principle. For under Arkansas' law of pardons, the State's evidence against Nelson in his sentencing trial was *at all times* insufficient to prove four valid prior convictions. The majority errs in treating this as a case of mere trial error, and in reaching the unsettled issue whether, after a trial error reversal based on the improper admission of evidence, a reviewing court should evaluate the sufficiency of the evidence by including, or excluding, the tainted evidence. See *Greene* v. *Massey*, *supra*, at 26, n. 9 (expressly reserving this question). This case has nothing to do with inadmissible evidence and everything to do with Arkansas' defective proof.

As the District Court noted in ruling for Nelson, Arkansas decisional law holds that pardoned convictions have no probative value in sentence enhancement proceedings. See 641 F. Supp. 174, 183 (ED Ark. 1986) (under Arkansas law: "[A] pardon renders the conviction a nullity. . . . [F]or purposes of the enhancement statute, a conviction which has been pardonned *[sic]* is not a conviction"). The District Court cited a 1973 decision of the Arkansas Supreme Court, *Duncan* v. *State*, 254 Ark. 449, 494 S. W. 2d 127 (1973), which held that a pardoned conviction cannot be counted toward the four prior convictions required under the State's sentence enhancement statute. The *Duncan* court, *id.*, at 451, 494 S. W. 2d, at 129, quoted with approval this Court's decision in *Ex parte Garland*, 4 Wall. 333, 380 (1867), where we stated: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." Drawing upon that state-court holding, the District Court in this case concluded: "The truth is that the state could not

have provided any evidence to rebut the petitioner's contention because it did not exist." 641 F. Supp., at 184.[3]

That Arkansas was not roused to investigate Nelson's pardon claim until long after his trial does not transform the State's failure of proof—fatal for double jeopardy purposes under *Burks*—into a mere failure of admissibility. As the District Court noted, Arkansas law establishes "that the prosecutor must carry the significant burden of ferreting out information regarding the validity of prior convictions whenever he seeks enhancement." 641 F. Supp., at 184 (citing *Roach* v. *State*, 255 Ark. 773, 503 S. W. 2d 467 (1973)). The delay in the discovery of Nelson's pardon does not change the essential fact that, as a matter of state law, the paper evidence of the disputed conviction presented by the prosecutor was devoid of probative value from the moment the conviction was expunged by the pardon. A pardon simply "blots out of existence" the conviction as if it had never happened. *Duncan* v. *State*, *supra*, at 451, 494 S. W. 2d, at 129. If, in seeking to prove Nelson's four prior convictions, the State had offered documented evidence to prove three valid prior convictions and a blank piece of paper to prove a fourth, no one would doubt that Arkansas had produced insufficient evidence and that the Double Jeopardy Clause barred retrial. There is no constitutionally significant difference between that hypothetical and this case.[4]

---

[3] The Court of Appeals did not disturb this determination of the District Court. Rather, it focused upon, and rejected, Arkansas' separate contention that double jeopardy does not attach to sentence enhancement trials. See 828 F. 2d 446, 449 (CA8 1987). That issue is not before this Court, Arkansas having conceded the validity of this aspect of the Court of Appeals' ruling. See *ante*, at 36–37, n. 4. The Court of Appeals also rejected as incorrect Arkansas' claim that, in cases of trial error, reviewing courts should not engage in *any* subsequent review for insufficiency, however measured. 828 F. 2d, at 450.

[4] The majority offers its own analogy: the discovery of Nelson's pardon, it states, is like "newly discovered evidence." *Ante*, at 41, n. 7. The majority overlooks a critical distinction. The emergence of new evidence in

In sum, Arkansas had "one fair opportunity to offer whatever proof it could assemble" that Nelson had four prior convictions, *Burks*, 437 U. S., at 16, but it "failed to prove its case." *Id.*, at 15. In reversing both the District Court and the Court of Appeals to give Arkansas a second chance to sentence Nelson as a habitual offender, the majority pays no more than lipservice to the *Burks* insufficiency principle. I would therefore hold that the Double Jeopardy Clause prohibits Arkansas from subjecting Nelson to a new sentencing trial at which it can "supply evidence" of a fourth conviction "which it failed to muster in the first proceeding." *Id.*, at 11.

II

Even if I did not regard this as a case of insufficient evidence controlled by *Burks*, I could not join my colleagues in the majority. The question whether a reviewing court, in evaluating insufficiency for double jeopardy purposes, should look to all the admitted evidence, or just the properly admitted evidence, is a complex one. It is worthy of the thoughtful consideration typically attending this Court's decisions concerning the Double Jeopardy Clause.

The majority instead resolves this issue as if it had already been decided. *Ante*, at 40–41. In the majority's view: "It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause." *Ibid.* *Burks* decided no such thing. At issue in *Burks* was whether a finding of initial insufficiency bars a defendant's retrial; we held that it did.

---

no way strips the old evidence of all probative value; while new evidence may cast doubt on the persuasiveness of the old evidence, its emergence does not render once sufficient evidence "insufficient." Arkansas' law of pardons, by contrast, robs evidence of a pardoned conviction of all probative value. It was thus not the *discovery* of Nelson's pardon that stripped his prior conviction of evidentiary weight, but rather the fact of the pardon itself. The discovery of Nelson's pardon merely called the parties' attention to this critical fact.

Burks did not presume to decide the completely distinct issue, raised by this case, of by what measure a reviewing court evaluates insufficiency in cases where a piece of evidence which went to the jury is later ruled inadmissible. Indeed, had *Burks* settled or even logically foreclosed this issue, there would have been no reason for us specifically to reserve its resolution in *Greene* v. *Massey*, 437 U. S., at 26, n. 9—a case decided the very same day as *Burks*.[5]

It seems to me that the Court's analysis of this issue should begin with the recognition that, in deciding when the double jeopardy bar should apply, we are balancing two weighty interests: the defendant's interest in repose and society's interest in the orderly administration of justice. See, *e. g.*, *United States* v. *Tateo*, 377 U. S., at 466. The defendant's interest in avoiding successive trials on the same charge reflects the idea that the State

> "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., at 187–188.

---

[5] None of the numerous appellate court cases cited by the majority in support of its resolution of this issue, *ante*, at 41, n. 8, interpreted *Burks* as disposing of the sufficiency question before us. Rather, with varying degrees of analysis, these courts evaluated the ramifications of including or excluding tainted evidence in a sufficiency analysis upon the interests of the defendant and of society—precisely the analytic approach I urge in the succeeding paragraphs. See, *e. g.*, *United States* v. *Tranowski*, 702 F. 2d 668, 671 (CA7 1983) (concluding that policy arguments favor including tainted evidence in insufficiency analysis), cert. denied, 468 U. S. 1217 (1984); *Bullard* v. *Estelle*, 665 F. 2d 1347, 1358–1361 (CA5 1982) (using similar interest analysis in case involving retrial for sentence enhancement and concluding that inadmissible evidence should not be included in insufficiency analysis).

See also *Burks*, *supra*, at 11. Society's corresponding interest in the sound administration of justice reflects the fact that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, *supra*, at 466.

I do not intend in this dissenting opinion to settle what rule best accommodates these competing interests in cases where a reviewing court has determined that a portion of a State's proof was inadmissible. At first blush, it would seem that the defendant's interest is every bit as great in this situation as in the *Burks* situation. Society's interest, however, would appear to turn on a number of variables. The chief one is the likelihood that retrying the defendant will lead to conviction. See *United States* v. *Tateo*, *supra*, at 466 (noting society's interest "in punishing one whose guilt is clear"). In appraising this likelihood, one might inquire into whether prosecutors tend in close cases to hold back probative evidence of a defendant's guilt; if they do not, there would be scant societal interest in permitting retrial given that the State's remaining evidence is, by definition, insufficient.[6] Alternatively, one might inquire as to why the evidence at issue was deemed inadmissible. Where evidence was stricken for reasons having to do with its unreliability, it would seem curious to include it in the sufficiency calculus. Inadmissible hearsay evidence, for example, or evidence deemed defective or nonprobative as a matter of law thus might not be included. By contrast, evidence stricken in compliance with evidentiary rules grounded in other public policies—the policy of encouraging subsequent remedial measures embodied in Federal Rule of Evidence 407, for ex-

[6] It is no answer to say that prosecutors who initially lacked sufficient admissible evidence may gather more before a retrial. Such conduct is precisely what the Double Jeopardy Clause was designed to guard against. See *Tibbs* v. *Florida*, 457 U. S. 31, 41 (1982).

ample, or the policy of deterring unconstitutional searches and seizures embodied in the exclusionary rule—might more justifiably be included in a double jeopardy sufficiency analysis.[7]

The Court today should have enunciated rules of this type, rules calibrated to accommodate, as best as possible, the defendant's interest in repose with society's interest in punishing the guilty. Regrettably, the majority avoids such subtlety in its terse opinion. Instead, it opts for a declaration that our decision in *Burks*—although no one knew it at the time—was settling the issue on which we granted certiorari here. This is *ipse dixit* jurisprudence of the worst kind. I dissent.

---

[7] Arkansas suggests a "clear trial court ruling" test as a means of accommodating defense and societal interests. Under this test, where a trial court has affirmatively ruled that a piece of evidence is admissible, a State is entitled to rely on that ruling by counting this evidence in a subsequent insufficiency analysis—even if a reviewing court had ruled the evidence inadmissible. Brief for Petitioner 12. This test furthers a societal interest of which this Court took note in *United States* v. *Tateo*, 377 U. S. 463, 466 (1964): the interest in not deterring appellate courts from safeguarding defendants' rights. It is not at all clear, however, that Arkansas' test would authorize retrial in this case. Far from having refrained from introducing evidence of additional convictions in reliance on a trial court's determination that Nelson had not received a pardon, the prosecutor in this case seems to have done all he could to lead the trial court to believe that Nelson's pardon claim was meritless. See n. 2, *supra*.

Syllabus

ARIZONA *v.* YOUNGBLOOD

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 86–1904. Argued October 11, 1988—Decided November 29, 1988

The victim, a 10-year-old boy, was molested and sodomized by a middle-aged man for 1½ hours. After the assault, the boy was taken to a hospital where a physician used a swab from a "sexual assault kit" to collect semen samples from the boy's rectum. The police also collected the boy's clothing, which they failed to refrigerate. A police criminologist later performed some tests on the rectal swab and the boy's clothing, but he was unable to obtain information about the identity of the boy's assailant. At trial, expert witnesses testified that respondent might have been completely exonerated by timely performance of tests on properly preserved semen samples. Respondent was convicted of child molestation, sexual assault, and kidnaping in an Arizona state court. The Arizona Court of Appeals reversed the conviction on the ground that the State had breached a constitutional duty to preserve the semen samples from the victim's body and clothing.

Held: The Due Process Clause of the Fourteenth Amendment did not require the State to preserve the semen samples even though the samples might have been useful to respondent. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Here, the police's failure to refrigerate the victim's clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's expert, who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and this Court agrees—that there was no suggestion of bad faith on the part of the police. Moreover, the Due Process Clause was not violated because the State failed to perform a newer test on the semen samples. The police do not have a constitutional duty to perform any particular tests. Pp. 55–59.

153 Ariz. 50, 734 P. 2d 592, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 59. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 61.

John R. Gustafson argued the cause for petitioner. With him on the brief were *Stephen D. Neely*, *James M. Howard*, and *Deborah Strange Ward*.

Daniel F. Davis argued the cause and filed a brief for respondent.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Larry Youngblood was convicted by a Pima County, Arizona, jury of child molestation, sexual assault, and kidnaping. The Arizona Court of Appeals reversed his conviction on the ground that the State had failed to preserve semen samples from the victim's body and clothing. 153 Ariz. 50, 734 P. 2d 592 (1986). We granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.

On October 29, 1983, David L., a 10-year-old boy, attended a church service with his mother. After he left the service at about 9:30 p.m., the boy went to a carnival behind the church, where he was abducted by a middle-aged man of medium height and weight. The assailant drove the boy to a secluded area near a ravine and molested him. He then took the boy to an unidentified, sparsely furnished house where he sodomized the boy four times. Afterwards, the assailant tied the boy up while he went outside to start his car. Once the assailant started the car, albeit with some difficulty, he returned to the house and again sodomized the boy. The assailant then sent the boy to the bathroom to wash up before he returned him to the carnival. He threatened to kill the boy if he told anyone about the attack. The entire ordeal lasted about 1½ hours.

After the boy made his way home, his mother took him to Kino Hospital. At the hospital, a physician treated the boy for rectal injuries. The physician also used a "sexual assault kit" to collect evidence of the attack. The Tucson Police De-

partment provided such kits to all hospitals in Pima County for use in sexual assault cases. Under standard procedure, the victim of a sexual assault was taken to a hospital, where a physician used the kit to collect evidence. The kit included paper to collect saliva samples, a tube for obtaining a blood sample, microscopic slides for making smears, a set of Q-Tip-like swabs, and a medical examination report. Here, the physician used the swab to collect samples from the boy's rectum and mouth. He then made a microscopic slide of the samples. The doctor also obtained samples of the boy's saliva, blood, and hair. The physician did not examine the samples at any time. The police placed the kit in a secure refrigerator at the police station. At the hospital, the police also collected the boy's underwear and T-shirt. This clothing was not refrigerated or frozen.

Nine days after the attack, on November 7, 1983, the police asked the boy to pick out his assailant from a photographic lineup. The boy identified respondent as the assailant. Respondent was not located by the police until four weeks later; he was arrested on December 9, 1983.

On November 8, 1983, Edward Heller, a police criminologist, examined the sexual assault kit. He testified that he followed standard department procedure, which was to examine the slides and determine whether sexual contact had occurred. After he determined that such contact had occurred, the criminologist did not perform any other tests, although he placed the assault kit back in the refrigerator. He testified that tests to identify blood group substances were not routinely conducted during the initial examination of an assault kit and in only about half of all cases in any event. He did not test the clothing at this time.

Respondent was indicted on charges of child molestation, sexual assault, and kidnaping. The State moved to compel respondent to provide blood and saliva samples for comparison with the material gathered through the use of the sexual assault kit, but the trial court denied the motion on the

ground that the State had not obtained a sufficiently large semen sample to make a valid comparison. The prosecutor then asked the State's criminologist to perform an ABO blood group test on the rectal swab sample in an attempt to ascertain the blood type of the boy's assailant. This test failed to detect any blood group substances in the sample.

In January 1985, the police criminologist examined the boy's clothing for the first time. He found one semen stain on the boy's underwear and another on the rear of his T-shirt. The criminologist tried to obtain blood group substances from both stains using the ABO technique, but was unsuccessful. He also performed a P–30 protein molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity. The Tucson Police Department had just begun using this test, which was then used in slightly more than half of the crime laboratories in the country.

Respondent's principal defense at trial was that the boy had erred in identifying him as the perpetrator of the crime. In this connection, both a criminologist for the State and an expert witness for respondent testified as to what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing had the clothing been properly refrigerated. The court instructed the jury that if they found the State had destroyed or lost evidence, they might "infer that the true fact is against the State's interest." 10 Tr. 90.

The jury found respondent guilty as charged, but the Arizona Court of Appeals reversed the judgment of conviction. It stated that "'when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'" 153 Ariz., at 54, 734 P. 2d, at 596, quoting *State* v. *Escalante*, 153 Ariz. 55, 61, 734 P. 2d 597, 603 (App. 1986). The Court of Ap-

peals concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent. The Court of Appeals reached this conclusion even though it did "not imply any bad faith on the part of the State." 153 Ariz., at 54, 734 P. 2d, at 596. The Supreme Court of Arizona denied the State's petition for review, and we granted certiorari. 485 U. S. 903 (1988). We now reverse.

Decision of this case requires us to again consider "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867 (1982). In *Brady* v. *Maryland*, 373 U. S. 83 (1963), we held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. In *United States* v. *Agurs*, 427 U. S. 97 (1976), we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *Id.*, at 111; see also *Moore* v. *Illinois*, 408 U. S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

There is no question but that the State complied with *Brady* and *Agurs* here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs*. Our most recent decision in this area of the law, *California* v. *Trombetta*, 467 U. S. 479 (1984), arose out of a drunken driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, "the officers here were acting in 'good faith and in accord with their normal practice,'" *id.*, at 488, quoting *Killian* v. *United States*, 368 U. S. 231, 242 (1961); second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, 467 U. S., at 489; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." *Id.*, at 490. In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*, but here, unlike in *Trombetta*, the State did not attempt to make any use of the materials in its own case in chief.*

---

*In this case, the Arizona Court of Appeals relied on its earlier decision in *State* v. *Escalante*, 153 Ariz. 55, 734 P. 2d 597 (1986), holding that "'when identity is an issue at trial and the police permit destruction of evidence that *could eliminate* a defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'" 153 Ariz. 50, 54, 734 P. 2d 592, 596 (1986), quoting *Escalante*, *supra*, at 61, 734 P. 2d, at 603 (emphasis added). The reasoning in *Escalante* and the instant case mark a sharp departure from *Trombetta* in two respects. First, *Trombetta* speaks of evidence whose exculpatory value is "apparent." 467 U. S., at 489. The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*. Second, we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent

Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In *United States* v. *Marion*, 404 U. S. 307 (1971), we said that "[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.*, at 325; see also *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977). Similarly, in *United States* v. *Valenzuela-Bernal*, *supra*, we considered whether the Government's deportation of two witnesses who were illegal aliens violated due process. We held that the prompt deportation of the witnesses was justified "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." *Id.*, at 872.

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, *supra*, at 486, that "[w]henever potentially excul-

---

"*before* the evidence was destroyed." *Ibid.* (emphasis added). Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Cf. *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959).

patory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see *Lisenba* v. *California*, 314 U. S. 219, 236 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i. e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and we agree—that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P–30 test. 153 Ariz., at 54, 734 P. 2d, at 596. If the court meant by this statement

that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

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

Reversed.

JUSTICE STEVENS, concurring in the judgment.

Three factors are of critical importance to my evaluation of this case. First, at the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police—who were still conducting an investigation—and to the prosecutor—who would later bear the burden of establishing guilt beyond a reasonable doubt—than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Second, although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission. In examining witnesses and in her summation, defense counsel impressed upon the jury the fact that the State failed to preserve the evidence and that the State could have conducted tests that might well have exonerated the defendant. See App. to Pet. for Cert. C21–C38, C42–C45; 9 Tr. 183–202, 207–208; 10 Tr. 58–61, 69–70. More significantly, the trial judge instructed the jury: "If you find that the State has . . . allowed to be destroyed or lost any evidence whose

content or quality are in issue, you may infer that the true fact is against the State's interest." 10 Tr. 90. As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage.

Third, the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was "immaterial." Our cases make clear that "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," and that a State's failure to turn over (or preserve) potentially exculpatory evidence therefore "must be evaluated in the context of the entire record." *United States* v. *Agurs*, 427 U. S. 97, 112 (1976) (footnotes omitted); see also *California* v. *Trombetta*, 467 U. S. 479, 488 (1984) (duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense"). In declining defense counsel's and the court's invitations to draw the permissive inference, the jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory. In *Trombetta*, this Court found no due process violation because "the chances [were] extremely low that preserved [breath] samples would have been exculpatory." *Id.*, at 489. In this case, the jury has already performed this calculus based on its understanding of the evidence introduced at trial. Presumably, in a case involving a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory.

With these factors in mind, I concur in the Court's judgment. I do not, however, join the Court's opinion because it announces a proposition of law that is much broader than necessary to decide this case. It states that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a

denial of due process of law." *Ante*, at 58. In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. Accordingly, I concur in the judgment.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law. In reversing the judgment of the Arizona Court of Appeals, this Court, in my view, misreads the import of its prior cases and unduly restricts the protections of the Due Process Clause. An understanding of due process demonstrates that the evidence which was allowed to deteriorate was "constitutionally material," and that its absence significantly prejudiced respondent. Accordingly, I dissent.

I

The Court, with minimal reference to our past cases and with what seems to me to be less than complete analysis, announces that "unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Ante*, at 58. This conclusion is claimed to be justified because it limits the extent of police responsibility "to that class of cases where the interests of justice most clearly require it, *i. e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Ibid.* The majority has identified clearly one type of violation, for police action affirmatively

aimed at cheating the process undoubtedly violates the Constitution. But to suggest that this is the only way in which the Due Process Clause can be violated cannot be correct. Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process.

The Court's most recent pronouncement in "what might loosely be called the area of constitutionally guaranteed access to evidence," *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867 (1982), is in *California* v. *Trombetta*, 467 U. S. 479 (1984). *Trombetta* addressed "the question whether the Amendment . . . demands that the State preserve potentially exculpatory evidence on behalf of defendants." *Id.*, at 481. JUSTICE MARSHALL, writing for the Court, noted that while the particular question was one of first impression, the general standards to be applied had been developed in a number of cases, including *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *United States* v. *Agurs*, 427 U. S. 97 (1976).[1] Those

[1] The Court's discussion in *Trombetta* also noted other cases: In *Napue* v. *Illinois*, 360 U. S. 264 (1959), the prosecution failed to inform the defense and the trial court that one of its witnesses had testified falsely that he had not been promised favorable treatment in return for testifying. The Court noted that a conviction obtained by the knowing use of such testimony must fall, and suggested that the conviction is invalid even when the perjured testimony is "'not the result of guile or a desire to prejudice . . . for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'" *Id.*, at 270, quoting *People* v. *Savvides*, 1 N. Y. 2d 554, 557, 136 N. E. 2d 853, 854–855 (1956). In *Giglio* v. *United States*, 405 U. S. 150 (1972), the Court required a federal prosecutor to reveal a promise of nonprosecution if a witness testified, holding that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Id.*, at 154. The good faith of the prosecutor thus was irrelevant for purposes of due process. And in *Roviaro* v. *United States*, 353 U. S. 53 (1957), the Court held that in some cases the Government must disclose to the defense the identity of a confidential informant. There was no discussion of any requirement of bad faith.

cases in no way require that government actions that deny a defendant access to material evidence be taken in bad faith in order to violate due process.

As noted by the majority, *ante*, at 55, the Court in *Brady* ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U. S., at 87. The *Brady* Court went on to explain that the principle underlying earlier cases, *e. g.*, *Mooney* v. *Holohan*, 294 U. S. 103 (1935) (violation of due process when prosecutor presented perjured testimony), is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U. S., at 87. The failure to turn over material evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile.'" *Id.*, at 88 (quoting lower court opinion).

In *Trombetta*, the Court also relied on *United States* v. *Agurs*, 427 U. S., at 107, which required a prosecutor to turn over to the defense evidence that was "clearly supportive of a claim of innocence" even without a defense request. The Court noted that the prosecutor's duty was not one of constitutional dimension unless the evidence was such that its "omission deprived the defendant of a fair trial," *id.*, at 108, and explained:

> "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not

the character of the prosecutor." *Id.*, at 110 (footnote omitted).[2]

Agurs thus made plain that the prosecutor's state of mind is *not* determinative. Rather, the proper standard must focus on the materiality of the evidence, and that standard "must reflect our overriding concern with the justice of the finding of guilt." *Id.*, at 112.[3]

Brady and *Agurs* could not be more clear in their holdings that a prosecutor's bad faith in interfering with a defendant's access to material evidence is *not* an essential part of a due process violation. Nor did *Trombetta* create such a requirement. *Trombetta*'s initial discussion focused on the due process requirement "that criminal defendants be afforded a meaningful opportunity to present a complete defense," 467 U. S., at 485, and then noted that the delivery of exculpatory evidence to the defendant "protect[s] the innocent from erro-

---

[2] The *Agurs* Court went on to note that the standard to be applied in considering the harm suffered by the defendant was different from the standard applied when new evidence is discovered by a neutral source after trial. The prosecutor is "the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" 427 U. S., at 111, quoting *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Holding the prosecution to a higher standard is necessary, lest the "special significance to the prosecutor's obligation to serve the cause of justice" be lost. 427 U. S., at 111.

[3] Nor does *United States* v. *Valenzuela-Bernal*, 458 U. S. 858 (1982), provide support for the majority's "bad faith" requirement. In that case a defendant was deprived of certain testimony at his trial when the Government deported potential witnesses after determining that they possessed no material evidence relevant to the criminal trial. These deportations were not the result of malice or negligence, but were carried out pursuant to immigration policy. *Id.*, at 863–866. Consideration of the Government's motive was only the first step in the due process inquiry. Because the Government acted in good faith, the defendant was required to make "a plausible showing" that "the evidence lost would be both material and favorable to the defense." *Id.*, at 873. In *Valenzuela-Bernal*, the defendant was not able to meet that burden. Under the majority's "bad faith" test, the defendant would have no opportunity to try.

neous conviction and ensur[es] the integrity of our criminal justice system." *Ibid.* Although the language of *Trombetta* includes a quotation in which the words "in good faith" appear, those words, for two reasons, do not have the significance claimed for them by the majority. First, the words are the antecedent part of the fuller phrase "in good faith and in accord with their normal practice." *Id.*, at 488. That phrase has its source in *Killian* v. *United States*, 368 U. S. 231, 242 (1961), where the Court held that the practice of discarding investigators' notes, used to compile reports that were then received in evidence, did not violate due process.[4] In both *Killian* and *Trombetta*, the importance of police compliance with *usual procedures* was manifest. Here, however, the same standard of conduct cannot be claimed. There has been no suggestion that it was the usual procedure to ignore the possible deterioration of important evidence, or generally to treat material evidence in a negligent or reckless manner. Nor can the failure to refrigerate the clothing be squared with the careful steps taken to preserve the sexual-assault kit. The negligent or reckless failure to preserve important evidence just cannot be "in accord with . . . normal practice."

Second, and more importantly, *Trombetta* demonstrates that the absence of bad faith does not end the analysis. The determination in *Trombetta* that the prosecution acted in good faith and according to normal practice merely prefaced the primary inquiry, which centers on the "constitutional materiality" of the evidence itself. 467 U. S., at 489. There is

---

[4] In *Killian*, the notes in question related to witnesses' statements, were used to prepare receipts which the witnesses then signed, and were destroyed in accord with usual practice. 368 U. S., at 242. Had it not been the usual practice of the agents to destroy their notes, or if no reports had been prepared from those notes before they were destroyed, a different question, closer to the one the Court decides today, would have been presented.

nothing in *Trombetta* that intimates that good faith alone should be the measure.[5]

The cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can result in a violation of due process. As *Agurs* points out, it makes no sense to overturn a conviction because a malicious prosecutor withholds information that he mistakenly believes to be material, but which actually would have been of no help to the defense. 427 U. S., at 110. In the same way, it makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness, simply because the police were inept rather than malicious.

I also doubt that the "bad faith" standard creates the bright-line rule sought by the majority. Apart from the inherent difficulty a defendant would have in obtaining evidence to show a lack of good faith, the line between "good faith" and "bad faith" is anything but bright, and the majority's formulation may well create more questions than it answers. What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient? Does "good faith police work" require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith? While the majority leaves these questions for

[5] The cases relied upon by the majority for the proposition that bad faith is necessary to show a due process violation, *United States* v. *Marion*, 404 U. S. 307 (1971), and *United States* v. *Lovasco*, 431 U. S. 783 (1977), concerned claims that preindictment delay violated due process. The harm caused by such delay is certainly more speculative than that caused by the deprivation of material exculpatory evidence, and in such cases statutes of limitations, not the Due Process Clause, provide the primary protection for defendants' interests. Those cases are a shaky foundation for the radical step taken by the Court today.

another day, its quick embrace of a "bad faith" standard has not brightened the line; it only has moved the line so as to provide fewer protections for criminal defendants.

II

The inquiry the majority eliminates in setting up its "bad faith" rule is whether the evidence in question here was "constitutionally material," so that its destruction violates due process. The majority does not say whether "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," *ante*, at 57, is, for purposes of due process, material. But because I do not find the question of lack of bad faith dispositive, I now consider whether this evidence was such that its destruction rendered respondent's trial fundamentally unfair.

Trombetta requires that a court determine whether the evidence possesses "an exculpatory value that was apparent before the evidence was destroyed," and whether it was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U. S., at 489. In *Trombetta* neither requirement was met. But it is important to note that the facts of *Trombetta* differed significantly from those of this case. As such, while the basic standards set by *Trombetta* are controlling, the inquiry here must be more finely tuned.

In *Trombetta*, samples of breath taken from suspected drunk drivers had been discarded after police had tested them using an Intoxilyzer, a highly accurate and reliable device for measuring blood-alcohol concentration levels. *Id.*, at 481–482. The Court reasoned that the likelihood of the posttest samples proving to be exculpatory was extremely low, and further observed that the defendants were able to attack the reliability of the test results by presenting evidence of the ways in which the Intoxilyzer might have malfunctioned. This case differs from *Trombetta* in that here no

conclusive tests were performed on the relevant evidence. There is a distinct possibility in this case, one not present in *Trombetta*, that a proper test would have exonerated respondent, unrebutted by any other conclusive test results. As a consequence, although the discarded evidence in *Trombetta* had impeachment value (*i. e.*, it might have shown that the test results were incorrect), here what was lost to the respondent was the possibility of complete exoneration. *Trombetta*'s specific analysis, therefore, is not directly controlling.

The exculpatory value of the clothing in this case cannot be determined with any certainty, precisely because the police allowed the samples to deteriorate. But we do know several important things about the evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecreter, *i. e.*, someone who does not secrete a blood-type "marker" into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. See *Hilliard* v. *Spalding*, 719 F. 2d 1443, 1446–1447 (CA9 1983); *People* v. *Nation*, 26 Cal. 3d 169, 176–177, 604 P. 2d 1051, 1054–1055 (1980). Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecreter, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secreter.

If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecreter, its constitutional materiality would be clear. But the State's conduct has deprived the defendant, and the courts, of the opportunity to determine with certainty the import of this evidence: it has "interfere[d] with

the accused's ability to present a defense by imposing on him a requirement which the government's own actions have rendered impossible to fulfill." *Hilliard* v. *Spalding*, 719 F. 2d, at 1446. Good faith or not, this is intolerable, unless the particular circumstances of the case indicate either that the evidence was not likely to prove exculpatory, or that the defendant was able to use effective alternative means to prove the point the destroyed evidence otherwise could have made.

I recognize the difficulties presented by such a situation.[6] The societal interest in seeing criminals punished rightly requires that indictments be dismissed only when the unavailability of the evidence prevents the defendant from receiving a fair trial. In a situation where the substance of the lost evidence is known, the materiality analysis laid out in *Trombetta* is adequate. But in a situation like the present one, due process requires something more. Rather than allow a State's ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process. To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.

---

[6] We noted in *California* v. *Trombetta*, 467 U. S. 479, 486 (1984): "The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." While the inquiry is a difficult one, I do not read *Trombetta* to say, nor do I believe, that it is impossible. Respect for constitutional rights demands that the inquiry be made.

The first inquiry under this standard concerns the particular evidence itself. It must be of a type which is clearly relevant, a requirement satisfied, in a case where identity is at issue, by physical evidence which has come from the assailant. Samples of blood and other body fluids, fingerprints, and hair and tissue samples have been used to implicate guilty defendants, and to exonerate innocent suspects. This is not to say that all physical evidence of this type must be preserved. For example, in a case where a blood sample is found, but the circumstances make it unclear whether the sample came from the assailant, the dictates of due process might not compel preservation (although principles of sound investigation might certainly do so). But in a case where there is no doubt that the sample came from the assailant, the presumption must be that it be preserved.

A corollary, particularly applicable to this case, is that the evidence embody some immutable characteristic of the assailant which can be determined by available testing methods. So, for example, a clear fingerprint can be compared to the defendant's fingerprints to yield a conclusive result; a blood sample, or a sample of body fluid which contains blood markers, can either completely exonerate or strongly implicate a defendant. As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise. See *Clark* v. *Jeter*, 486 U. S. 456, 465 (1988). The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable.

The next inquiry is whether the evidence, which was obviously relevant and indicates an immutable characteristic of the actual assailant, is of a type likely to be independently exculpatory. Requiring the defendant to prove that the particular piece of evidence probably would be independently ex-

culpatory would require the defendant to prove the content of something he does not have because of the State's misconduct. Focusing on the *type* of evidence solves this problem. A court will be able to consider the type of evidence and the available technology, as well as the circumstances of the case, to determine the likelihood that the evidence might have proved to be exculpatory. The evidence must also be without equivalent in the particular case. It must not be cumulative or collateral, cf. *United States* v. *Agurs*, 427 U. S., at 113–114, and must bear directly on the question of innocence or guilt.

Due process must also take into account the burdens that the preservation of evidence places on the police. Law enforcement officers must be provided the option, as is implicit in *Trombetta*, of performing the proper tests on physical evidence and then discarding it.[7] Once a suspect has been arrested the police, after a reasonable time, may inform defense counsel of plans to discard the evidence. When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense. There should also be flexibility to deal with evidence that is unusually dangerous or difficult to store.

III

Applying this standard to the facts of this case, I conclude that the Arizona Court of Appeals was correct in overturning respondent's conviction. The clothing worn by the victim contained samples of his assailant's semen. The appeals court found that these samples would probably be larger, less contaminated, and more likely to yield conclusive test results than would the samples collected by use of the assault kit. 153 Ariz. 50, 54, 734 P. 2d 592, 596 (1986). The cloth-

[7] There is no need in this case to discuss whether the police have a duty to test evidence, or whether due process requires that police testing be on the "cutting edge" of technology. But uncertainty as to these questions only highlights the importance of preserving evidence, so that the defense has the opportunity at least to use whatever scientifically recognized tests are available. That is all that is at issue in this case.

ing and the semen stains on the clothing therefore obviously were material.

Because semen is a body fluid which could have been tested by available methods to show an immutable characteristic of the assailant, there was a genuine possibility that the results of such testing might have exonerated respondent. The only evidence implicating respondent was the testimony of the victim.[8] There was no other eyewitness, and the only other significant physical evidence, respondent's car, was seized by police, examined, turned over to a wrecking company, and then dismantled without the victim's having viewed it. The police also failed to check the car to confirm or refute elements of the victim's testimony.[9]

[8] This Court "has recognized the inherently suspect qualities of eyewitness identification evidence." *Watkins* v. *Sowders*, 449 U. S. 341, 350 (1981) (BRENNAN, J., dissenting). Such evidence is "notoriously unreliable," *ibid.*; see *United States* v. *Wade*, 388 U. S. 218, 228 (1967); *Manson* v. *Brathwaite*, 432 U. S. 98, 111–112 (1977), and has distinct impacts on juries. "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" E. Loftus, Eyewitness Testimony 19 (1979).

Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults. See generally Cohen & Harnick, The Susceptibility of Child Witnesses to Suggestion, 4 Law and Human Behavior 201 (1980). Other studies show another element of possible relevance in this case: "Cross-racial identifications are much less likely to be accurate than same race identifications." Rahaim & Brodsky, Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 (1982). These authorities suggest that eyewitness testimony alone, in the absence of corroboration, is to be viewed with some suspicion.

[9] The victim testified that the car had a loud muffler, that country music was playing on its radio, and that the car was started using a key. Respondent and others testified that his car was inoperative on the night of the incident, that when it was working it ran quietly, that the radio did not work, and that the car could be started only by using a screwdriver. The police did not check any of this before disposing of the car. See 153 Ariz. 50, 51–52, 734 P. 2d 592, 593–594 (App. 1986).

Although a closer question, there was no equivalent evidence available to respondent. The swab contained a semen sample, but it was not sufficient to allow proper testing. Respondent had access to other evidence tending to show that he was not the assailant, but there was no other evidence that would have shown that it was physically impossible for respondent to have been the assailant. Nor would the preservation of the evidence here have been a burden upon the police. There obviously was refrigeration available, as the preservation of the swab indicates, and the items of clothing likely would not tax available storage space.

Considered in the context of the entire trial, the failure of the prosecution to preserve this evidence deprived respondent of a fair trial. It still remains "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S. 358, 372 (1970) (concurring opinion). The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law. Because the Court's opinion improperly limits the scope of due process, and ignores its proper focus in a futile pursuit of a bright-line rule,[10] I dissent.

---

[10] Even under the standard articulated by the majority the proper resolution of this case should be a remand to consider whether the police did act in good faith. The Arizona Court of Appeals did not state in its opinion that there was no bad faith on the part of the police. Rather, it held that the proper standard to be applied was a consideration of whether the failure to preserve the evidence deprived respondent of a fair trial, and that, as a result, its holding did "not imply any bad faith on the part of the state." *Id.*, at 54, 734 P. 2d, at 596. But there certainly is a sufficient basis on this record for a finding that the police acted in bad faith. The destruction of respondent's car by the police (which in itself may serve on remand as an alternative ground for finding a constitutional violation, see

id., at 55, 734 P. 2d, at 597 (question left open)) certainly suggests that the police may have conducted their investigation with an improper animus. Although the majority provides no guidance as to how a lack of good faith is to be determined, or just how egregious police action must be, the police actions in this case raise a colorable claim of bad faith. If the Arizona courts on remand should determine that the failure to refrigerate the clothing was part of an overall investigation marred by bad faith, then, even under the majority's test, the conviction should be overturned.

PENSON *v.* OHIO

CERTIORARI TO THE COURT OF APPEALS OF OHIO, MONTGOMERY COUNTY

No. 87-6116. Argued October 12, 1988—Decided November 29, 1988

After the indigent petitioner and two codefendants were found guilty of several serious crimes in an Ohio state court, the new counsel appointed to represent petitioner on appeal filed with the Ohio Court of Appeals a document captioned "Certification of Meritless Appeal and Motion," which recited that the attorney had carefully reviewed the record, that he had found no errors requiring reversal, and that he would not file a meritless appeal, and which requested leave to withdraw. The court entered an order that granted the latter motion and that specified that the court would thereafter independently review the record thoroughly to determine whether any reversible error existed. The court later denied petitioner's request for the appointment of a new attorney. Subsequently, upon making its own examination of the record without the assistance of counsel for petitioner, the court noted that counsel's certification of meritlessness was "highly questionable" since petitioner had "several arguable claims," and, in fact, reversed one of petitioner's convictions for plain error, but concluded that petitioner "suffered no prejudice" as a result of "counsel's failure to give a more conscientious examination of the record" because the court had thoroughly examined the record and received the benefit of arguments advanced by the codefendants' counsel. The court therefore affirmed petitioner's convictions on the remaining counts, and the State Supreme Court dismissed his appeal.

Held:

1. Petitioner was deprived of constitutionally adequate representation on appeal by the Ohio Court of Appeals' failure to follow the procedures set forth in *Anders* v. *California*, 386 U. S. 738, for allowing appointed counsel for an indigent criminal defendant to withdraw from a first appeal as of right on the basis that the appeal is frivolous. Under those procedures, counsel must first conduct a "conscientious examination" of the case and support a request to withdraw with a brief referring to anything in the record that might arguably support the appeal, and the court must then conduct a full examination of all the proceedings and permit withdrawal if its separate inquiry reveals no nonfrivolous issue, but must appoint new counsel to argue the appeal if such an issue exists. The state court erred in two respects in not denying counsel's motion to withdraw. First, the motion was not supported with an "*Anders* brief," so

that the court was left without an adequate basis for determining that counsel had performed his duty of carefully searching the record for arguable error and was deprived of assistance in the court's own review of the record. Second, the court should not have acted on the motion before it made its own examination of the record to determine whether counsel's evaluation of the case was sound. Most significantly, the court erred by failing to appoint new counsel to represent petitioner after determining that the record supported "several arguable claims." Such a determination creates a constitutional imperative that counsel be appointed, since the need for forceful and vigorous advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not passed over is of paramount importance in our adversary system of justice, whether at the trial or the appellate stage. Pp. 79–85.

2. In cases such as this, it is inappropriate to apply either the lack of prejudice standard of *Strickland* v. *Washington*, 466 U. S. 668, or the harmless-error analysis of *Chapman* v. *California*, 386 U. S. 18. Such application would render the protections afforded by *Anders* meaningless, since the appellant would suffer no prejudice or harm from the denial of counsel and would thus have no basis for complaint, whether the court, on reviewing the bare appellate record, concluded either that the conviction should not be reversed or that there was a basis for reversal. The Court of Appeals' consideration of the appellate briefs filed on behalf of petitioner's codefendants does not alter this conclusion, since a criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy. More significantly, the question whether the briefs filed by the codefendants, along with the court's own review of the record, adequately focused the court's attention on petitioner's arguable claims is itself an issue that should have been resolved in an adversary proceeding. Furthermore, it is important that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process, since such a total denial is legally presumed to result in prejudice and can never be considered harmless error, whether at the trial or the appellate stage. Pp. 85–89.

Reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 89. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 89.

Gregory L. Ayers, by appointment of the Court, 485 U. S. 957, argued the cause for petitioner. With him on the briefs

were *Randall M. Dana*, *David C. Stebbins*, and *George A. Lyons*.

Mark B. Robinette argued the cause for respondent. With him on the brief was *Lee C. Falke*.*

JUSTICE STEVENS delivered the opinion of the Court.

In *Anders* v. *California*, 386 U. S. 738 (1967), we gave a negative answer to this question:

> "May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?" Brief for Petitioner in *Anders* v. *California*, O. T. 1966, No. 98, p. 2.

The question presented by this case is remarkably similar and therefore requires a similar answer.

I

Petitioner is indigent. After a trial in the Montgomery County, Ohio, Court of Common Pleas, he and two codefendants were found guilty of several serious crimes. Petitioner was sentenced to a term of imprisonment of 18 to 28 years. On January 8, 1985, new counsel was appointed to represent him on appeal. Counsel filed a timely notice of appeal.

On June 2, 1986, petitioner's appellate counsel filed with the Montgomery County, Ohio, Court of Appeals a document captioned "Certification of Meritless Appeal and Motion." Excluding this caption and the certificate evidencing its serv-

---

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Larry W. Yackle*, *John A. Powell*, *Steven R. Shapiro*, and *Kim Robert Fawcett;* and for the National Association of Criminal Defense Lawyers by *Bruce S. Rogow*.

Gloria A. Eyerly and *Harry R. Reinhart* filed a brief for the Ohio Association of Criminal Defense Lawyers as *amicus curiae*.

ice on the prosecutor's office and petitioner, the document in its entirety read as follows:

> "Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84–CR–1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84–CR–1401, and that he will not file a meritless appeal in this matter.
>
> "MOTION
>
> "Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion." App. 35–36.

A week later, the Court of Appeals entered an order allowing appellate counsel to withdraw and granting petitioner 30 days in which to file an appellate brief *pro se*. *Id.*, at 37. The order further specified that the court would thereafter "independently review the record thoroughly to determine whether any error exists requiring reversal or modification of the sentence . . . ." *Ibid.* Thus, counsel was permitted to withdraw before the court reviewed the record on nothing more than "a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief." Moreover, although granting petitioner several extensions of time to file a brief, the court denied petitioner's request for the appointment of a new attorney. No merits brief was filed on petitioner's behalf.

In due course, and without the assistance of any advocacy for petitioner, the Court of Appeals made its own examination of the record to determine whether petitioner received "a fair trial and whether any grave or prejudicial errors occurred therein." *Id.*, at 40. As an initial matter, the court noted that counsel's certification that the appeal was meritless was "highly questionable." *Ibid.* In reviewing the record and the briefs filed by counsel on behalf of petitioner's codefendants, the court found "several arguable claims." *Id.*, at 41. Indeed, the court concluded that plain error had been committed in the jury instructions concerning one count.[1] The court therefore reversed petitioner's conviction and sentence on that count but affirmed the convictions and sentences on the remaining counts. It concluded that petitioner "suffered no prejudice" as a result of "counsel's failure to give a more conscientious examination of the record" because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants. *Ibid.* Petitioner appealed the judgment of the Court of Appeals to the Ohio Supreme Court, which dismissed the appeal. *Id.*, at 45. We granted certiorari, 484 U. S. 1059 (1988), and now reverse.

II

Approximately a quarter of a century ago, in *Douglas* v. *California*, 372 U. S. 353 (1963), this Court recognized that the Fourteenth Amendment guarantees a criminal appellant the right to counsel on a first appeal as of right. We held

---

[1] Petitioner was charged in counts 5 and 6 of the indictment with felonious assault. App. 6–7; see Ohio Rev. Code Ann. § 2903.11(A)(2) (1987). In examining the record, the Court of Appeals discovered that the trial court neglected to instruct the jury concerning an element of this crime. Applying the State's plain-error doctrine, which requires a showing of substantial prejudice, the Court of Appeals reversed petitioner's conviction under count 6 of the indictment, but let stand his conviction under count 5. App. 41–43.

that a procedure in which appellate courts review the record and "appoint counsel if in their opinion" the assistance of counsel "would be helpful to the defendant or the court," *id.*, at 355, is an inadequate substitute for guaranteed representation.[2] Four years later, in *Anders* v. *California*, 386 U. S. 738 (1967), we held that a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal.

The *Anders* opinion did, however, recognize that in some circumstances counsel may withdraw without denying the indigent appellant fair representation provided that certain safeguards are observed: Appointed counsel is first required to conduct "a conscientious examination" of the case. *Id.*, at 744. If he or she is then of the opinion that the case is wholly frivolous, counsel may request leave to withdraw. The request "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Ibid.* Once the appellate court receives this brief, it must then itself conduct "a full examination of all the proceeding[s] to decide whether the case is wholly frivolous." *Ibid.* Only after this separate inquiry, and only after the appellate court finds no nonfrivolous issue for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel. On the other hand, if the court disagrees with counsel—as the Ohio Court of Appeals did in this case—and concludes that there are nonfrivolous issues for appeal, "it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Ibid.*

---

[2] In reaching this conclusion, the Court noted:

"At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required." 372 U. S., at 356.

It is apparent that the Ohio Court of Appeals did not follow the *Anders* procedures when it granted appellate counsel's motion to withdraw, and that it committed an even more serious error when it failed to appoint new counsel after finding that the record supported several arguably meritorious grounds for reversal of petitioner's conviction and modification of his sentence. As a result, petitioner was left without constitutionally adequate representation on appeal.

The Ohio Court of Appeals erred in two respects in granting counsel's motion for leave to withdraw. First, the motion should have been denied because counsel's "Certification of Meritless Appeal" failed to draw attention to "anything in the record that might arguably support the appeal."[3] *Ibid.* The so-called "*Anders* brief" serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case[4] and that

---

[3] Counsel's "Certification of Meritless Appeal," which simply noted that counsel, after carefully reviewing the record, "found no errors requiring reversal, modification and/or vacation of appellant's" conviction or sentence, App. 35, bears a marked resemblance to the no-merit letter we held inadequate in *Anders*. The no-merit letter at issue in *Anders* read as follows:

"Dear Judge Van Dyke:

"This is to advise you that I have received and examined the trial transcript of CHARLIE ANDERS as it relates to his conviction of the crime of possession of narcotics.

"I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him as they relate to his appeal.

"Mr. Anders has advised me that he wishes to file a brief in this matter on his own behalf. . . ." Tr. of Record in *Anders* v. *California*, O. T. 1966, No. 98, p. 6.

[4] Not only does the *Anders* brief assist the court in determining that counsel has carefully reviewed the record for arguable claims, but, in marginal cases, it also provides an independent inducement to counsel to perform a diligent review:

"The danger that a busy or inexperienced lawyer might opt in favor of a one sentence letter instead of an effective brief in an individual marginal

the appeal is indeed so frivolous that it may be decided without an adversary presentation. The importance of this twin function of the *Anders* brief was noted in *Anders* itself, 386 U. S., at 745, and was again emphasized last Term. In our decision in *McCoy* v. *Court of Appeals of Wisconsin*, 486 U. S. 429 (1988), we clearly stated that the *Anders* brief is designed both "to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability," and also to help the court make "the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." *Id.*, at 439. Counsel's failure to file such a brief left the Ohio court without an adequate basis for determining that he had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal.[5]

Moreover, the Court of Appeals should not have acted on the motion to withdraw before it made its own examination of the record to determine whether counsel's evaluation of the

---

case is real, notwithstanding the dedication that typifies the profession. If, however, counsel's ultimate evaluation of the case must be supported by a written opinion 'referring to anything in the record that might arguably support the appeal,' *[Anders,]* 386 U. S., at 744 . . . , the temptation to discharge an obligation in summary fashion is avoided, and the reviewing court is provided with meaningful assistance." *Nickols* v. *Gagnon*, 454 F. 2d 467, 470 (CA7 1971) (footnotes omitted), cert. denied, 408 U. S. 925 (1972).

In addition, simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue.

[5] One hurdle faced by an appellate court in reviewing a record on appeal without the assistance of counsel is that the record may not accurately and unambiguously reflect all that occurred at the trial. Presumably, appellate counsel may contact the trial attorney to discuss the case and may thus, in arguing the appeal, shed additional light on the proceedings below. The court, of course, is not in the position to conduct such *ex parte* communications.

case was sound.[6] This requirement was plainly stated in *Ellis* v. *United States*, 356 U. S. 674, 675 (1958), it was repeated in *Anders*, 386 U. S., at 744, and it was reiterated last Term in *McCoy*, 486 U. S., at 442. As we explained in *McCoy:*

> "To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous." *Ibid.*

Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported "several arguable claims." App. 41. As *Anders* unambiguously provides, "if [the appellate court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." 386 U. S., at 744; see also *McCoy*, 486 U. S., at 444 ("Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits"). This requirement necessarily follows from an understanding of the interplay between *Douglas* and *Anders*. *Anders*, in essence, recognizes a limited exception to the requirement articulated in *Douglas* that indigent defendants receive representation on their first appeal as of right. The exception is predicated on the fact that the Fourteenth Amendment—although demand-

[6] Obviously, a court cannot determine whether counsel is in fact correct in concluding that an appeal is frivolous without itself examining the record for arguable appellate issues. In granting counsel's motion to withdraw, however, the Ohio Court of Appeals noted that it was deferring its independent review of the record for a later date. See App. 37.

ing active and vigorous appellate representation of indigent criminal defendants—does not demand that States require appointed counsel to press upon their appellate courts wholly frivolous arguments. However, once a court determines that the trial record supports arguable claims, there is no basis for the exception and, as provided in *Douglas*, the criminal appellant is entitled to representation. The Court of Appeals' determination that arguable issues were presented by the record, therefore, created a constitutional imperative that counsel be appointed.

It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. We have long recognized that "lawyers in criminal courts are necessities, not luxuries." *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956); see also *Kimmelman* v. *Morrison*, 477 U. S. 365, 377 (1986); *United States* v. *Cronic*, 466 U. S. 648, 654 (1984). The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is "'best discovered by powerful statements on both sides of the question.'" Kaufman, Does the Judge Have a Right to Qualified Counsel?, 61 A. B. A. J. 569, 569 (1975) (quoting Lord Eldon); see also *Cronic*, 466 U. S., at 655; *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981). Absent representation, however, it is unlikely that a criminal defendant will be able adequately to test the government's case, for, as Justice Sutherland wrote in *Powell* v. *Alabama*, 287 U. S. 45 (1932), "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.*, at 69.

The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over. As we stated in *Evitts* v. *Lucey*, 469 U. S. 387 (1985):

> "In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Id.*, at 396.

By proceeding to decide the merits of petitioner's appeal without appointing new counsel to represent him, the Ohio Court of Appeals deprived both petitioner and itself of the benefit of an adversary examination and presentation of the issues.

III

The State nonetheless maintains that even if the Court of Appeals erred in granting the motion to withdraw and in failing to appoint new counsel, the court's conclusion that petitioner suffered "no prejudice" indicates both that petitioner has failed to show prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984), and also that any error was harmless under *Chapman* v. *California*, 386 U. S. 18 (1967). In either event, in the State's view, the Court of Appeals' affirmance of petitioner's conviction should stand.[7] We disagree.

---

[7] The Court of Appeals' finding of "no prejudice" is not free from ambiguity. The court wrote: "Because we have thoroughly examined the record and already considered the assignments of error raised in the other defend-

The primary difficulty with the State's argument is that it proves too much. No one disputes that the Ohio Court of Appeals concluded that the record below supported a number of arguable claims. Thus, in finding that petitioner suffered no prejudice, the court was simply asserting that, based on its review of the case, it was ultimately unconvinced that petitioner's conviction—with the exception of one count—should be reversed. Finding harmless error or a lack of *Strickland* prejudice in cases such as this, however, would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

Nor are we persuaded that the Court of Appeals' consideration of the appellate briefs filed on behalf of petitioner's codefendants alters this conclusion. One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party. See Tr. of Oral Arg. 28–29. To the contrary, "[t]he right to counsel guaranteed by the Constitution contemplates the services of an at-

---

ants' appeals we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." App. 40–41. Not only does this language leave unclear whether the court relied on *Strickland*, *Chapman*, or both cases in concluding that petitioner was not entitled to relief, but it also appears to limit the finding of no prejudice to "counsel's failure to give a more conscientious examination of the record." The court did not recognize that petitioner's rights were also violated by its own omission in failing to appoint new counsel, and thus did not consider whether this separate violation was prejudicial.

torney devoted solely to the interests of his client. *Glasser* v. *United States*, 315 U. S. 60, 70 [(1942)]." *Von Moltke* v. *Gillies*, 332 U. S. 708, 725 (1948) (plurality opinion). A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy.[8] The State's argument appears to suggest, however, that there would rarely, if ever, be a remedy for an indigent criminal appellant who only receives representation to the extent a codefendant's counsel happens to raise relevant arguments in which they share a common interest. Again, the State's argument proves too much.

More significantly, the question whether the briefs filed by petitioner's codefendants, along with the court's own review of the record, adequately focused the court's attention on the arguable claims presented in petitioner's case is itself an issue that should not have been resolved without the benefit of an adversary presentation. An attorney acting on petitioner's behalf might well have convinced the court that petitioner's interests were at odds with his codefendants' or that petitioner's case involved significant issues not at stake in his codefendants' cases. Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process.[9]

---

[8] There is, of course, a significant distinction between joint representation on appeal, which is often appropriate, and the mere possibility of a coincidence of interest between represented and unrepresented criminal appellants.

[9] Although petitioner has been represented by counsel in this Court, we decline to sit in place of the Ohio Court of Appeals in the first instance to determine whether petitioner was prejudiced as to any appellate issue by reason of either counsel's failure to file an *Anders* brief or the court's failure to appoint new counsel. Cf. *Kimmelman* v. *Morrison*, 477 U. S. 365, 390 (1986). It would be particularly inappropriate for us to do so in a case raising both factual issues and questions of Ohio law.

Finally, it is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process. This is quite different from a case in which it is claimed that counsel's performance was ineffective. As we stated in *Strickland*, the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U. S., at 692. Our decision in *United States* v. *Cronic*, likewise, makes clear that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 U. S., at 659 (footnote omitted). Similarly, *Chapman* recognizes that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error." 386 U. S., at 23, and n. 8. And more recently, in *Satterwhite* v. *Texas*, 486 U. S. 249, 256 (1988), we stated that a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error. Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, see *supra*, at 85, the presumption of prejudice must extend as well to the denial of counsel on appeal.

The present case is unlike a case in which counsel fails to press a particular argument on appeal, cf. *Jones* v. *Barnes*, 463 U. S. 745 (1983), or fails to argue an issue as effectively as he or she might. Rather, at the time the Court of Appeals first considered the merits of petitioner's appeal, appellate counsel had already been granted leave to withdraw; petitioner was thus entirely without the assistance of counsel on appeal. In fact, the only relief that counsel sought before the Court of Appeals was leave to withdraw, an action that can hardly be deemed advocacy on petitioner's behalf. Cf. *McCoy*, 486 U. S., at 439–440, n. 13. It is therefore in-

appropriate to apply either the prejudice requirement of *Strickland* or the harmless-error analysis of *Chapman*.[10]

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. I write separately to emphasize that nothing in the Court's opinion forecloses the possibility that a mere technical violation of *Anders* v. *California*, 386 U. S. 738 (1967), might be excusable. The violation in this case was not a mere technical violation, however, and on that understanding I concur.

CHIEF JUSTICE REHNQUIST, dissenting.

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The Court has construed this language to include not only the right to assistance of counsel at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), but also to the assistance of counsel on appeal. *Douglas* v. *California*, 372 U. S. 353 (1963). We have also held that the right conferred is not simply to the assistance of counsel, but also to the effective assistance of counsel, both at trial, see *United States* v. *Cronic*, 466 U. S. 648 (1984); *Strickland* v. *Washington*, 466 U. S. 668 (1984), and on appeal, see *Evitts* v. *Lucey*, 469 U. S. 387 (1985).

---

[10] A number of the Federal Courts of Appeals have reached a like conclusion when faced with similar denials of appellate counsel. See *United States ex rel. Thomas* v. *O'Leary*, 856 F. 2d 1011 (CA7 1988); *Freels* v. *Hills*, 843 F. 2d 958 (CA6 1988); *Jenkins* v. *Coombe*, 821 F. 2d 158 (CA2 1987), cert. denied, 484 U. S. 1008 (1988); *Cannon* v. *Berry*, 727 F. 2d 1020 (CA11 1984). But cf. *Sanders* v. *Clarke*, 856 F. 2d 1134 (CA8 1988); *Lockhart* v. *McCotter*, 782 F. 2d 1275 (CA5 1986), cert. denied, 479 U. S. 1030 (1987); *Griffin* v. *West*, 791 F. 2d 1578 (CA10 1986).

There is undoubtedly an equal protection component in the decisions extending the Sixth Amendment right to counsel on appeal; *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, *supra*. But we have also recognized that

> "[t]he duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974).

The Court today loses sight of this, and instead seeks to engraft onto our decision in *Anders* v. *California*, 386 U. S. 738 (1967), a presumption of prejudice when the appellate attorney for an indigent does not exactly follow the procedure laid down in that case. Thus today's decision is added to the decision in *Anders* itself as a futile monument to the Court's effort to guarantee to the indigent appellant what no court can guarantee him: exactly the same sort of legal services that would be provided by suitably retained private counsel.

There are doubtless lawyers admitted to practice in the State of Ohio who, for a substantial retainer, would have filed a brief on behalf of petitioner in the Ohio Court of Appeals urging, with a straight face, all of the claims which petitioner's appointed attorney decided were frivolous. But nothing in the Constitution or in any rational concept of public policy should lead us to require public financing for that sort of an effort. The Court's opinion today justifies the *Anders* brief because it "serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Ante*, at 81–82 (footnote omitted). These may be desirable purposes, but it seems to me that it stretches the Sixth Amendment a good deal to say that *it* requires these interests to be pursued in this manner. The

Sixth Amendment does not confer a right to have the court supervise counsel's assistance as it is rendered, but rather a right to have counsel appointed for the purpose of pursuing the appeal.

Here counsel rendered "assistance" and his performance must be reviewed for ineffectiveness and prejudice before any constitutionally mandated relief is in order. *Strickland*, *supra*, at 687–696. Counsel states—and we have no reason to disbelieve him—that he conscientiously reviewed the record and "found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in [his case]." App. 35. As it turned out, that determination was incorrect, but this fact does not mean that counsel did not employ his legal talents in the service of his client. Whether or not this evaluative process constituted "assistance" cannot be affected by its conclusion. "[T]he canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals." See *Polk County* v. *Dodson*, 454 U. S. 312, 323 (1981).

This is not to say that an attorney's erroneous decision to withdraw is necessarily adequate assistance of counsel. That is to be judged under *Strickland*. Of course, counsel may protect himself from collateral review of the effectiveness of his performance by following the safe-harbor procedures outlined in *Anders*. As described by the Court today, the filing of an *Anders* brief creates a strong presumption that counsel has diligently worked on the case and that the court was correct in assessing the frivolousness of the appeal when it allowed withdrawal. *Anders* may well outline a prudent course to follow for the appointed attorney who wishes to withdraw from a frivolous case. But if counsel declines to follow it, the basic constitutional guarantee of effective assistance remains the underlying standard by which his conduct should be judged.

In this case, petitioner was one of a group of three men who broke into a dwelling and robbed, raped, and otherwise sexually assaulted the adult inhabitants. It cannot be questioned that petitioner and his codefendants stood in substantially the same position in defending against the charges.* The appellate court considered the briefs of petitioner's codefendants and conducted its own review of the record. It ultimately reversed one of petitioner's convictions as a result. It also considered but decided against reversing another. Although the "coincidence of interest with a represented codefendant," *ante*, at 87, is not a substitute for the assistance of counsel, it certainly may eliminate the prejudice of poor representation if it brings to the court's attention the meritorious arguments that appointed counsel failed to make. In this case, the merits briefs filed on behalf of his codefendants were substantially *more* beneficial to petitioner than an *Anders* brief from his own attorney. The appellate court performed its duty in utilizing the available advocate's papers on petitioner's behalf and in exercising its independent judgment of the record. After doing so, it concluded that petitioner had not suffered prejudice from his counsel's withdrawal without filing an *Anders* brief. On these facts, I think that conclusion plainly correct.

---

*The Court asserts that "[a]n attorney acting on petitioner's behalf might well have convinced the court that petitioner's interests were at odds with his codefendants' . . . ." *Ante*, at 87. This appears to be pure speculation. Nothing in the papers filed in this Court, nor in the majority opinion, suggests any theory of how this might be done or why, if such a conflict existed, the court could not discern it from its own review of the record.

CARLUCCI, SECRETARY OF DEFENSE, ET AL. *v.* DOE

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

No. 87–751. Argued October 11, 1988—Decided December 6, 1988

After respondent, a cryptographic material control technician at the National Security Agency (NSA), disclosed to NSA officials that he had engaged in homosexual relationships with foreign nationals, his employment was terminated pursuant to NSA personnel regulations setting forth procedures for removal "for cause," which were promulgated under provisions of the National Security Agency Act of 1959 (1959 NSA Act) empowering the Secretary of Defense, or his designee, to appoint NSA employees. Claiming that the 1959 NSA Act does not authorize removals and that he could only be discharged under 5 U. S. C. § 7532—which provides that, "[n]otwithstanding other statutes," the head of an agency "may" suspend and then remove employees "in the interests of national security," so long as they have been given, *inter alia*, a preremoval hearing by the agency head or his designee—respondent requested a hearing before the Secretary. That request was denied on the ground that respondent had been removed under the NSA regulations, which do not include the right to such a hearing, and not pursuant to the Secretary's § 7532 summary authority. Granting summary judgment for petitioners, the Secretary and the NSA Director, in respondent's suit challenging his removal, the District Court held that, although NSA could have elected to proceed under either § 7532 or 50 U. S. C. § 833—which is part of the NSA Personnel Security Procedures Act, and which provides that the Secretary "may" remove an NSA employee upon determining that the termination procedures set forth in other statutes "cannot be invoked consistently with national security"—NSA could *also* proceed under the authority provided by the 1959 NSA Act. The Court of Appeals reversed as to the optional application of § 7532 and vacated the remainder of the District Court's decision, holding that removals for national security reasons must occur under either § 7532 or § 833, and that, because NSA disclaimed reliance on § 833, resort to § 7532 rather than NSA's for cause removal regulations was mandatory.

Held: Neither § 833 nor § 7532 barred NSA from invoking its for-cause removal mechanism adopted by regulation pursuant to the 1959 NSA Act. Pp. 99–104.

(a) Although the 1959 NSA Act expressly confers only appointment power upon the Secretary and does not refer to termination, neverthe-

less, as a matter of statutory construction, the power of removal from office is incident to the power of appointment, absent a specific provision to the contrary. *Keim* v. *United States*, 177 U. S. 290. There has been no showing that Congress expressly or impliedly indicated a contrary purpose in the 1959 NSA Act or its subsequent amendments. P. 99.

(b) That §§ 833 and 7532 are not the exclusive means to remove NSA employees for national security reasons, but instead contemplate alternative recourse to NSA's ordinary removal mechanisms pursuant to the 1959 NSA Act, is established by the express language of those sections. Thus, since § 833 provides that the Secretary "may" terminate an employee if other statutory removal procedures cannot be invoked consistently with national security, it follows that recourse may, even must, be had to those other removal procedures where those procedures do not jeopardize national security. Similarly, § 7532 also is not mandatory since, in providing that an agency head "may" suspend or remove an employee "[n]otwithstanding other statutes," that section, in effect, declares that even though other statutes might not permit it, the Secretary may authorize removals pursuant to § 7532 procedures, rather than those governing terminations under other laws. This discretionary aspect of § 7532 is manifest in the section's legislative history. Congress could not have intended that § 7532 would be the exclusive procedure in this and like cases, since no national security termination would then be permissible without an initial suspension and adherence to the standard of *Cole* v. *Young*, 351 U. S. 536, 546, whereby a showing of "immediate threat of harm to the 'national security' " is required in order for § 7532 to be invoked. Indeed, when Congress later passed the NSA Personnel Security Procedures Act, it must have intended that § 7532 not impose such restrictions on the various affected agencies, since the stringency of the § 7532 standard would conflict with the more lenient provisions of that Act authorizing the revocation of a security clearance and consequent dismissal. The Court of Appeals' view that its construction of § 7532 is necessary to provide employees sought to be removed on national security grounds with procedures equivalent to those provided by that section assumes that NSA's ordinary clearance revocation and for-cause dismissal procedures are less protective than those guaranteed by § 7532, which assumption is not borne out by the record in this case. More significantly, the Court of Appeals' view that Congress enacted § 7532 to extend new protections to such employees runs counter to explicit congressional statements that the legislation was proposed to increase agency heads' authority to suspend and terminate employees on national security grounds. Pp. 99–104.

261 U. S. App. D. C. 96, 820 F. 2d 1275, reversed and remanded.

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

Michael K. Kellogg argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Bolton, Deputy Solicitor General Cohen, Barbara L. Herwig,* and *Freddi Lipstein.*

John G. Gill, Jr., argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the National Security Agency (NSA) invoked the proper statutory authority when it terminated respondent John Doe, an NSA employee. The Court of Appeals held that NSA did not—a decision with which we disagree. We first describe the statutes relevant to this case.

Section 7532 of Title 5 of the United States Code, on which the Court of Appeals relied, was passed in 1950 and reenacted and codified in 1966, as part of Chapter 75 of Title 5, the Chapter that deals with adverse actions against employees of the United States. See 5 U. S. C. § 7532. The section provides that the head of an agency "may suspend without pay" an employee when he considers such action "necessary in the interests of national security," see § 7532(a), and "may remove" the suspended employee if such action is "necessary or advisable in the interests of national security." § 7532(b). Subsection (c) of § 7532 specifies the procedural protections to which a suspended employee is entitled prior to removal.[1]

**David I. Shapiro, George Kaufmann, Peter W. Morgan, John A. Powell,* and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union Foundation as *amicus curiae* urging affirmance.

[1] Title 5 U. S. C. § 7532(c) accords the suspended employee the following procedural rights before removal: "(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit; (B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits; (C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose; (D) a review of his case by the head of the agency or his designee, before a decision adverse to the

The National Security Agency Act of 1959 (1959 NSA Act) empowers the Secretary of Defense, or his designee, to establish NSA positions and appoint employees thereto "as may be necessary to carry out the functions of such agency." Note following 50 U. S. C. § 402. By virtue of the 1959 NSA Act, NSA employees who are not preferred eligible veterans are in the "excepted" service, hence not covered by the removal provisions of the Civil Service Reform Act of 1978. 5 U. S. C. §§ 7511–7513. Pursuant to the Defense Department Directive No. 5100.23 (May 17, 1967), as printed in App. in No. 86–5395 (CADC), p. 60, the Secretary delegated his 1959 NSA Act appointment authority to the NSA Director, who promulgated internal personnel regulations. See National Security Agency Central Security Service Personnel Management Manual 30–2 (PMM), Ch. 370 (Aug. 12, 1980), App. to Pet. for Cert. 36a. Chapter 370 of these regulations describes procedures for removing employees, and states generally that removal is permissible for "such cause as will promote the efficiency of the service," § 3–4, App. to Pet. for Cert. 39a. Dismissals proposed under Chapter 370 guarantee employees various procedural protections, such as 30-day advance notice, an opportunity to respond and to have legal representation, and a written final decision. Although Chapter 370 assigns to some employees the further right to appeal an adverse action to the Merit Systems Protection Board, nonveterans like Doe at NSA do not have this right; nor does Chapter 370 provide for a hearing or review by the Secretary of Defense.

In 1964, Congress amended the Internal Security Act of 1950 by passing an Act relating to "Personnel Security Procedures in the National Security Agency." 78 Stat. 168, 50 U. S. C. §§ 831–833 (NSA Personnel Security Procedures Act). Section 831 requires the Secretary of Defense to promulgate regulations assuring that no person will be employed

---

employee is made final; and (E) a written statement of the decision of the head of the agency."

or continue to be employed by NSA or have access to classified information unless such employment or access is "clearly consistent with the national security." The Secretary's determination is final. The Secretary's authority under § 831 has been delegated to the NSA Director and implemented through regulations, including a regulation requiring security clearance for employment at NSA. See PMM, Ch. 371, §§ 1–1, 1–3. Section 832(a) proscribes NSA employment to any person not subjected to a full field investigation and "cleared for access to classified information." In addition, Congress directs that boards of appraisal are to assist in appraising the loyalty and suitability of persons for access to classified information in those cases where the NSA Director doubts such suitability. § 832(b). Section 833(a) gives the Secretary authority to terminate the employment of any NSA officer or employee whenever he considers that action "to be in the interest of the United States" and determines that the procedures stated in other provisions of the law "cannot be invoked consistently with national security."

This case began in 1982 when John Doe, a cryptographic material control technician at NSA for 16 years, disclosed to NSA officials that he had engaged in homosexual relationships with foreign nationals. Doe was notified of his proposed removal pursuant to Chapter 370 of the PMM, which governs NSA's procedures for removal for cause. The notification letter of Virginia C. Jenkins, Director of Civilian Personnel, was dated November 23, 1982, and explained that Doe's "indiscriminate personal conduct with unidentified foreign nationals" makes impossible his continued—and essential to NSA employment—access to classified information. See App. in No. 86–5395 (CADC), p. 83. The notice also advised Doe of his adjudicatory rights to contest the decision, which rights he exercised through counsel, including in his answer the results of a psychiatric evaluation as to his security threat. Pursuant to 50 U. S. C. § 832(b), the NSA Director convened a board of appraisal, which ultimately con-

cluded that Doe's access to classified material was "clearly inconsistent with the national security." See App. in No. 5395 (CADC), p. 108. After a hearing before the Director, Doe was notified that his security clearance was being revoked. Because this clearance is a condition of NSA employment, the Director, pursuant to the authority delegated to him under the 1959 NSA Act, removed Doe. Relying on 5 U. S. C. § 7532, Doe then requested a hearing before the Secretary of Defense, claiming that the 1959 NSA Act does not authorize removals and that he could only be discharged by the Secretary after a hearing before that official or his designee. Both the Secretary and the Director replied that Doe's removal was "for cause" under Chapter 370 of the PMM and was not pursuant to the Secretary's § 7532 summary authority.

Doe brought suit in the District Court challenging his removal on constitutional and statutory grounds. He charged, *inter alia*, that the 1959 NSA Act's appointment authority delegated by the Secretary of Defense to the NSA Director does not include the authority to remove employees; hence NSA is required to apply 5 U. S. C. § 7532's termination procedures that guarantee NSA employees a preremoval hearing before the Secretary or his designee, the NSA Director. The District Court denied this argument and granted summary judgment for petitioners. Acknowledging that the NSA Director could have elected to proceed under either § 833 or § 7532 summary authority, the court held that the Director could *also* proceed under the authority provided by the 1959 NSA Act. *Doe* v. *Weinberger*, Civ. Action No. 85–1996 (DC, Apr. 25, 1986).

The Court of Appeals reversed as to the optional applicability of § 7532 and vacated the remainder of the District Court's decision. *Doe* v. *Weinberger*, 820 F. 2d 1275 (1987). The Court of Appeals was of the view that the chronology of congressional action indicates that § 7532, which predates the establishment of NSA, must control NSA employee dismiss-

als on national security grounds. The court acknowledged § 833's parallel summary removal scheme, but held that because the NSA Director disclaimed reliance on that section, remand to NSA for compliance with § 7532 was obligatory. We granted the Secretary's and Director's petition for certiorari. 485 U. S. 904 (1988).

The 1959 NSA Act authorizes the Secretary of Defense, or his designee, "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency." Note following 50 U. S. C. § 402. The Secretary, in turn, issued Defense Department Directive No. 5100.23 to delegate this appointment authority to the NSA Director, which authority was implemented by regulations covering both the hiring and removal of NSA employees. Although the 1959 NSA Act does not refer to termination, the Court has held, as a matter of statutory interpretation, that, absent a "specific provision to the contrary, the power of removal from office is incident to the power of appointment." *Keim* v. *United States*, 177 U. S. 290, 293 (1900); see also *Crenshaw* v. *United States*, 134 U. S. 99, 108 (1890); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896 (1961). Neither the Court of Appeals nor respondent questions this general proposition, nor have they shown that Congress expressly or impliedly indicated a contrary purpose in the 1959 NSA Act or its subsequent amendments.

The Court of Appeals, however, held that removals for national security reasons must occur under either 5 U. S. C. § 7532 or 50 U. S. C. § 833 and that because NSA disclaimed reliance on § 833, resort to § 7532 rather than NSA's for-cause removal regulations was mandatory. In our view, however, § 833 and § 7532 are not the exclusive means to remove NSA employees for national security reasons, but instead contemplate alternative recourse to NSA's ordinary removal mechanisms pursuant to the 1959 NSA Act. This discretionary as-

pect of §§ 833 and 7532 is manifest in both the express statutory language and also the legislative history of these provisions.

Section 833(a) states: "[N]otwithstanding sections 7512 and 7532 of title 5, or any other provision of law," the Secretary of Defense "may" remove an employee provided that he finds that "the procedures prescribed in other provisions of law that authorize the termination . . . cannot be invoked consistently with the national security." Petitioners correctly argue that where the for-cause procedures for removal under § 7512 or under the regulations adopted under the 1959 NSA Act do not jeopardize national security, recourse may, even must, be had to those other procedures.[2]

Section 7532 also is not mandatory. It provides that "[n]otwithstanding other statutes," the head of an agency "may" suspend and remove employees "in the interests of national security." This language declares that even though other statutes might not permit it, the Secretary may authorize removals pursuant to § 7532 procedures, rather than those governing terminations under those other laws. The Court of Appeals did not expressly address the permissive character of the section and construed the statute to require the Secretary, in all cases of removal based on national security, to resort to the removal procedures of § 833 or § 7532, notwithstanding other available statutory removal regimes.

---

[2] See Defense Department Directive No. 5210.45, p. 3 (May 9, 1964), as printed in App. in No. 86–5395 (CADC), p. 75 (emphasis added), which reads: "When the two conditions [in § 833—*i. e.*, (1) other statutory removal provisions, which (2) will safeguard the national security—] do not exist, the Director, NSA shall, when appropriate, take action pursuant to other provisions of law, as applicable, to terminate the employment of a civilian officer or employee. The Director shall recommend to the Secretary of Defense the exercise of the authority of [§ 833] *only when* the termination of the employment of a civilian officer or employee cannot, because of paramount national security interests, be carried out under any other provision of law."

The Court of Appeals reached this conclusion by relying on two sentences from the House Report on the bill that ultimately became the predecessor to § 7532. These sentences state that the bill guarantees employees in various agencies, including the Department of Defense, the right to appeal to the head of the department in removal cases covered by § 7532.[3] This passage, however, does not indicate that § 7532 procedures are the *exclusive* means for removals on national security grounds or that § 7532 displaces the otherwise applicable removal provisions of the agencies covered by the section.[4] Read as the Court of Appeals understood them, the two sentences confound the permissive language of the statute and are inconsistent with other evidence from the legislative history.[5]

---

[3] The relevant sentences in the House Report state: "Under the present law, with respect to [the Departments of State and Defense,] the officer or employee who is suspended or terminated as a security risk is not entitled as a matter of right to an appeal to the head of the agency concerned. This legislation extends this appeal right to employees [of these agencies]." H. R. Rep. No. 2330, 81st Cong., 2d Sess., 3 (1950).

[4] The Court of Appeals also noted that 5 U. S. C. § 7533 provides that § 7532 does not "impair the powers vested in the Atomic Energy Commission [AEC]—or the requirement—that adequate provision be made for administrative review" of a termination by that Agency, yet does omit any similar exception for the pre-existing powers of any other agency. The Court of Appeals extrapolated that except in the case of the AEC, § 7532 supplants the removal authority of all agencies covered by the section in all cases involving national security. This conjecture extracts far more meaning than is warranted from the special mention by Congress that it intended to preserve the unique, expansive removal powers of the AEC, particularly in light of § 7532's language indicating that its applicability is permissive.

[5] Numerous congressional reports and statements indicate that § 7532 and its legislative antecedents were proposed as extraordinary, supplementary measures to enable the Secretary of Defense, and other agency heads responsible for United States security, to respond to rare, urgent threats to national security. See, *e. g.*, S. Rep. No. 2158, 81st Cong., 2d Sess., 2, 6 (1950); H. R. Rep. No. 2330, 81st Cong., 2d Sess., 2, 6 (1950); S. Rep. No. 1155, 80th Cong., 2d Sess., 2 (1948); Hearing on S. 1561 and

Congress enacted the § 7532 and § 833 summary removal measures to supplement, not narrow, ordinary agency removal procedures. Section 7532, like § 833, applies to a special class of national security cases, and authorizes summary suspension and unreviewable removal at the Secretary's personal initiative after a hearing of unspecified scope. The removal provisions apply only to an employee who has been suspended. An employee so removed is ineligible for employment elsewhere in the Government without approval by the Office of Personnel Management. See 5 U. S. C. § 7312. The Court has held that in light of its summary nature, Congress intended § 7532 to be invoked only where there is "an immediate threat of harm to the 'national security'" in the sense that the delay from invoking "normal dismissal procedures" could "cause serious damage to the national security." *Cole* v. *Young*, 351 U. S. 536, 546 (1956). Were § 7532 the exclusive procedure in this case and like cases, no national security termination would be permissible without an initial suspension and adherence to the *Cole* v. *Young* standard. We are unconvinced that Congress intended any such result when it enacted § 7532.

Indeed, when Congress passed the NSA Personnel Security Procedures Act in 1964, 50 U. S. C. §§ 831–833, Congress must have intended that § 7532 did not impose this restriction on the various affected agencies. The stringency would conflict with the provisions of that Act that require the Secretary to apply general security considerations in selecting NSA employees. Just as the Secretary need only find "inconsistency" with national security to reject an applicant seeking the necessary NSA clearance for classified information, see § 831, so too the boards of appraisal that assist in this determination are authorized to recommend denial or cancellation of such clearance if the NSA Director "doubt[s]" that clearance is consistent with national security. See

---

S. 1570 before the Subcommittee of the Senate Committee on Armed Services, 80th Cong., 2d Sess., 2–3, 4 (1948).

§ 832(b). The Secretary, in turn, must adhere to a board's recommendation unless he makes the affirmative finding that clearance is in the national interest. See *ibid.* Under the construction adopted by the Court of Appeals, however, the revocation of a security clearance ordered by NSA pursuant to a board's recommendation will not suffice for the dismissal mandated by § 832(a), but rather would require further review by the Secretary under the more stringent standard imposed by § 7532.

The Court of Appeals was of the view that its construction of § 7532 is necessary to provide employees sought to be removed on national security grounds with procedures equivalent to those provided by that section. This approach assumes that NSA's ordinary clearance revocation and for cause dismissal procedures are less protective than those guaranteed by § 7532. This is a doubtful proposition, to say the least. The section, as we have said, provides for summary suspension without pay, affords a hearing of undefined scope before the agency head, and attaches to a removal order the sanction that the employee is ineligible for other governmental employment. NSA's for-cause removals neither are preceded by suspension nor entail a collateral bar from federal employment. In this case, Doe was on the payroll until removed, and the record does not indicate that the hearing Doe received, or the other procedural protections accorded to him, were inferior to those that would have been available under § 7532. Indeed, in *Department of the Navy* v. *Egan*, 484 U. S. 518, 533 (1988), we rejected the argument that § 7532 would have provided more protections than the Navy's ordinary for-cause removal procedures. More significantly, the Court of Appeals' view that Congress enacted § 7532 to extend new protections to all employees sought to be dismissed on national security grounds runs counter to explicit congressional statements that the legislation was proposed "to increase the authority of the heads of Government departments engaged in sensitive activities to

summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action." S. Rep. No. 2158, at 2; see also H. R. Rep. No. 2330, at 2.

We thus agree with the conclusion of the Merit Systems Protection Board in a similar case that "section 7532 is not the exclusive basis for removals based upon security clearance revocations," *Egan* v. *Department of the Navy*, 28 M. S. P. R. 509, 521 (1985), and with the Court of Appeals for the Federal Circuit that "[t]here is nothing in the text of section 7532 or in its legislative history to suggest that its procedures were intended to preempt section 7513 procedures whenever the removal could be taken under section 7532. The language of section 7532 is permissive." *Egan* v. *Department of the Navy*, 802 F. 2d 1563, 1568 (1986).

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[6]

So ordered.

---

[6] Respondent defends the result reached by the Court of Appeals on the alternative ground that NSA violated its own regulations in removing him. That claim, as well as others argued to the Court of Appeals, was not passed on by that court, and we prefer to leave the matter to the Court of Appeals in the first instance.

PITTSTON COAL GROUP ET AL. *v.* SEBBEN ET AL.

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

No. 87–821. Argued October 3, 1988—Decided December 6, 1988*

The Black Lung Benefits Reform Act of 1977 (BLBRA), in 30 U. S. C. § 902(f)(2), provided that, pending the issuance of permanent regulations by the Secretary of Labor, cases filed or pending, as well as certain claims required to be reopened or readjudicated, were to be assessed under "[c]riteria . . . not . . . more restrictive than the criteria applicable to a claim filed on June 30, 1973." As of that date, under interim regulations established by the Secretary of Health, Education, and Welfare (HEW), a miner could establish presumptive entitlement to benefits if he submitted X-ray, biopsy, or autopsy evidence of pneumoconiosis, and showed *either* 10 years of mining service *or* that his impairment arose out of coal mine employment. In response to the BLBRA, the Secretary of Labor promulgated an interim regulation that accorded a presumptive claim of entitlement only to miners who had 10 years of experience and could satisfy one of several "medical requirements," including X-ray, biopsy, or autopsy evidence of pneumoconiosis identical to that required by the interim HEW regulation. In No. 87–1095, since neither claimant had worked 10 years in the mines, neither qualified for the presumptive entitlement under the interim Labor regulation, and their claims were adjudicated under more stringent *permanent* regulations originally promulgated by the Secretary of HEW. Their claims were administratively denied, but the Court of Appeals reversed, holding that the unavailability of the interim Labor presumption to short-term miners violated § 902(f)(2). In Nos. 87–821 and 87–827, the Court of Appeals, having similarly found the interim Labor regulation invalid under § 902(f)(2), reversed the District Court's refusal to issue a writ of mandamus compelling the Secretary of Labor to readjudicate a class of claims previously considered under the interim Labor regulation, notwithstanding that the Secretary's decision in those cases had become final.

---

*Together with No. 87–827, *McLaughlin, Secretary of Labor, et al.* v. *Sebben et al.*, also on certiorari to the same court, and No. 87–1095, *Director, Office of Workers' Compensation Programs* v. *Broyles et al.*, on certiorari to the United States Court of Appeals for the Fourth Circuit.

Held:

1. The interim Labor regulation violates § 902(f)(2). Pp. 113–120.

(a) The Labor criteria are more restrictive than the interim HEW criteria in that the latter permitted a miner to obtain a presumption of entitlement by establishing pneumoconiosis and *either* 10 years' coal mining experience *or* proof that the pneumoconiosis was caused by mining employment, whereas under the interim Labor regulation 10 years' experience is the *exclusive* element of the second factor. By making the criteria for proving causation "more restrictive" for miners who seek a presumptive entitlement and can establish pneumoconiosis, the interim Labor regulation necessarily applies "more restrictive" total disability criteria than those in the interim HEW regulation. Pp. 113–115.

(b) Even if the "criteria" in § 902(f)(2) consist solely of "medical criteria," as the Secretary asserts, the interim Labor regulation violates the statute. Under the interim Labor regulation, unlike the interim HEW regulation, claimants who submit X-ray, biopsy, or autopsy evidence of pneumoconiosis and can prove causation, but have worked fewer than 10 years in a coal mine, must in addition submit affirmative proof of total disability, which would principally involve submission of underlying medical proof of disability. Pp. 115–117.

2. The Court of Appeals in No. 87–1095 properly remanded the case to the Benefits Review Board for further proceedings. But the Court of Appeals' order in Nos. 87–821 and 87–827 was not proper, since mandamus does not lie to compel the readjudication of claims decided under erroneous standards where the cases had already become final by reason of the claimants' failure to pursue administrative remedies or to appeal directly to the courts within the prescribed time. Pp. 121–123.

Nos. 87–821 and 87–827, 815 F. 2d 475, reversed and remanded; No. 87–1095, 824 F. 2d 327, affirmed.

SCALIA, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 123.

Deputy Solicitor General Ayer argued the cause for the federal petitioners. With him on the briefs were *Solicitor General Fried, Christopher J. Wright, George R. Salem, Allen H. Feldman, Charles I. Hadden*, and *Edward D. Sieger. Mark E. Solomons* argued the cause for petitioners Pittston Coal Group et al. With him on the briefs were *John D. Maddox, Laura Metcoff Klaus*, and *Allen R. Prunty.*

Paul M. Smith argued the cause for respondents in all cases. With him on the brief for respondents Sebben et al. were *Joseph N. Onek* and *I. John Rossi*. *Robert E. Lehrer* filed a brief for respondents Broyles et al. With him on the brief was *Raymond T. Reott.*†

JUSTICE SCALIA delivered the opinion of the Court.

These consolidated cases call into question the Secretary of Labor's interpretation of 30 U. S. C. § 902(f)(2), which, for specified categories of black lung benefit claimants, provides that "[c]riteria applied by the Secretary of Labor in the case of . . . any claim . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Respondents contend that interim regulations applied by the Secretary in adjudicating their claims, see 20 CFR pt. 727 (1988), did not comply with this provision. In *Broyles* v. *Director, OWCP*, 824 F. 2d 327 (CA4 1987) (No. 87–1095), the Court of Appeals for the Fourth Circuit agreed, and directed the Secretary to adjudicate the claims pursued by respondents Broyles and Colley under the less restrictive standards in force on June 30, 1973. See 20 CFR § 410.490 (1973). In *In re Sebben*, 815 F. 2d 475 (CA8 1987) (Nos. 87–821 and 87–827), the Court of Appeals for the Eighth Circuit similarly found the interim Labor regulation invalid under § 902(f)(2), and reversed the District Court's refusal to issue a writ of mandamus compelling the Secretary to readjudicate a class of claims previously considered under the interim regulation, notwithstanding that the Secretary's decision in those cases had become final. We granted certiorari, 484 U. S. 1058 (1988), to decide the statutory issue, which is the subject of

†Briefs of *amici curiae* urging reversal were filed for the National Coal Association by *Robert F. Stauffer;* and for the National Council on Compensation Insurance et al. by *Michael Camilleri, Mark Gordon,* and *John Nangle.*

a Circuit conflict,[1] and further to decide, in the event we find the Secretary's interpretation of the statute unlawful, whether mandamus will lie to compel the readjudication of claims decided under erroneous standards but not directly appealed to the courts within the time prescribed.

I

The black lung benefits program provides benefits to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U. S. 135, 141 (1987). Originally enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA), Pub. L. 91–173, 83 Stat. 792–798, the program has consisted of two separate parts. Under the original legislation, part B constituted a temporary program of federally financed benefits to be administered by the Secretary of Health, Education, and Welfare (HEW), and part C envisioned a more permanent program operating under the auspices of the Secretary of Labor and relying on state workers' compensation programs where possible.

For part B claims, the FCMHSA provided that the Secretary of HEW "shall by regulation prescribe standards for determining . . . whether a miner is totally disabled due to pneumoconiosis." FCMHSA § 411(b). The regulations relevant here consisted of "permanent" and "interim" components. The permanent HEW regulations generally prescribed methods and standards for establishing elements of statutory entitlement. See 20 CFR §§ 410.401–410.476 (1973). In addition, following (and in response to) the Black Lung Benefits Act of 1972, Pub. L. 92–303, 86 Stat. 150, the

[1] Besides the Fourth and Eighth Circuits, two other federal appeals courts have found the interim Labor regulations impermissibly "restrictive" under § 902(f)(2). See *Kyle* v. *Director, OWCP*, 819 F. 2d 139 (CA6 1987); *Halon* v. *Director, OWCP*, 713 F. 2d 21 (CA3 1983). The Seventh Circuit has held to the contrary. See *Strike* v. *Director, OWCP*, 817 F. 2d 395, 404–405 (1987).

Secretary of HEW adopted an interim regulation designed to "permit prompt and vigorous processing of the large backlog of claims" that had developed during the early phases of administering part B. See 20 CFR § 410.490(a) (1973). To deal with a perceived inadequacy in facilities and medical tests, this interim HEW regulation established two classes of presumptions. First, under the presumption at issue here, a claimant could establish presumptive entitlement by showing that "[a] chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis" and that "[t]he impairment . . . arose out of coal mine employment." §§ 410.490(b)(1)(i), (b)(2). The proof of causality required for this first presumption was to be established under § 410.416 or § 410.456, both of which accorded a rebuttable presumption of causality to claimants with 10 years of mining service *and also permitted claimants to prove causality by direct evidence.* See § 410.490(b)(2). The second presumption (drafted in a most confusing manner) enables a claimant to obtain presumptive entitlement by establishing specified scores on ventilatory tests if the miner had "at least 10 years of the requisite coal mine employment." §§ 410.490(b)(1)(ii), (b)(3). Both presumptions were rebuttable by a showing that the miner was working or could work at his former mine employment or the equivalent. § 410.490(c). Miners unable to obtain either presumption had to proceed under the permanent HEW regulations. § 410.490(e). The term of the interim regulation coincided with the term of the part B program, and expired after June 30, 1973, for claims filed by living miners and after December 31, 1973, for survivors' claims. § 410.490(b).

The FCMHSA provided that after part B ceased, part C would shift black lung benefits claims into state workers' compensation programs approved by the Secretary of Labor as "adequate" under statutory standards. FCMHSA § 421. If no statutorily approved program existed in a given State, the Secretary of Labor was to handle the benefits claims aris-

ing in that State directly, and was to prescribe regulations for assigning liability to responsible mine owners. See FCMHSA § 422(a). Events did not unfold as expected, however. The Secretary of Labor approved no state workers' compensation program during the relevant period, see Lopatto, The Federal Black Lung Program: A 1983 Primer, 85 W. Va. L. Rev. 677, 688 (1983), and part C became exclusively a federally run workers' compensation program administered by the Secretary of Labor. Significantly, the FCMHSA provided that "[t]he regulations of the Secretary of Health, Education, and Welfare under section 411(a) of this title shall also be applicable to claims [processed by the Secretary of Labor] under [part C]." FCMHSA § 422(h). Thus, because the interim HEW regulation expired as part C began, the Secretary of Labor adjudicated part C claims exclusively under the permanent HEW regulations.

This state of affairs persisted until Congress passed the Black Lung Benefits Reform Act of 1977 (BLBRA), Pub. L. 95–239, 92 Stat. 95. The BLBRA amended 30 U. S. C. § 902(f) to give the Secretary of Labor authority to establish total disability regulations for part C cases. § 902(f)(1). Pending issuance of the new Labor Department regulations, the BLBRA provided for an interim administrative regime applying standards different from (and more generous than) those of the permanent HEW regulations. Moreover, the BLBRA provided not only that these interim standards would be applied to cases filed or pending during the interim period, but also that claims previously denied would, upon the claimant's request, be reopened and readjudicated under the interim standards. 30 U. S. C. § 945. The nature of the interim standards was to be such that the "[c]riteria applied by the Secretary of Labor in the case of . . . any claim . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U. S. C. § 902(f)(2). That is the language giving rise to the dispute in these cases.

In response to the BLBRA, the Secretary of Labor promulgated the interim regulation at issue here for claims within the scope of § 902(f)(2). This regulation accords a presumptive claim of entitlement to miners having 10 years' experience in coal mines and satisfying one of several "medical requirements," including X-ray, biopsy, or autopsy evidence of pneumoconiosis or ventilatory study evidence identical to that required by the HEW interim regulation. 20 CFR § 727.203(a) (1988). It is central to the present cases that under this interim regulation, unlike the interim HEW regulation (§§ 410.490(b)(1)(i), (b)(2)), a miner cannot obtain the first presumption of entitlement without 10 years of coal mine service. Moreover, the rebuttal provisions of the interim Labor regulation mandate that "all relevant medical evidence shall be considered," § 727.203(b), permitting rebuttal not only on the grounds available in the interim HEW regulation (§ 410.490(c)), but also on the basis that "the total disability or death of the miner did not arise in whole or in part out of coal mine employment" or that "the miner does not, or did not, have pneumoconiosis." See §§ 727.203(b)(1)–(4). A § 902(f)(2) claimant unable to obtain the interim Labor presumption can prove entitlement under either the permanent HEW regulations or the (subsequently issued) permanent Labor regulations, depending on when the claim was filed and adjudicated. 20 CFR § 727.4(b) (1988). The permanent Labor regulations took effect on April 1, 1980. See 20 CFR § 718.2 (1988).

II

One of the three consolidated cases before us, *Director, OWCP* v. *Broyles*, No. 87–1095, is itself a consolidation by the Fourth Circuit of two separate cases brought by, respectively, Lisa Kay Colley and Charlie Broyles. Respondent Colley's father, Bill Colley, and respondent Broyles filed claims for black lung benefits in 1974 and 1976, respectively. Under 30 U. S. C. § 945(b), both claimants were entitled to

have their claims adjudicated pursuant to the BLBRA amendments. Thus, the interim Labor regulation applied. Since, however, neither claimant had worked 10 years in the mines, neither qualified for the presumption of entitlement under § 727.203, so that both cases were adjudicated under the permanent HEW regulations. In both cases, the Administrative Law Judge found against the claimants, and the Benefits Review Board (BRB) affirmed. The Court of Appeals for the Fourth Circuit reversed the BRB as to both claimants, holding that the unavailability of the interim Labor presumption to short-term miners violated § 902(f)(2) by forcing the application of the "more restrictive" "criteria" found in the permanent HEW regulations. See 824 F. 2d, at 329–330.

The other two consolidated cases before us, *Pittston Coal Group* v. *Sebben*, No. 87–821, and *McLaughlin* v. *Sebben*, No. 87–827, both involve a potential class of claimants consisting of those who

> "(1) have filed claims for benefits under the BLBA between December 30, 1969, and April 1, 1980; (2) have claimed a disability due to pneumoconiosis caused by employment in the coal mining industry; (3) have submitted a positive X-ray as proof of the presence of pneumoconiosis; (4) have been denied the benefit of the presumption of pneumoconiosis contained in 20 CFR § 727.203(a)(1) because they did not prove that they had worked ten years in the coal mines; (5) were not afforded the opportunity to submit a claim under 20 CFR § 410.490; and (6) do not have claims under 20 CFR § 410.490 or 20 CFR § 727.203(a)(1) currently pending before the Department of Labor." 815 F. 2d, at 484–485.

These claimants differ from those in No. 87–1095 in that the latter have timely appealed the Labor Department's adverse decisions to the courts, while these claimants have permitted the time for direct appeal to expire. See 815 F. 2d, at 478, 485. The Eighth Circuit ordered the certification of this

class and decided that mandamus would appropriately lie to compel the Secretary of Labor to readjudicate the class members' claims under § 410.490. The panel's opinion relied on the Eighth Circuit's earlier decision in *Coughlan* v. *Director, OWCP*, 757 F. 2d 966 (CA8 1985), which, like *Broyles*, had determined that 30 U. S. C. § 902(f)(2) required the application of § 410.490 standards to claims filed before April 1, 1980. It further held that the claimants' failure to perfect direct appeals from the Secretary's adverse decisions was no obstacle to the present suit.

III

The statutory text at issue here provides that "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable" under the interim HEW regulation. The respect in which it is claimed here that the Labor criteria are more restrictive is this: whereas under the first presumption of the interim HEW regulation (see *supra*, at 109) a miner would obtain a presumption of entitlement by establishing (1) pneumoconiosis and (2) *either* 10 years of coal mining experience *or* proof that the pneumoconiosis was caused by mining employment, under the interim Labor regulation 10 years' experience is the *exclusive* element of the second factor. In defending the interim Labor regulation, the Secretary maintains that the term "criteria" is ambiguous, and that her resolution of that ambiguity is reasonable and therefore must be sustained. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843, and n. 9 (1984). We disagree. In our view, the statute simply will not bear the meaning the Secretary has adopted.

"Criteria" are "standard[s] on which a judgment or decision may be based." Webster's Ninth New Collegiate Dictionary 307 (1983). It is undisputed that in the current context the standards referred to include the standards for obtaining the *presumption* of entitlement. The distinctive feature of the

interim HEW regulation was precisely its establishment of presumptions, and to fix it as a benchmark without reference to its presumptions would be meaningless.

The Secretary contends, however, that the criteria referred to in § 902(f)(2) do not include the criteria for *all* the elements necessary to a successful claim. Those elements are essentially three: (1) pneumoconiosis; (2) causation by coal mine employment; and (3) total disability (defined as the inability of the claimant to do his former mine work or the equivalent because of pneumoconiosis). See *Mullins Coal Co.* v. *Director, OWCP*, 484 U. S. 135 (1987). The Secretary argues that since § 902(f)(2) is part of the statutory definition section dealing with "total disability," the "criteria" to which it refers must be limited to those bearing upon that element. Total disability criteria would in her view consist of essentially medical (and to some extent vocational) factors, but in no circumstances could include the 10-year-employment requirement at issue here, which obviously goes to causation rather than disability.

The premise of the Secretary's argument—that "criteria" means total disability criteria—has considerable merit, though it is by no means free from doubt. Assuming it is correct, however, we find it unavailing to sustain the Secretary's interim regulation, which in our view does impose more restrictive total disability criteria. For although the categorical 10-year-employment requirement bears *proximately* upon causation, it bears *ultimately* upon total disability as well. The interim HEW regulation had provided, in effect, that if certain evidence of the first two elements of entitlement (pneumoconiosis and causation) was established, the third element (total disability) *would automatically be presumed.* Thus, to increase the requirements for the presumption of causality is necessarily to increase the requirements for the presumption of total disability. No other view of the matter accords with the reality. By making the criteria for proving causation "more restrictive" for miners who

seek a presumption of entitlement and can establish pneumoconiosis, the interim Labor regulation necessarily applies "more restrictive" total disability criteria than those in the interim HEW regulation.

The Secretary goes further still, however, and argues that the legislative history leading up to the enactment of the BLBRA actually discloses a congressional intention to preserve only "*medical* criteria" in the adoption of § 902(f)(2). We need not canvass in detail that legislative history, which shows at most that medical criteria were the focus of the House and Senate debates. It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history, and the text of the present statute plainly embraces criteria of more general application. We refer not merely to use of the unqualified term "criteria" in § 902(f)(2) itself, but also to the text of related provisions. Immediately preceding § 902(f)(2) in the text of the BLBRA and of the United States Code is § 902(f)(1)(D), which provides that the "Secretary of Labor . . . shall establish *criteria for all appropriate medical tests under this subsection which accurately reflect total disability.*" (Emphasis added.) If, as the Secretary contends, Congress intended the word "criteria" to cover only medical criteria (such as ventilatory scores) in both of these simultaneously adopted subsections, it is most implausible that it would have qualified the word in the one but not in the other.[2]

---

[2] The dissent asserts that "criteria" in § 902(f)(2) was merely "shorthand" for the earlier phrase "criteria for all appropriate medical tests," proving the point to its satisfaction by recasting the two statutory provisions into a single sentence where such shorthand reference would be obvious. See *post*, at 133–134. It is difficult to argue with the proposition that a statute can be rephrased to say something different. The point here is that the two provisions *do not* occur within the same sentence, or indeed even within parallel sentences (one being a subparagraph, and the next the beginning of a new paragraph), and that they do not naturally suggest any ellipsis. Moreover, not only is the unqualified term "criteria" used in the separate paragraph immediately *following* the lengthier phrase "criteria

Moreover, the Secretary has suggested no reason why Congress should insist that only the *medical* criteria under the interim Labor regulation be no more restrictive, while being utterly indifferent as to the addition of other conditions for recovery. There was assuredly no belief that the interim HEW medical criteria were particularly precise or accurate. Quite to the contrary, the prologue of the regulation that adopted them made very clear that they were rough guesses adopted for the time being "in the light of limited medical resources and techniques." 20 CFR § 410.490 (1988). Petitioners Pittston Coal Group et al. cite persuasive evidence for the proposition that the X-ray evidence required in § 410.490 does not conclusively establish pneumoconiosis, and that the ventilatory scores employed in that provision "are basically normal values for retired coal miners." Brief for Petitioners in No. 87–821, pp. 31–33. It seems likely that Congress had no particular motive in preserving the HEW interim medical criteria other than to assure the continued liberality of black lung awards. Since that motive applies to *non*medical criteria with equal force, there is no apparent reason for giving the unqualified word "criteria" the unnaturally limited meaning the Secretary suggests.

Even if we agreed with the Secretary's assertion that the "criteria" in § 902(f)(2) consist solely of "medical criteria," we

---

for all appropriate medical tests," but it is also used in the separate subparagraph immediately *preceding* use of the lengthier phrase—namely, in § 902(f)(1)(C), which provides that the Secretary's regulations "shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act." Surely this preceding provision cannot be interpreted as a "shorthand" for a longer provision that has not yet appeared, which means that if the dissent's construction is correct the word "criteria" in the statute is used twice, one paragraph apart, with two different meanings. It is true that § 902(f)(1)(C) was a pre-existing provision, whereas §§ 902(f)(1)(D) and 902(f)(2) were simultaneously added by the BLBRA; even so, one should not attribute to the draftsmen of the BLBRA the use of a shorthand that produces such a peculiarity in the United States Code.

would still conclude that the interim Labor regulation is in violation of the statute. The various criteria that go into determining a claim of entitlement under the interim HEW regulation are closely—indeed, inextricably—intertwined. The configuration of a claimant's nonmedical characteristics effectively determines which "medical criteria" the claimant must establish in order to obtain presumptive entitlement. Thus, in order to make out a prima facie claim of entitlement by submitting X-ray, biopsy, or autopsy evidence establishing pneumoconiosis, a miner proceeding under the interim HEW regulation must fall within either the class of claimants having 10 years of coal mine experience or the class of claimants able to prove that respiratory impairment arose out of coal mine employment. Under the interim Labor regulation, however, this medical evidence no longer suffices for the latter class of claimants; they must in addition submit affirmative proof of total disability (regardless of whether they then proceed under the permanent HEW or the permanent Labor regulations), which would principally involve submission of *medical* proof of disability. See 20 CFR §§ 410.422–410.426 (1988) (permanent HEW regulations); *id.*, § 718.204 (permanent Labor regulations). Thus, for claims brought by miners in that class, the medical criteria are necessarily more restrictive—violating the statutory requirement of "no more restrictive" criteria "in the case of . . . *any* claim."

That the Secretary has increased medical criteria can be more readily understood by transposing the substance of what has occurred here to a more commonplace, analogous context. Just as the black lung program considers both medical and nonmedical criteria for entitlement, college admissions programs typically consider both academic and extracurricular criteria for admission. Assume a hypothetical college that has traditionally tendered offers of admission to all applicants with a B+ average, and to all high school student-body presidents and football-team captains with a B

average. The Board of Trustees, concerned about increasing intellectualism at the institution, issues a directive providing that "the academic criteria applied by the admissions committee in considering any application for admission shall be no more restrictive than those employed in the past." Surely one would not say that this directive permits the admissions committee to terminate the practice of admitting football-team captains with a B average. To be sure, the admissions committee could assert that it was merely applying stricter extracurricular activity requirements for those who had B averages, just as the Secretary here claims that she is merely applying stricter causality requirements for those miners who have the requisite evidence of pneumoconiosis. But the admissions committee would at the same time be raising the academic criteria for all football-team captains—just as the Secretary is raising the medical criteria for miners who can establish causality only by direct evidence.

The Secretary's remaining arguments require little discussion. She points out that Congress could very easily have adopted the entire interim HEW regulation if it had meant to preserve all aspects of the HEW presumptions. But that course (which is in any event no more simple than § 902(f)(2)) would have produced a different result, because it would not have permitted the Secretary to adopt *less* restrictive criteria. The Secretary also observes that in enacting the BLBRA, Congress had before it evidence suggesting that disabling pneumoconiosis rarely manifests itself in miners with fewer than 10 years of coal mine experience. Though that is quite true, we do not sit to determine what Congress ought to have done given the evidence before it, but to apply what Congress enacted—and, as we have discussed, the exclusion of short-term miners from the benefits of the presumption finds no support in the statute. The Secretary and private petitioners cite favorable postenactment statements by key sponsors of the BLBRA. Since such statements cannot possibly have informed the vote of the legislators who

earlier enacted the law, there is no more basis for considering them than there is to conduct postenactment polls of the original legislators. Finally, the Secretary focuses on the interim Labor regulation's additional rebuttal provisions, which permit the introduction of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. Respondents have conceded the validity of these provisions, even though they permit rebuttal of more elements of statutory entitlement than did the interim HEW regulation. The Secretary argues that there is no basis for drawing a line that permits alteration of the rebuttal provisions, but not the affirmative factors addressed by the Secretary. That may or may not be so, but it does not affect our determination regarding the affirmative factors, for which it seems to us the statutory requirements are clear. Respondents' concession on the rebuttal provisions means that we are not required to decide the question of their validity, not that we must reconcile their putative validity with our decision today. (The concession also means that we have no occasion to consider the due process arguments of petitioners, which are predicated upon the proposition that the rebuttal provisions must be more expansive than those in the HEW interim regulation.)

Finally, we address an argument not made by the Secretary—neither before us nor, as far as appears, before any other court in connection with this extensive litigation—but relied upon by the dissent. The dissent believes that the Secretary of HEW made a typographical error in drafting § 410.490, and that the reference in paragraph (b)(3) to subparagraph (b)(1)(ii) should be a reference to subparagraph (b)(1)(i). Even if this revision of what the Secretary wrote (and defended here) made total sense, we would hesitate to impose it uninvited. But in fact it does not bring order to the regulation. It does not, as the dissent contends, eliminate redundancy in § 410.490, but merely shifts redundancy from one paragraph to another. Under the dissent's revi-

sion of the regulation, a claimant submitting X-ray, biopsy, or autopsy evidence of pneumoconiosis under subparagraph (b)(1)(i) would also have to establish disease causation under paragraph (b)(2) and total disability causation under paragraph (b)(3). The last of these requires 10 years of coal mine employment. But if that can be established, the second requirement, contained in paragraph (b)(2), is entirely superfluous, since that provides (by cross-references to §§ 410.416 and 410.456) that a presumption of disease causation is established by 10 years of coal mine employment. (To be sure, §§ 410.416 and 410.456 permit rebuttal of the presumption, but it is plainly not the intended purpose of paragraph (b)(2) to serve as a rebuttal provision rather than a substantive requirement.) Nor would paragraph (b)(2) have any operative effect for a claimant proceeding under subparagraph (b)(1)(ii), since that itself (without reference to paragraph (b)(3)) requires a minimum of 15 years of coal mine employment.

Moreover, even if the Secretary of HEW had made a typographical error, the dissent offers no evidence whatever to establish that in enacting the BLBRA, Congress, unlike past and present Secretaries, was aware of that error, and meant to refer to the regulation as the dissent would amend it. To support congressional agreement with its understanding of the regulation, the dissent produces, from the voluminous legislative history of hearings, debates, and committee reports dealing with this subject, nothing more than stray remarks made by a United Mine Workers official and a single Representative at hearings occurring four years and two Congresses before the BLBRA was enacted, see *post*, at 147–148—remarks that the dissent concedes could be attributable to a simple "misread[ing] [of] the regulation," *post*, at 148, n. 12. We do not think this suffices to justify rewriting § 410.490 as the dissent believes (perhaps quite reasonably) it should have been written.

IV

Having agreed with the conclusion of both courts below that the interim Labor regulation violates § 902(f)(2), there remains for us to consider the propriety of the orders which that conclusion produced. In *Broyles* (No. 87–1095), the Fourth Circuit remanded the case to the Benefits Review Board for further proceedings in accordance with its opinion. That action was correct—with the clarification, however, that its opinion requires application of criteria no more restrictive than § 410.490 only as to the affirmative factors for invoking the presumption of entitlement, and not as to the rebuttal factors, the validity of which respondents have conceded.

The order of the Eighth Circuit in *Sebben* (Nos. 87–821 and 87–827) is more problematic. There, as we described earlier, the finding that the interim Labor regulation violated § 902(f)(2) was the basis for mandamus instructing the Secretary to readjudicate, under the correct standard, cases that had already become final by reason of the claimants' failure to pursue administrative remedies or petition for judicial review in a timely manner. The Eighth Circuit's rationale for this order is deceptively simple: with respect to both the claims reopened and readjudicated pursuant to 30 U. S. C. § 945, and the claims initially adjudicated under the interim Labor regulation, the Court of Appeals reasoned that the Secretary had never fulfilled her statutory duty because she had failed to adjudicate the claims "under the proper standard." 815 F. 2d, at 482. This rationale does not suffice.

The extraordinary remedy of mandamus under 28 U. S. C. § 1361 will issue only to compel the performance of "a clear nondiscretionary duty." *Heckler* v. *Ringer*, 466 U. S. 602, 616 (1984). Under the provisions of the Longshore and Harbor Workers' Compensation Act made applicable to the adjudication of black lung benefits claims by 30 U. S. C. 932(a), initial administrative determinations become final after 30

days if not appealed to the Benefits Review Board, see 33 U. S. C. § 921(a), and persons aggrieved by a final order of the Board may have such an order set aside only by petitioning for review in a court of appeals within 60 days of the final order, see 33 U. S. C. § 921(c). Determinations of all of the *Sebben* claims became final at one of these two stages. Thus, to succeed in the present cases the *Sebben* respondents had to establish not only a duty to apply less restrictive criteria than those found in 20 CFR § 727.203 (1988), but also a duty to reopen the final determinations. The latter was not established.

With respect to claims filed between the effective date of the BLBRA and that of the permanent Labor regulations, and with respect to claims filed before the effective date of the BLBRA but not yet adjudicated at that time, there is not even a colorable basis for the contention that Congress has imposed a duty to reconsider finally determined claims. And with respect to the already adjudicated pre-BLBRA claims that 30 U. S. C. § 945 required the Secretary to *re*adjudicate under the new, interim Labor regulation, a basis for reopening can be found only if one interprets § 945 to override the principle of res judicata not just once but perpetually, requiring readjudication and re-readjudication (despite the normal rules of finality) until the Secretary finally gets it right. But there is no more reason to interpret a command to *re*adjudicate pursuant to a certain standard as permitting perpetual reopening, until the Secretary gets it right, than there is to interpret a command to *adjudicate* in this fashion. That is to say, one could as plausibly contend that *every* statutory requirement that adjudication be conducted pursuant to a particular standard permits reopening until that requirement is complied with. This is not the way the law works. The pre-BLBRA claimants received what § 945 required: a readjudication of their cases governed by the new statutorily prescribed standards. Assuming they are correct that these new standards would have entitled them to benefits, they

would have been vindicated if they had sought judicial review; they chose instead to accept incorrect adjudication. They are in no different position from any claimant who seeks to avoid the bar of res judicata on the ground that the decision was wrong.

We do not believe that *Bowen* v. *City of New York*, 476 U. S. 467 (1986), upon which the *Sebben* respondents place principal reliance, has any bearing upon the present cases. There we held that the application of a secret, internal policy by the Secretary of Health and Human Services in adjudicating Social Security Act claims equitably tolled the limitations periods for seeking administrative or judicial review. *Id.*, at 478–482. Even assuming that equitable tolling is available under the relevant provisions of the Longshore and Harbor Workers' Compensation Act, the conditions for applying it do not exist. The agency action here was not taken pursuant to a secret, internal policy, but under a regulation that was published for all to see. If respondents wished to challenge it they should have done so when their cases were decided.

Accordingly, we affirm the decision of the Fourth Circuit, and reverse the decision of the Eighth Circuit and remand with instructions to direct the District Court to dismiss the petition for mandamus.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

Pneumoconiosis is a serious respiratory disease that has afflicted hundreds of thousands of coal miners who have spent their entire working lives inhaling coal dust. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U. S. 135 (1987). The severity of the disease is directly related to the duration of the miner's underground employment. Although pneumoconiosis may be present in its early stages in short-term miners (*i. e.*, miners with fewer than 10 years of coal mine experience), it is seldom, if ever, disabling unless the employee has

worked in the mines for well over 10 years. Not surprisingly, there is no evidence that any participant in the lawmaking process ever suggested that it would be reasonable to presume that short-term miners—even if afflicted by pneumoconiosis in its early stages—should be presumed to be totally disabled. In fact, the original draft of the Department of Health, Education, and Welfare (HEW) regulation, 20 CFR § 410.490(b) (1973), 37 Fed. Reg. 18013 (1972), like the final draft of the Department of Labor (Labor) regulation under review in this case, 20 CFR § 727.203 (1988), plainly and unambiguously provided that the presumption of total disability for miners who satisfy the relevant medical criteria would not arise unless the miner had at least 10 years of coal mine employment. The only basis for reaching a conclusion that the law now extends this presumption to short-term miners is an unexplained change in the original draft of the HEW regulation, which was either a scrivener's error or a strikingly unique product of incompetent draftsmanship. Nonetheless, the Court today holds that Congress intended such short-term miners to receive the benefit of such an unreasonable presumption.

The specific statutory debate in these cases is over the meaning of the word "criteria" as used in § 2(c) of the Black Lung Benefits Reform Act of 1977 (BLBRA). See 92 Stat. 96; 30 U. S. C. § 902(f)(2). More narrowly, the question is whether the Secretary of Labor (Secretary) could reasonably conclude that Congress chose that word to describe medical criteria but not evidentiary rules or adjudicatory standards. Because my reading of the statute is the same as the Secretary's, I readily conclude that her reading is reasonable.

But even if my reading of this complex legislation revealed mere ambiguity—that is, if I concluded that there were reasonable grounds for construing "criteria" broadly and reasonable grounds for construing it more narrowly—I would nevertheless conclude that these are especially appropriate cases for deferring to the Secretary's interpretation of the statute

she must administer. See, *e. g.*, *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281 (1988); *id.*, at 293, n. 4 (KENNEDY, J.) ("[T]he threshold question in ascertaining the correct interpretation of a statute is whether the language of the statute is clear or *arguably ambiguous*") (emphasis added); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In explaining why I am convinced that the Court's rather superficial treatment of these cases is profoundly wrong, I shall first discuss the HEW regulation, 20 CFR § 410.490(b) (1988), that serves as the point of reference for the statutory provision at issue today, § 902(f)(2). Next, I shall explain why the statute's face yields no easy answer, and then show how the context of the statute's enactment reveals that Congress was concerned solely with *medical* criteria. After reviewing statistical studies revealing low incidence of pneumoconiosis in short-term miners (*i. e.*, miners with fewer than 10 years' coal mine experience), I shall conclude with a discussion of why the Court's analysis today is inconsistent with standard principles of deference.[1]

I

This litigation exists because of the following problem: As promulgated in 1972, the HEW regulation, § 410.490(b), permitted a miner or his survivor who proved pneumoconiosis through X-ray, biopsy, or autopsy evidence, and who also proved coal mine causation of the disease, to be presumed totally disabled as a result of such coal mine caused pneumoconiosis, regardless of the number of years he worked in the mines. The Labor regulation promulgated in 1978 to adjudicate earlier filed or once-denied part C claims, 20 CFR § 727.203 (1988), requires such miners to prove, in addition, at least 10 years of coal mine employment. Thus, for such miners, the Labor regulation is more restrictive than the

[1] I fully agree with the Court's analysis in Part IV of its opinion regarding the availability of mandamus relief in the Eighth Circuit case.

HEW regulation. Since § 902(f)(2) requires that the "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria [applied by HEW]," the legal question presented is whether the Labor regulation is more restrictive in a way prohibited by § 902(f)(2). See Parts II–V, *infra*.

Unfortunately, no one has seen fit to examine the mechanics of the HEW regulation itself; rather, both sides seem to assume that the gap created by that regulation is a given, a firm starting point from which Congress and Labor operated. A close inspection of the HEW regulation and its genesis reveals, however, that the gap was a mistake caused by a scrivener's error, and that no one—not HEW, not Labor, not Congress—has ever intended that short-term miners receive the benefit of a scheme that presumes them totally disabled from coal mine caused pneumoconiosis.

The "interim regulation" promulgated by HEW in 1972 was a response to serious congressional concern about the large backlog of claims that could not await the development of more accurate tests to evaluate disability due to coal mine caused pneumoconiosis.[2] Paragraphs defining the interim presumption of entitlement to benefits appear to have been intended to answer three questions: (1) did the miner have pneumoconiosis? and, if so, (2) was the disease caused by coal mine employment? and (3) was the miner totally disabled as a result of the disease? Instead of requiring a claimant to prove all three elements of entitlement—disease, disease causation, and disability causation—the regulation apparently was intended to create a presumption of entitlement through proof of disease plus proof of a certain minimum number of years of coal mine employment. Let me explain: The answer to the first question was to be provided by reference to the "medical requirements" described in paragraph

---

[2] The basis for the interim regulation is explained in 20 CFR § 410.490(a) (1988), which is set forth *infra*, at 135–136.

(b)(1) of the regulation.[3] The medical requirements were of two kinds: subparagraph (i) authorized the use of an X ray or biopsy (or an autopsy in the case of a deceased miner) establishing the existence of pneumoconiosis, while subparagraph

---

[3] The entire text of 20 CFR § 410.490(b) reads as follows:

"(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

"(1) One of the following medical requirements is met:

"(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

"(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV 1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

"(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

"(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment."

(ii) provided that ventilatory studies establishing the presence of a chronic pulmonary or respiratory ailment would be acceptable "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment." Thus, paragraph (b)(1), in essence, allowed an applicant to establish the presence of pneumoconiosis either by direct proof based on an X ray, biopsy, or autopsy, or by inference based on ventilatory studies coupled with a history of 15 years of underground work.

The 15-year requirement is especially noteworthy for two reasons. First, it reminds us of the important fact that pneumoconiosis is a progressive disease. Although miners with only a few years of underground employment sometimes contract simple pneumoconiosis, they seldom, if ever, develop disabling cases of the disease unless they have worked in the mines for at least 10 years. See Part IV, *infra*. Second, the 15-year requirement for those applicants who must rely on ventilatory-study evidence is the source of the confusion in the critical third paragraph of the regulation.

Paragraph (b)(2) of the regulation required an applicant who had satisfied the medical requirements to prove further that his impairment arose out of coal mine employment, in other words, to prove disease causation. Disease causation could be established either by direct evidence or by proof of 10 years of underground employment.[4]

The regulatory answer to the third question—whether the disease had caused total disability—has a peculiar history. As originally drafted, paragraph (b)(3) of the regulation provided that every miner who met any of the medical requirements in paragraph (b)(1) would be "presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment" if he had "at least 10 years of the requisite coal mine employment." 37 Fed. Reg. 18013 (1972). Thus, as

[4] This alternative method of proof is not apparent from the text of the regulation quoted in n. 3, *supra*, but is explained in §§ 410.416 and 410.456, which are cross-referenced in paragraph (b)(2).

originally written, the presumption of disability causation was triggered by a 10-year minimum requirement. But since one group of miners—those who had relied upon ventilatory studies to satisfy the medical criteria—already had to show 15 years of underground employment for their medical evidence to be considered probative, it must have been clear to the drafters that they should alter paragraph (b)(3) to apply only to those miners who did not otherwise have to prove a minimum number of years in the mines, namely, those miners who proved disease under subparagraph (b)(1)(i).

Ironically, however, the revision—unexplained in the final promulgation and referred to merely as one of a number of "[m]inor editorial and clarifying changes," *id.*, at 20634—made the 10-year requirement applicable to miners who met "the medical requirements in subparagraph (1)(ii) of this paragraph," instead of those who met the medical requirements in subparagraph (b)(1)(i). *Id.*, at 20646. Thus, as the promulgated regulation reads, paragraph (b)(3) is totally superfluous, because the miners who had to prove 10 years of underground employment are precisely those miners who had to prove 15 years of underground employment by the terms of subparagraph (b)(1)(ii). The drafters, who had initially provided a 10-year minimum requirement for all miners to trigger disability causation, had either (1) dropped such a requirement for the only group of miners to whom it was relevant (the subparagraph (b)(1)(i) claimants) and created a wholly irrelevant disability causation requirement for another group of miners (the subparagraph (b)(1)(ii) claimants), or (2) promulgated a scrivener's error.

The latter assumption is far more plausible for three reasons. First, the confusing and complex character of this regulation makes such human error understandable and not surprising. Second, a substitution of subparagraph (b)(1)(i) for subparagraph (b)(1)(ii) gives the regulation a meaning that comports with the abundant evidence that coal miners

with fewer than 10 years of underground employment seldom, if ever, contract disabling pneumoconiosis. In other words, the regulatory presumption is entirely reasonable if it includes a 10-year requirement. But it is most unreasonable if it does not. Third, if the correction is not made, the inconsistency between the 15-year requirement in subparagraph (b)(1)(ii) and the 10-year requirement in paragraph (b)(3) is simply inexplicable.

The Court responds that understanding the HEW regulation in this fashion would "merely shif[t] redundancy from one paragraph to another," and then explains why in its view paragraph (b)(2) would be rendered superfluous. *Ante*, at 119–120. Three things ought be said about the Court's response. First, reading the HEW regulation to correct for the scrivener's error would not render the disease-causation requirement embodied in paragraph (b)(2) "redundant" or "superfluous." That HEW intended to require proof of 10 years in the mines to invoke a presumption of disability causation, and to permit such proof to invoke a presumption of disease causation, renders neither requirement superfluous; because they are separate elements of the claim, it makes sense to state them separately, and given the vanishingly low incidence of totally disabling coal mine caused pneumoconiosis in short-term miners, it also makes sense to use a 10-year minimum to satisfy both causation requirements. Second, the Court fails to note that this parallelism of requirement between paragraphs (b)(2) and (b)(3) would exist, at least for some miners, regardless of whether the scrivener's error is corrected. For even as the regulation reads on its face, subparagraph (b)(1)(ii) miners, required by paragraph (b)(3) to prove 10 years in the mines to invoke a presumption of disability causation (and by subparagraph (b)(1)(ii) to prove 15 years in the mines to satisfy the medical requirement), in so doing satisfy paragraph (b)(2). Finally—and this is a critical point that the Court simply ignores—the revision of para-

graph (b)(3) is totally inexplicable unless it was unintentional, whereas the current confusion between paragraph (b)(3) and subparagraph (b)(1)(ii) would be eliminated by correcting the scrivener's error. (The Court also states that paragraph (b)(2) would not have any "operative effect for a claimant proceeding under subparagraph (b)(1)(ii)," *ante*, at 120; but this is certainly true regardless of how one reads paragraph (b)(3).)

In sum, as originally drafted, paragraph (b)(3) of the proposed regulation provided that the presumption of total disability was conditioned on at least 10 years of coal mine employment. Had the Secretary of HEW intended to eliminate the 10-year requirement, he could have done so by simply eliminating paragraph (b)(3) in its entirety. It is quite absurd to assume that he deliberately accomplished this objective by means of an obscure "clarifying change" that had the effect of making the 10-year requirement applicable only to those applicants who had already established 15 years of coal mine employment. It is equally senseless to assume that Congress perpetuated this typographical error by etching it into stone in the BLBRA, to which I now turn.

II

The conclusion that the term "criteria" in § 902(f)(2) of the BLBRA has reference to medical criteria and not to evidentiary or procedural standards is well supported not only by the foregoing discussion, but also by the text of the statute and by its legislative history. Let me begin with the text.

Respondents' case is based primarily on the argument that the phrase "criteria" in § 902(f)(2) must mean all criteria, medical and nonmedical, because otherwise Congress would have written "medical criteria" instead. To this end, respondents point out that in § 902(f)(1)(D) Congress expressly instructed the Secretary to establish "criteria for all appropriate medical tests" for Labor's permanent regulations; by the principle *expressio unius est exclusio alterius*, respond-

ents contend that Congress knew how to narrow the field to "medical criteria" when it so desired, and therefore that the unadorned "criteria" of § 902(f)(2) must include nonmedical factors as well as medical.[5]

---

[5] The full text of § 2 of the Act reads as follows:

"Sec. 2. (a) Section 402(b) of the Federal Mine Safety and Health Act of 1977 (hereinafter in this Act referred to as the 'Act') is amended to read as follows:

"'(b) The term "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'

"(b) Section 402(d) of the Act is amended to read as follows:

"'(d) The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.'

"(c) Section 402(f) of the Act is amended to read as follows:

"'(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413, except that—

"'(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

"'(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

"'(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act; and

"'(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish crite-

This argument proves far too little. In order to understand the meaning of a statutory text, one must at least understand the way in which the drafters used and understood the words they chose.[6] To see how this process works, consider if the two statutory provisions referred to in the preceding paragraph were combined into one sentence, and rephrased as follows: "The Secretary of Labor shall establish criteria for all appropriate medical tests that accurately reflect total disability in coal miners, but criteria applied by the Secretary of Labor to earlier filed or once-denied claims shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." It would be quite normal—in fact, the mark of a good writer—to use the phrase "criteria for all appropriate medical tests" the first time, and the shorthand "criteria"—meaning, "criteria for all appropriate medical tests"—the second. In other words, rather than assuming that the *expressio unius est exclusio alterius* principle applies, it is at least equally reasonable (and, as I shall show below in Part III, far more reasonable in these cases) to assume

---

ria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

"'(2) Criteria applied by the Secretary of Labor in the case of—

"'(A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor, under section 435(a);

"'(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

"'(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.'" 92 Stat. 95–96.

[6] This process is quite similar to the rule of contract interpretation that requires looking to the customary usage of the contract terms at issue. See, *e. g.*, E. Farnsworth, Contracts § 713, pp. 508–511, and n. 10 (1982) (giving as example "usage that 'minimum 50% protein' included 49.5 percent protein").

that the unmodified "criteria" was used as a synonym for the bulkier "criteria for all appropriate medical tests."[7]

III

A careful reading of the legislative history of the BLBRA leaves no doubt that Members of Congress were concerned with whether the HEW *medical* criteria—not the system of presumptions through which the medical criteria were utilized—were too lenient or too stringent. This is precisely the conclusion reached by the two Circuit Court judges who conducted a thorough investigation into the background of the BLBRA. See *Strike* v. *Director, OWCP*, 817 F. 2d 395, 400–406 (CA7 1987) (Cummings, J.); *Halon* v. *Director, OWCP*, 713 F. 2d 21, 25–30 (CA3 1983) (Weis, J., dissenting in part). To understand fully the certainty of the proposition that Congress intended "criteria" to mean "medical criteria," one must examine closely first the background of the BLBRA and then the congressional debates and Committee Reports that serve as evidence of the context of what became § 902(f)(2).

In 1972, Congress amended the original black lung legislation in several respects. The HEW part B interim regulation that serves as the benchmark for these cases was promulgated as a result of the 1972 amendments, and followed from concerns regarding HEW's claims-approval rate, as explained in the Report of the Senate Committee on Labor and Public Welfare:

> "[T]he backlog of claims which have been filed under [part B] cannot await the establishment of new facilities

[7] It is also interesting to note that the definition of the word "criterion" in Webster's Third New International Dictionary 538 (1966) is in three parts, the first two of which contain medical references. Thus, the first definition uses as an example "a special constitutional criterion of that person," drawn from the Journal of the American Medical Association, and the second makes reference to "the accepted criteria of adequate diet." None of the definitions makes any reference to legal procedures, presumptions, or burdens of proof.

> or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> "Accordingly, the Committee expects the Secretary to adopt *such interim evidentiary rules and disability evaluation criteria* as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments. *Such interim rules and criteria* shall give full consideration to the combined employment handicap of disease and age and provide for the *adjudication of claim[s] on the basis of medical evidence* other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [by HEW]." S. Rep. No. 92–743, pp. 18–19 (1972) (emphasis added).

The Report clearly distinguishes between evidentiary rules and medical disability evaluation criteria. The part B interim regulation (20 CFR § 410.490) followed this distinction by providing for certain medical disability evaluation criteria to be adjudicated by means of certain evidentiary rules. In fact, § 410.490(a) explicitly describes the "interim adjudicatory rules" that follow in § 410.490(b) in terms that match the Senate Report's distinction between "evidentiary rules" and "disability evaluation criteria":

> "In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such *interim evidentiary rules and disability evaluation criteria* as would permit prompt and vigorous processing of the large backlog of claims consistent with

> the language and intent of the 1972 amendments and that such *rules and criteria* would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such *interim evidentiary rules and criteria.* They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal." (Emphasis added.)

Although HEW's claims-approval rate rose under the part B interim regulation, Labor was still adjudicating part C claims under stricter permanent regulations. In a 1975 House Report that served as a precursor to the BLBRA, the Committee on Education and Labor explained Labor's bind, and offered assistance:

> "For some inexplicable reason, [HEW], exercising authority provided under the current law, has literally saddled [Labor] with *rigid and difficult medical standards* for measuring claimant eligibility under part C of the program. The so-called *'permanent' medical standards* now in effect under part C are much more demanding than the so-called *'interim' standards* applied by HEW under part B of the program. HEW points to 'substantial legal and other reasons' for applying *restrictive medical standards* to a claim filed on and after July 1, 1973, and *less restrictive criteria* to a claim filed before July 1, 1973. That assertedly 'substantial' support apparently arises out of language contained in the Senate Report

accompanying the 1972 amendments. In actual fact, HEW has completely misplaced the emphasis of the Senate Report. The Senate directive with regard to the *'interim' standards* clearly spoke to *standards* that would obtain until 'the *establishment of new facilities or the development of new medical procedures.*' (S. Rept. 92–743, at 18) That was the clear and explicit condition underscoring the need for and the duration of *'interim' medical standards.* Under the HEW interpretation, these developments somehow magically occurred at the onset of part C of the program. The Congress *did not* intend in adopting the Senate initiative, as HEW so unequivocally asserts, that this 'interim' approach would suddenly conclude at the termination date for new part B filings. And HEW could hardly intimate that the *'new facilities' or 'new medical procedures'* referenced so specifically in the Senate Report have, in fact, become reality.

"This provision of the bill would require that *standards no more restrictive than the 'interim' medical standards* shall be equally applicable to part C claims. To the extent that *more restrictive standards* are justified by the presence of *'new facilities' or 'new medical procedures,'* it is apparent that the Congress must in the future make that determination." H. R. Rep. No. 94–770, pp. 13–14 (1975) (emphasis added).

The terms "medical standards" and "standards" are used interchangeably in this Report; the unmodified term "standards" is used not to distinguish "medical standards," but rather as a matter of style to avoid repetition.

Testifying during 1977 hearings, President Arnold Miller of the United Mine Workers of America explained his support for a requirement that Labor adjudicate earlier filed or once-denied part C claims under medical standards no less restrictive than HEW's part B medical standards:

> "The interim standards were by no means ideal. Nearly four of every ten miners' claims were denied under these standards. We have criticized their failure to include new blood gas standards and their overreliance on a single breathing test score. However, these standards can provide a base point, and we urge enactment of a guarantee that any new standards will be no more restrictive than the interim standards. In developing new regulations we urge that [Labor] utilize the lung formation standards established by the I. L. O." Oversight of the Administration of the Black Lung Program, Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., pp. 49–50 (1977).

That a strong supporter of liberalized standards for black lung benefits explained quite carefully that the criteria at issue in this case are medical—specifically, those medical criteria that relate to proof of the disease ("blood gas standards"; "breathing test score"; "lung formation standards")—is certainly strong evidence that the Secretary's position is correct (and, *a fortiori*, reasonable).[8] It is also interesting

[8] Similarly, a Social Security Administration (SSA) medical staff member explained that HEW's concern in constructing the part B interim rules was with liberalizing medical test standards:

"The only practicable way to respond to [Congress' desire to decrease the backlog of claims in a liberalized fashion], considering the marked limitations in actually obtaining the physical performance tests, was to establish *criteria which would detect disease.*

"It was acknowledged that *these criteria* would not necessarily describe a level of impairment which would impose a functional limitation on the individual. Thus, the interim adjudicatory rules provide for allowing the claim if (1) a chest roentgenogram, biopsy, or autopsy establishes the existence of pneumoconiosis or (2) the individual's ventilatory function values met a liberalized table provided in the section.

"The liberalized ventilatory function table was established at a sufficiently high level, at a point just below normal for the younger individual, so as not to disadvantage those individuals who might be allowed benefits if the physical performance test could be obtained, and it was recognized it

to note that the ensuing Labor regulation did provide liberalized standards for proving disease by adding "[b]lood gas studies" and "[o]ther medical evidence" to the methods of proof available under the HEW regulation. See 20 CFR §§ 727.203(a)(3) and (4) (1988).

The House Education and Labor Committee returned its Report on the proposed BLBRA on March 31, 1977. H. R. Rep. No. 95–151. Throughout the discussion whether Labor could adopt HEW's more lenient regulation, the Report uses the terms "medical standards" and "screening criteria" to describe what Labor sought to borrow. See *id.*, at 15, 16, 28. The House bill required Labor to adjudicate *all* part C claims—whether earlier filed, once-denied, or later filed—pursuant to criteria not more restrictive than HEW's part B criteria.

The Senate Human Resources Committee approved a bill that authorized Labor to write new part C permanent regulations for all claims adjudicated under its aegis and in so doing "to establish medical test criteria appropriate to disability in coal miners." See S. Rep. No. 95–209, p. 2 (1977). The Committee clarified the Senate's desire to give Labor leeway in establishing "medical test standards." See *id.*, at 13–14. Even the United Mine Workers, who thought HEW's part B interim standards too *stringent*, wrote to the Committee about medical test standards that measure pulmonary capacity; there is no mention of evidentiary standards. See *id.*, at 13. Further, a Congressional Budget Office survey, written when it was assumed that HEW's part B interim standards would be maintained for all part C claims, states that the new

---

could not be obtained in a vast majority of cases." Oversight of the Administration of the Black Lung Program, Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., p. 194 (1977) (statement of Herbert Blumenfeld, M. D., Chief, Medical Consulting Staff, Bureau of Disability Insurance, Social Security Administration) (emphasis added).

measure of total disability "will be equivalent to the interim medical standards." See *id.*, at 25.[9]

House and Senate conferees met to resolve the differences between the two bills, and, not surprisingly, reached a compromise. See H. R. Conf. Rep. No. 95–864 (1978). The Conference Report explains that, pursuant to the Senate's desires, Labor would promulgate for future claims "new medical standards," that is, "criteria for medical tests," and that, in accord with the House's wishes, "the so-called 'interim' part B medical standards are to be applied to all reviewed and pending claims filed before the date the Secretary of Labor promulgates new medical standards for part C cases." *Id.*, at 16. It could not be clearer that the conferees intended to carry over HEW's part B *medical* standards to earlier filed or once-denied part C claims, while new *medical* standards would govern Labor's adjudication of claims filed later. It is also important to note that although the resulting bill required that Labor "shall not provide more restrictive criteria" to its adjudication of earlier filed or once-denied claims, the Conference Report adds that "in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor." *Ibid.* This indicates that Congress was concerned that some *medical* evidence was not being considered; this concern, attached as a clause at the end of a sentence about "no more restrictive criteria," implies that the referenced criteria are medical ones.

The Senate and House debates on the Conference Report provide the most dramatic evidence that Members of both Houses of Congress understood the term "criteria" in

---

[9] During Senate debate, Senator Randolph of West Virginia, the manager of the Senate bill, explained that the bill "authorizes the Secretary of Labor to establish medical criteria for determining total disability in coal mines under part C. Currently the [SSA] imposes on [Labor] its own standards, which are considerably more restrictive than the standards it uses for part B claimants." 123 Cong. Rec. 24239 (1977).

§ 902(f)(2) to refer to "medical criteria." Senator Randolph of West Virginia, the Senate manager of the bill, explained: "Under the conference report, the Secretary of Labor is authorized to promulgate medical standards for the evaluation of part C claims at a time in the future. However, the review of all part B and part C claims and of all claims filed prior to the promulgation of the Labor Department's medical standards will be accomplished with the use of the 'interim' medical standards which were in use after the Black Lung Amendments of 1972." 124 Cong. Rec. 2331 (1978). Senator Javits of New York then described his understanding of the legislation under consideration:

> "I was concerned throughout the consideration of this legislation by the conference committee that the dual responsibilities of HEW and [Labor] for reviewing previously denied claims be exercised in a manner that is fair to all concerned. These claims are to be reviewed by both agencies under *medical criteria no more restrictive than the so-called interim medical standards* which were originally promulgated by HEW for the determination of claims under part B of the act, for which HEW was responsible through June 30, 1973. The bill also provides authority for the Secretary of Labor to promulgate regulations establishing *revised medical criteria*, based on the best medical information available, to be applicable to all newly filed claims.
>
> "The *'interim' standards* as they were applied to determine benefit claims under part B, have been highly controversial and widely criticized. For example, the Secretary of Labor, on September 30, 1977, stated:
>
> "'The *part B standards are not medically sound* for providing benefits to all deserving individuals.'
>
> "I therefore requested that the statement of managers include language to the effect that 'all relevant medical evidence' be considered in applying the *'interim' standards* to the reviewed claims in order to more clearly ex-

> plain the intent of the new section [902(f)(2)] of the act created by section 2(c) of the bill. I also suggested the language that 'the conferees expect the Secretary of HEW to administer the *"interim" standards* with a view to the just accomplishment of the purpose of allowing for reviewed Part B claims to establish disability within the meaning of the 1977 amendments as they apply to all reviewed Part B claims.' It is found in the statement of managers under the heading of 'Review.'" *Id.*, at 2333–2334 (emphasis added).

Thus, the Senators who spoke to the issue plainly understood § 902(f)(2) as referring to *medical* criteria.

The House debate reveals a similar clarity of understanding. Representative Perkins of Kentucky, the bill's House manager, explained:

> ". . . The House bill required that the so-called *interim medical standards* of part B of the program be applied under part C as well. For the most part, the House provision prevailed in conference on this issue and all of the denied and pending claims subject to review under the legislation will be evaluated according to the *'interim' standards*. *These standards* will continue to apply into the future as well, until such time as the Secretary of Labor promulgates new regulations consistent with the authority given him by the bill. With respect to the review responsibility of the Secretary of HEW under the legislation, the *'interim' standards* remain solely applicable, as they have in the past under the HEW-part of the program. As for the Secretary of Labor's review responsibility thereunder, the *'interim' standards* are exclusively and unalterably applicable with respect to every area they now address, and may not be made or applied more restrictively than they were in the past, but they may be considered by the Labor Secretary within the context of all relevant medical evidence according to the methodology prescribed by the Secretary

and published in the Federal Register." 124 Cong. Rec. 3426 (1978) (emphasis added).

Representatives Perkins and Simon, of Illinois, then engaged in the following revealing colloquy:

"Mr. SIMON. Mr. Speaker, I would also like to ask Chairman PERKINS, who also served as chairman of the conference committee, if in his opinion this legislation clearly requires that all denied or pending claims subject to the review provisions of the new section 435 will be subject to reconsideration under the so-called *interim medical criteria* applicable under part B of the black lung program?

"Mr. PERKINS. That is the intent of the legislation, and I would state to the gentleman that a reading of the conference report and of the joint explanatory statement could lead only to that opinion. The new law speaks clearly to this issue; and the relevant legislative history and intent is equally clear. All claims filed before the date that the Secretary of Labor promulgates *new medical standards* under part C are subject to evaluation under *standards* that are no more restrictive than those in effect as of June 30, 1973. And that means the so-called *interim standards*. These are the *standards* HEW has applied under part B and they are the precise and only *standards* HEW will apply to these old claims it must review according to this legislation. As for the Labor Department, it too must apply the *interim standards* to all of the claims filed under part C, at least until such time as the Secretary of Labor promulgates *new standards* consistent with the authority this legislation gives him. We do recognize in the joint explanatory statement that the Secretary of Labor may apply the *interim standards* to its part C claims within the context of all relevant medical evidence. But there is no such directive or requirement imposed on HEW as it fulfills its review duties. We expect that HEW will review these

old claims according to the same *interim criteria* it has applied in the past.

"I would also add here that this legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the *interim standards* until such time as he actually promulgates the *new standards* and those *new standards* will apply only to claims filed after the effective date of their promulgation. *Insofar as the interim standards address a medical criteria, they cannot be made more restrictive.*

"Mr. SIMON. Mr. Speaker, I thank the chairman for his response. His views are in perfect accord with my own understanding of the intent underlying these provisions.

. . . . .

"Mr. Speaker, I am pleased that the language in this bill is crystal clear on the subject of the *medical standards* that must be used by the Secretary of HEW and the Secretary of Labor in reviewing all pending and denied claims filed before the effective date of *new medical standards* promulgated by the Secretary of Labor for part C cases. *Those standards* can be no more restrictive than the so-called *interim criteria, formally known as the interim adjudicatory standards,* applied by the [SSA] after the 1972 Black Lung Amendments and before July 1, 1973.

[He then quotes § 902(f)(2).]

"It should not be possible to misconstrue the meaning of this language. The Department of Labor is required to apply *medical criteria* no more restrictive than *criteria* being used by the [SSA] on June 30, 1973.

"The conference committee agreed that the Secretary of Labor, in his review of denied and pending cases, is to consider all relevant medical evidence and to promulgate regulations for the use of such evidence. An example of this would be for the Secretary to consider and promul-

> gate regulations on the International Labour Organization's respiratory function tests in pneumoconiosis, which is not a form of medical evidence included in the interim adjudicatory standards.
>
> [He then quotes from the Conference Report.]
>
> "So the Secretary is *not confined to the medical evidence of the interim criteria and yet may not prescribe criteria more restrictive than the social security interim adjudicatory standards.*" *Id.*, at 3431 (emphasis added).

Although the Members occasionally used the unmodified terms "standards" and "criteria," and although Representative Simon a few times referred to the "interim adjudicatory standards," the comments read in full leave no doubt that these terms were used interchangeably to refer to what the Members viewed as *medical* criteria.

I have quoted at length from the legislative history of the BLBRA because this history reveals the supposedly "plain" language of the statute to be not so plain after all. In other words, although § 902(f)(2) uses the term "criteria," it is plain that what Members of Congress were concerned about were *medical* criteria. This concern found its way to both sides of the compromise: The Senate prevailed in authorizing Labor to promulgate new permanent part C regulations according to newly developed medical criteria, while the House prevailed in ensuring that Labor's adjudication of earlier filed or once-denied claims would be undertaken pursuant to HEW's part B interim medical criteria. That § 902(f)(2) uses the phrase "criteria" rather than "medical criteria" can only be understood, in the context of the intentions of the Members of Congress who enacted the BLBRA, as the natural culmination of a discussion that used the two phrases interchangeably throughout.[10] Although the Court today ex-

[10] Alternatively, even if the use of the unmodified "criteria" in § 902(f)(2) is seen as the product of congressional inadvertence, legislative oversight or inadvertence can at times produce statutory language that does not

presses disbelief as to the proposition that Congress could use both "criteria for all appropriate medical tests" and "criteria" to refer to medical criteria, a contextual understanding of this legislation reveals that attributing to Congress an intent to *distinguish* between these two provisions is, in fact, the unbelievable proposition. As the genesis and culmination of the compromise reveal, the concerns of both the House and the Senate throughout were with what *medical* criteria should be utilized by Labor in adjudication of part C claims.

IV

There is another body of evidence completely consistent with the understanding that Congress intended "criteria" in § 902(f)(2) to refer to "medical criteria" only: All available data plainly demonstrate that pneumoconiosis is a progressive disease and that although miners with fewer than 10 years of underground employment sometimes contract sim-

---

cleanly reflect Congress' intention. See, *e. g.*, *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 582–586 (1976) (interpreting 28 U. S. C. § 1343(3) to confer jurisdiction upon territorial courts); *Cass* v. *United States*, 417 U. S. 72, 83 (1974) ("In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process"); *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351, 354 (1971) ("We often must legislate interstitially to iron out inconsistencies within a statute or to fill gaps resulting from legislative oversight or to resolve ambiguities resulting from a legislative compromise" (footnote omitted)); see also *United States* v. *Locke*, 471 U. S. 84, 123 (1985) (STEVENS, J., dissenting) ("[I]t is surely understandable that the author of § 314 might inadvertently use the words 'prior to December 31' when he meant to refer to the end of the calendar year"); *Maine* v. *Thiboutot*, 448 U. S. 1, 14 (1980) (Powell, J., dissenting) ("When the language does not reflect what history reveals to have been the true legislative intent, we have readily construed the Civil Rights Acts to include words that Congress inadvertently omitted"); cf. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 Case W. Res. L. Rev. 179, 191 (1986) ("Interpretation is no less a valid method of acquiring knowledge because it necessarily ranges beyond the text").

ple pneumoconiosis, they rarely, if ever, develop disabling cases of the disease. Although the Court is quite correct in saying that "we do not sit to determine what Congress *ought to have done* given the evidence before it," *ante*, at 118 (emphasis added), comprehending the evidence with which Congress worked can help us determine what Congress *actually did*.[11]

During the 1974 hearings that gave rise to the BLBRA, even supporters of liberalized standards agreed that short-term miners should be subjected to more rigorous rules than long-term miners. See, *e. g.*, Hearings on H. R. 3476, H. R. 8834, H. R. 8835, and H. R. 8838, before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st and 2d Sess., 367 (hereinafter 1974 Hearings) (Director of Appalachian Research and Defense Fund argues for quite lenient standards for miners with 20 years of experience, and suggests that "[a] miner with 10 or 15 years might be required to meet the interim standards, and a miner with less than 10 years, perhaps, a more rigid standard"). During those same hearings, supporters of liberalized standards from the United Mine Workers and the House both mentioned that 20 CFR § 410.490, the HEW in-

---

[11] As we said just last Term in *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 484 U. S. 135, 157–158, n. 30 (1987):

"Like all rules of evidence that permit the inference of an ultimate fact from a predicate one, black lung benefits presumptions rest on a judgment that the relationship between the ultimate and the predicate facts has a basis in the logic of common understanding.

"'Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts . . . . The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.' *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979)."

terim part B regulation under consideration today, provided a burden-shifting presumption only to miners with at least 15 years of coal mining experience. 1974 Hearings 353 (statement of Bedford W. Bird, Deputy Director, Department of Occupational Health, United Mine Workers); *id.*, at 395 (question from Representative Perkins of Kentucky).[12]

Study after study has revealed one stark, simple fact: Miners with fewer than 10 years in the mines rarely suffer from pneumoconiosis *at all*, and those who have the disease have its earliest, nondisabling stage. The Appendix to the 1977 House Report lists a number of studies that have been conducted concerning black lung disease. H. R. Rep. No. 95–151, at 30–38. The evidence from these studies could not more plainly demonstrate that short-term miners either do not have pneumoconiosis or have it only at its earliest stages. See, *e. g.*, Lainhart, Prevalence of Coal Miners' Pneumoconi-

---

[12] One may conclude that these gentlemen simply misread the regulation; it does take a rather labyrinthian route through this regulation to reach that class of miners who can receive the presumption without at least 10 years in the mines. However, another theory, which follows from the discussion in Part I, *supra*, is available: HEW itself may have overlooked the fact that its interim regulation, as promulgated, permitted one class of miners—those who can prove both pneumoconiosis (through X ray, biopsy, or autopsy) and coal mine causation (independently of the 10-year minimum option)—to receive the presumption without proving at least 10 years in the mines. In other words: All parties to this litigation have assumed that § 410.490 clearly permits miners such as respondents to receive the benefit of the presumption without showing at least 10 years in the mines. Additionally, it has been assumed that Labor's interim presumption, by requiring a 10-year minimum from all miners, is clearly more restrictive for miners such as respondents. However, the evidence from the hearings, Committee Reports, and floor debates reveals that no one assumed that short-term miners would obtain the benefit of the HEW presumption, and therefore lends strength to the theory, set forth in Part I, *supra*, that the gap in the presumption was inadvertent, *i. e.*, a loophole. Accordingly, one could readily conclude as well that the 1977 Congress, which required Labor's interim presumption to utilize no less restrictive criteria than HEW's, was also legislating under the assumption that only long-term miners were affected.

osis in Appalachian Bituminous Coal Miners, in Pneumoconiosis in Appalachian Bituminous Coal Miners 31, 52, 56 (1969) (526 of 536 short-term miners either did not have the disease or were merely suspect for it (98%); 10 short-term miners definitely had pneumoconiosis. "[F]or work periods less than 15 years underground, the occurrence of roentgenographic evidence of definite pneumoconiosis appeared to be spotty among all working coal miners . . . and showed no particular trend. For work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground"); Hyatt, Kistin, & Mahan, Respiratory Disease in Southern West Virginia Coal Miners, 89 American Rev. Respiratory Disease 387, 389 (1964) (33 of 35 short-term miners had no pneumoconiosis (94.3%); 2 had simple pneumoconiosis); Morgan, Burgess, Jacobson, O'Brien, Pendergrass, Reger, & Shoub, The Prevalence of Coal Workers' Pneumoconiosis in U. S. Coal Miners, 27 Archives of Environmental Health 225 (1973) (3,064 of 3,450 short-term miners had no pneumoconiosis (88.8%); 385 had simple pneumoconiosis (11.2%); 1 had complex pneumoconiosis).[13]

Given this overwhelming evidence, it was surely not unreasonable for the Secretary to reject a reading of the BLBRA that would mandate a presumption of total disability caused by pneumoconiosis for every short-term miner who could establish that he had contracted simple pneumoconiosis, which "is generally regarded by physicians as seldom productive of significant respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 7 (1976).

[13] As another example, two studies presented during 1981 hearings classified 99.3% and 98.9% of miners with fewer than 10 years of coal mine experience in radiographic category "0," revealing no disease whatsoever. Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 97th Cong., 1st Sess., 32 (statement of Dr. J. Donald Millar, Director, National Institute for Occupational Safety and Health, Centers for Disease Control, Public Health Service).

V

Deference to Labor's construction is appropriate at two different levels of analysis. First, to the extent that the debate is over whether "criteria" means "all criteria" or only "medical criteria," the foregoing sections on the legislative history of the BLBRA and statistical studies of the connection between years in the mines and incidence of pneumoconiosis reveal that reading "criteria" to mean "medical criteria" is almost certainly correct and is certainly reasonable. Second, if one concedes that Congress meant "medical criteria," but simultaneously insists that medical criteria encompass proof of total disability from pneumoconiosis as well as proof of black lung disease itself, the case for deference could not be stronger. For as an interpretive question becomes more technical, the expertise of the agency charged with a statute's administration becomes greater and deferring to its construction rather than importing our own becomes more appropriate. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 864–866; *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U. S. 380, 390 (1984). One can define away the problem through hypotheticals about football-team captains and B averages, but in the end such hypotheticals cannot overcome the common-sense proposition that "medical criteria" may well be limited to criteria that are clearly medical—ventilatory study values, how X rays are to be read, etc.—and not extended to second-level medical concerns—*e. g.*, at what point someone is likely to be totally disabled from coal mine employment. That we have evidence of congressional concern with the former, as well as evidence that short-term miners simply do not suffer from pneumoconiosis in the same way that longer term miners do, should be sufficient to sustain the Secretary's reading as reasonable.

In order to sanction a departure from the views of an agency charged with the administration of a complex regu-

latory scheme, we must be convinced that Congress meant something other than the agency thinks it meant. The regulation of the Secretary that is at issue in this case was promulgated in 1978 and has been consistently defended and enforced by four different Secretaries of Labor.[14] Congress delegated the task of implementing this complex and costly piece of legislation to that office and I find no reason to conclude that the Secretary's interpretation exceeded the bounds of the powers delegated to her. Accordingly, I respectfully dissent.

---

[14] That the Secretary's interpretation has survived a change in administration (and political party as well) provides yet another reason to defer to the reasonable view of the Executive Branch on the subject. See, *e. g.*, *Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 807 (1973) (plurality opinion of MARSHALL, J.) ("A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress"); *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 40–42 (1983); cf. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 585 (1985) ("[A]brupt and profound alterations in an agency's course [after change in administration or Congress] may signal a loss of fidelity to [Congress'] original intent"). It is also relevant that the Secretary was involved in the drafting of the BLBRA. See, *e. g.*, *Miller* v. *Youakim*, 440 U. S. 125, 144 (1979); cf., *e. g.*, *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965) (contemporaneous construction by agency due deference).

McNAMARA *v.* COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 87–5840. Argued November 28, 1988—Decided December 6, 1988

Appeal dismissed.

James E. Sutherland argued the cause for appellant. With him on the briefs was *R. Stephen McNally.*

Lloyd M. Harmon, Jr., argued the cause for appellee. With him on the brief were *Jerome A. Barron* and *Sanford N. Katz.**

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

**Isabelle Katz Pinzler, Steven R. Shapiro*, and *John A. Powell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Barker Foundation by *Erwin N. Griswold, Robert C. Gombar*, and *Glen D. Nager;* for the Child by *Christian R. Van Deusen* and *Ted R. Youmans;* and for the National Committee for Adoption by *Merrill F. Nelson, C. Harold Brown*, and *William M. Schur.*

BEECH AIRCRAFT CORPORATION *v.* RAINEY ET AL.

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

No. 87–981. Argued October 4, 1988—Decided December 12, 1988*

Respondents' spouses, a Navy flight instructor and her student, were killed when, during training exercises, their Navy aircraft banked sharply to avoid another plane, lost altitude, and crashed. At the trial of respondents' product liability suit against petitioners, the companies which manufactured and serviced the plane in question, the only seriously disputed issue was whether the crash was caused by pilot error or equipment malfunction. Having previously determined that a Navy investigative report of the incident (the JAG Report or Report) was sufficiently trustworthy to be admissible, the District Court admitted, over respondents' objections, most of the Report's "opinions," including a statement suggesting that pilot error was the most probable cause of the accident. Moreover, after respondent Rainey, who was himself a Navy flight instructor, admitted on direct examination as an adverse witness that he had made certain statements arguably supporting a pilot error theory in a detailed letter in which he took issue with some of the JAG Report's findings, his counsel attempted to ask him on cross-examination whether the letter did not also say that the most probable primary cause of the mishap was a loss of power due to equipment malfunction. However, before Rainey could answer, the court sustained a defense objection on the ground that the question asked for Rainey's opinion, and cut off further questioning along this line. After the jury returned a verdict for petitioners, the Court of Appeals reversed and remanded for a new trial. The court held itself bound by *Smith* v. *Ithaca Corp.*, 612 F. 2d 215 (CA5), such that Federal Rule of Evidence 803(8)(C)—which excepts from the hearsay rule "public records and reports" setting forth "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness"—did not encompass the JAG Report's evaluative conclusions or opinions. The court also held that Federal Rule of Evidence 106 forbade the trial court to prohibit cross-examination about additional portions of Rainey's letter which would

---

*Together with No. 87–1028, *Beech Aerospace Services, Inc.* v. *Rainey et al.*, also on certiorari to the same court.

have put in context the admissions elicited from him on direct examination. On rehearing en banc the Court of Appeals did not disturb the panel's judgment.

Held:

1. Statements in the form of opinions or conclusions are not by that fact excluded from the scope of Rule 803(8)(C). The Rule's language does not call for the distinction between "fact" and "opinion" drawn by *Smith*, *supra*, and other proponents of a narrow interpretation of the Rule's "factual findings" phrase, since "finding of fact" is commonly defined to include conclusions by way of reasonable inference from the evidence, and since in specifying the kinds of reports that are admissible the Rule does not create a distinction between "fact" and "opinion." Nor is any such distinction required by the intent of the Rule's framers, as expressed in the Advisory Committee's Notes on the Rule. This conclusion is strengthened by the analytical difficulty of drawing such a distinction. Rather than requiring that some inevitably arbitrary line be drawn between the various shades of fact/opinion that invariably will be present in investigatory reports, the Rule instructs courts—as its plain language states—to admit "reports . . . setting forth . . . factual findings." Appropriate limitations and safeguards lie in the fact that the Rule's requirement that reports contain factual findings bars the admission of statements not based on factual investigation, and in the Rule's trustworthiness requirement. Thus, as long as a conclusion satisfies the latter requirements, it should be admissible along with other portions of the Report. Here, since the District Court determined that certain of the JAG Report's conclusions were trustworthy, it rightly admitted them into evidence. Pp. 161–170.

2. On the facts of this litigation, the District Court abused its discretion in restricting the scope of cross-examination of respondent Rainey by his counsel in regard to his letter. Pp. 170–175.

(a) While the letter did make the statements to which Rainey admitted on direct examination which tended to support a pilot error theory, the letter's thrust was to challenge that theory as inconsistent with the evidence and the likely actions of the two pilots, and to expound at length on Rainey's theory of equipment malfunction and demonstrate how the various pieces of evidence supported that theory. Since it is plausible that the jury would have concluded from Rainey's testimony that he did not believe in his equipment malfunction theory when he wrote the letter but developed it only later for litigation purposes, the jury was given a distorted and prejudicial impression of the letter, which Rainey's counsel was unable to counteract due to the District Court's refusal to allow him to present additional information on cross-examination. The common-law "rule of completeness," which has been

partially codified in Rule 106—whereby, when a party has introduced part of a writing, an adverse party may require the introduction of any other part which ought in fairness to be considered contemporaneously—was designed to prevent exactly this type of prejudice. However, although the concerns underlying Rule 106 are clearly relevant to this litigation, it is unnecessary to determine whether the Rule applies, since, where misunderstanding or distortion can be averted only through presentation of an additional portion of a document, the material required for completeness is necessarily relevant and admissible. The question posed by Rainey's counsel on cross-examination was not asked for the purpose of eliciting Rainey's opinion as to the cause of the accident, but rather inquired whether he had made a certain statement in his letter, a question he was eminently qualified to answer. Defense counsel's objection to that question as calling for an opinion could not avail in view of the obvious purpose for which the statement was offered. Pp. 170–173.

(b) Petitioners' contention that Rainey waived the right to pursue the cross-examination testimony issue on appeal because he did not properly raise it in the trial court is not persuasive. The nature of Rainey's proposed testimony was abundantly apparent from the very question put by his counsel, such that the offer-of-proof requirement of Federal Rule of Evidence 103(a)(2) was satisfied. Moreover, Rainey's counsel substantially satisfied the requirement of Federal Rule of Civil Procedure 46 that he put the court on notice as to his objection to the exclusion and the grounds therefor, when, in the colloquy following the defense objection to his question, and before he was cut off, he began to articulate his completeness argument. Pp. 174–175.

827 F. 2d 1498, affirmed in part, reversed in part, and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined, and in Parts I and II of which REHNQUIST, C. J., and O'CONNOR, J., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 176.

Jos. W. Womack argued the cause for petitioners in both cases and filed briefs for petitioner Beech Aircraft Corp. *W. H. F. Wiltshire* filed briefs for petitioner Beech Aerospace Services, Inc.

Dennis K. Larry argued the cause for respondents in both cases. With him on the brief were *Edward R. Curtis* and *Donald H. Partington.*

JUSTICE BRENNAN delivered the opinion of the Court.

In this action we address a longstanding conflict among the Federal Courts of Appeals over whether Federal Rule of Evidence 803(8)(C), which provides an exception to the hearsay rule for public investigatory reports containing "factual findings," extends to conclusions and opinions contained in such reports. We also consider whether, on the facts of this litigation, the trial court abused its discretion in refusing to admit, on cross-examination, testimony intended to provide a more complete picture of a document about which the witness had testified on direct.

I

This litigation stems from the crash of a Navy training aircraft at Middleton Field, Alabama, on July 13, 1982, which took the lives of both pilots on board, Lieutenant Commander Barbara Ann Rainey and Ensign Donald Bruce Knowlton. The accident took place while Rainey, a Navy flight instructor, and Knowlton, her student, were flying "touch-and-go" exercises in a T–34C Turbo-Mentor aircraft, number 3E955. Their aircraft and several others flew in an oval pattern, each plane making successive landing/takeoff maneuvers on the runway. Following its fourth pass at the runway, 3E955 appeared to make a left turn prematurely, cutting out the aircraft ahead of it in the pattern and threatening a collision. After radio warnings from two other pilots, the plane banked sharply to the right in order to avoid the other aircraft. At that point it lost altitude rapidly, crashed, and burned.

Because of the damage to the plane and the lack of any survivors, the cause of the accident could not be determined with certainty. The two pilots' surviving spouses brought a product liability suit against petitioners Beech Aircraft Corporation, the plane's manufacturer, and Beech Aerospace Services, which serviced the plane under contract with the Navy.[1] The plaintiffs alleged that the crash had been

[1] The manufacturer of the plane's engine, Pratt & Whitney Canada, Ltd., was also a defendant, but it subsequently settled with respondents and is no longer a party to this action.

caused by a loss of engine power, known as "rollback," due to some defect in the aircraft's fuel control system. The defendants, on the other hand, advanced the theory of pilot error, suggesting that the plane had stalled during the abrupt avoidance maneuver.

At trial, the only seriously disputed question was whether pilot error or equipment malfunction had caused the crash. Both sides relied primarily on expert testimony. One piece of evidence presented by the defense was an investigative report prepared by Lieutenant Commander William Morgan on order of the training squadron's commanding officer and pursuant to authority granted in the Manual of the Judge Advocate General. This "JAG Report," completed during the six weeks following the accident, was organized into sections labeled "finding of fact," "opinions," and "recommendations," and was supported by some 60 attachments. The "finding of fact" included statements like the following:

> "13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned.
>
> . . . . .
>
> "27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power." App. 10–12.

Among his "opinions" Lieutenant Commander Morgan stated, in paragraph 5, that due to the deaths of the two pilots and the destruction of the aircraft "it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground." He nonetheless continued with a detailed reconstruction of a possible set of events, based on pilot error, that could have caused the accident.[2] The next two paragraphs stated a caveat and a conclusion:

---

[2] Paragraph 5 reads in its entirety as follows:

"Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on

"6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a 'rollback' did occur.

"7. The most probable cause of the accident was the pilots *[sic]* failure to maintain proper interval." *Id.*, at 15.

The trial judge initially determined, at a pretrial conference, that the JAG Report was sufficiently trustworthy to be admissible, but that it "would be admissible only on its fac-

---

its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

"a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

"b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings 'on the numbers.' After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

"c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

"d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

"e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

"f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

"g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Rainey reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available." App. 14–15.

tual findings and would not be admissible insofar as any opinions or conclusions are concerned." *Id.*, at 35. The day before trial, however, the court reversed itself and ruled, over the plaintiffs' objection, that certain of the conclusions would be admitted. *Id.*, at 40–41. Accordingly, the court admitted most of the report's "opinions," including the first sentence of paragraph 5 about the impossibility of determining exactly what happened, and paragraph 7, which opined about failure to maintain proper interval as "[t]he most probable cause of the accident." *Id.*, at 97. On the other hand, the remainder of paragraph 5 was barred as "nothing but a possible scenario," *id.*, at 40, and paragraph 6, in which investigator Morgan refused to rule out rollback, was deleted as well.[3]

This action also concerns an evidentiary ruling as to a second document. Five or six months after the accident, plaintiff John Rainey, husband of the deceased pilot and himself a Navy flight instructor, sent a detailed letter to Lieutenant Commander Morgan. Based on Rainey's own investigation, the letter took issue with some of the JAG Report's findings and outlined Rainey's theory that "[t]he most probable primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." *Id.*, at 104, 111.

At trial Rainey did not testify during his side's case in chief, but he was called by the defense as an adverse witness. On direct examination he was asked about two statements contained in his letter. The first was to the effect that his wife had unsuccessfully attempted to cancel the ill-fated training flight because of a variety of adverse factors including her student's fatigue. The second question concerned a portion of Rainey's hypothesized scenario of the accident:

---

[3] The record gives no indication why paragraph 6 was deleted. See, *e. g.*, *id.*, at 40 (striking most of paragraph 5, as well as paragraphs 8 and 9, but silent on paragraph 6). Neither at trial nor on appeal have respondents raised any objection to the deletion of paragraph 6.

> "Didn't you say, sir, that after Mrs. Rainey's airplane rolled wings level, that Lieutenant Colonel Habermacher's plane came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximitely *[sic]* of Colonel Habermacher's plane caused one of the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Colonel Habermacher's airplane?" *Id.*, at 75.

Rainey admitted having made both statements. On cross-examination, Rainey's counsel asked the following question: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably *[sic]* primary cause of this mishap was rollback?" *Id.*, at 77. Before Rainey answered, the court sustained a defense objection on the ground that the question asked for Rainey's opinion. Further questioning along this line was cut off.

Following a 2-week trial, the jury returned a verdict for petitioners. A panel of the Eleventh Circuit reversed and remanded for a new trial. 784 F. 2d 1523 (1986). Considering itself bound by the Fifth Circuit precedent of *Smith* v. *Ithaca Corp.*, 612 F. 2d 215 (1980),[4] the panel agreed with Rainey's argument that Federal Rule of Evidence 803(8)(C), which excepts investigatory reports from the hearsay rule, did not encompass evaluative conclusions or opinions. Therefore, it held, the "conclusions" contained in the JAG Report should have been excluded. One member of the panel, concurring specially, urged however that the Circuit reconsider its interpretation of Rule 803(8)(C), suggesting that "*Smith* is an anomaly among the circuits." 784 F. 2d, at 1530 (opinion of Johnson, J.). The panel also held, citing Federal Rule of Evidence 106, that it was reversible error for the trial court

---

[4] In *Bonner* v. *Prichard*, 661 F. 2d 1206 (1981), the newly created Eleventh Circuit adopted as binding precedent Fifth Circuit decisions rendered prior to October 1981.

to have prohibited cross-examination about additional portions of Rainey's letter which would have put in context the admissions elicited from him on direct.[5]

On rehearing en banc, the Court of Appeals divided evenly on the question of Rule 803(8)(C). 827 F. 2d 1498 (CA11 1987). It therefore held that *Smith* was controlling and consequently reinstated the panel judgment. On the Rule 106 question, the court unanimously reaffirmed the panel's decision that Rule 106 (or alternatively Rule 801(d)(1)(B)) required reversal. We granted certiorari to consider both issues. 485 U. S. 903 (1988).

II

Federal Rule of Evidence 803 provides that certain types of hearsay statements are not made excludable by the hearsay rule, whether or not the declarant is available to testify. Rule 803(8) defines the "public records and reports" which are not excludable, as follows:

> "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

Controversy over what "public records and reports" are made not excludable by Rule 803(8)(C) has divided the federal courts from the beginning. In the present litigation, the Court of Appeals followed the "narrow" interpretation of *Smith* v. *Ithaca Corp.*, *supra*, at 220–223, which held that the

---

[5] In the alternative the court held that Rainey's testimony should have been admitted as a prior consistent statement under Rule 801(d)(1)(B).

term "factual findings" did not encompass "opinions" or "conclusions." Courts of Appeals other than those of the Fifth and Eleventh Circuits, however, have generally adopted a broader interpretation. For example, the Court of Appeals for the Sixth Circuit, in *Baker* v. *Elcona Homes Corp.*, 588 F. 2d 551, 557–558 (1978), cert. denied, 441 U. S. 933 (1979), held that "factual findings admissible under Rule 803(8)(C) may be those which are made by the preparer of the report from disputed evidence . . . ."[6] The other Courts of Appeals that have squarely confronted the issue have also adopted the broader interpretation.[7] We agree and hold that factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(C).

---

[6] *Baker* involved a police officer's report on an automobile accident. While there was no direct witness as to the color of the traffic lights at the moment of the accident, the court held admissible the officer's conclusion on the basis of his investigations at the accident scene and an interview with one of the drivers that "apparently unit #2 . . . entered the intersection against a red light." 588 F. 2d, at 555.

[7] See *Melville* v. *American Home Assurance Co.*, 584 F. 2d 1306, 1315–1316 (CA3 1978); *Ellis* v. *International Playtex, Inc.*, 745 F. 2d 292, 300–301 (CA4 1984); *Kehm* v. *Procter & Gamble Mfg. Co.*, 724 F. 2d 613, 618 (CA8 1983); *Jenkins* v. *Whittaker Corp.*, 785 F. 2d 720, 726 (CA9), cert. denied, 479 U. S. 918 (1986); *Perrin* v. *Anderson*, 784 F. 2d 1040, 1046–1047 (CA10 1986).

Nor is the scope of Rule 803(8)(C) unexplored terrain among legal scholars. The leading evidence treatises are virtually unanimous in recommending the broad approach. See E. Cleary, McCormick on Evidence 890, n. 7 (3d ed. 1984); M. Graham, Handbook of Federal Evidence 886 (2d ed. 1986); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 449–450 (2d ed. 1982); G. Lilly, An Introduction to the Law of Evidence 275–276 (2d ed. 1987); 4 D. Louisell & C. Mueller, Federal Evidence § 455, pp. 740–741 (1980); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(8)[03], pp. 803–250 to 803–252 (1987). See generally Grant, The Trustworthiness Standard for the Public Records and Reports Hearsay Exception, 12 Western St. U. L. Rev. 53, 81–85 (1984) (favoring broad admissibility); Note, The Scope of Federal Rule of Evidence 803(8)(C), 59 Texas L. Rev. 155 (1980) (advocating narrow interpretation); Comment, The Public Documents Hearsay Exception for Evaluative Reports: Fact or Fiction?, 63 Tulane L. Rev. 121 (1988) (same).

Because the Federal Rules of Evidence are a legislative enactment, we turn to the "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446 (1987), in order to construe their provisions. We begin with the language of the Rule itself. Proponents of the narrow view have generally relied heavily on a perceived dichotomy between "fact" and "opinion" in arguing for the limited scope of the phrase "factual findings." *Smith* v. *Ithaca Corp.* contrasted the term "factual findings" in Rule 803(8)(C) with the language of Rule 803(6) (records of regularly conducted activity), which expressly refers to "opinions" and "diagnoses." "Factual findings," the court opined, must be something other than opinions. 612 F. 2d, at 221–222.[8]

For several reasons, we do not agree. In the first place, it is not apparent that the term "factual findings" should be

---

[8] The court in *Smith* found it significant that different language was used in Rules 803(6) and 803(8)(C): "Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings." 612 F. 2d, at 222. The Advisory Committee Notes to Rule 803(6) make clear, however, that the Committee was motivated by a particular concern in drafting the language of that Rule. While opinions were rarely found in traditional "business records," the expansion of that category to encompass documents such as medical diagnoses and test results brought with it some uncertainty in earlier versions of the Rule as to whether diagnoses and the like were admissible. "In order to make clear its adherence to the [position favoring admissibility]," the Committee stated, "the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries." Advisory Committee's Notes on Fed. Rule Evid. 803(6), 28 U. S. C. App., p. 723. Since that specific concern was not present in the context of Rule 803(8)(C), the absence of identical language should not be accorded much significance. See 827 F. 2d, 1498, 1511–1512 (CA11 1987) (en banc) (Tjoflat, J., concurring). What is more, the Committee's report on Rule 803(8)(C) strongly suggests that that Rule has the same scope of admissibility as does Rule 803(6): "Hence the rule, *as in Exception [paragraph] (6)*, assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Advisory Committee's Notes on Fed. Rule Evid. 803(8), 28 U. S. C. App., p. 725 (emphasis added).

read to mean simply "facts" (as opposed to "opinions" or "conclusions"). A common definition of "finding of fact" is, for example, "[a] conclusion by way of reasonable inference from the evidence." Black's Law Dictionary 569 (5th ed. 1979). To say the least, the language of the Rule does not compel us to reject the interpretation that "factual findings" includes conclusions or opinions that flow from a factual investigation. Second, we note that, contrary to what is often assumed, the language of the Rule does not state that "factual findings" are admissible, but that "*reports* . . . setting forth . . . factual findings" (emphasis added) are admissible. On this reading, the language of the Rule does not create a distinction between "fact" and "opinion" contained in such reports.

Turning next to the legislative history of Rule 803(8)(C), we find no clear answer to the question of how the Rule's language should be interpreted. Indeed, in this litigation the legislative history may well be at the origin of the dispute. Rather than the more usual situation where a court must attempt to glean meaning from ambiguous comments of legislators who did not focus directly on the problem at hand, here the Committees in both Houses of Congress clearly recognized and expressed their opinions on the precise question at issue. Unfortunately, however, they took diametrically opposite positions. Moreover, the two Houses made no effort to reconcile their views, either through changes in the Rule's language or through a statement in the Report of the Conference Committee.

The House Judiciary Committee, which dealt first with the proposed rules after they had been transmitted to Congress by this Court, included in its Report but one brief paragraph on Rule 803(8):

> "The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be

admissible under this Rule." H. R. Rep. No. 93–650, p. 14 (1973).

The Senate Committee responded at somewhat greater length, but equally emphatically:

> "The House Judiciary Committee report contained a statement of intent that 'the phrase "factual findings" in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule.' The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. . . . We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, 'the sources of information or other circumstances indicate lack of trustworthiness.'
>
> . . . . .
>
> "The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports." S. Rep. No. 93–1277, p. 18 (1974).

Clearly this legislative history reveals a difference of view between the Senate and the House that affords no definitive guide to the congressional understanding. It seems clear however that the Senate understanding is more in accord with the wording of the Rule and with the comments of the Advisory Committee.[9]

---

[9] See Advisory Committee's Notes on Fed. Rule Evid. 803(8), 28 U. S. C. App., pp. 724–725. As Congress did not amend the Advisory Committee's draft in any way that touches on the question before us, the

The Advisory Committee's comments are notable, first, in that they contain no mention of any dichotomy between statements of "fact" and "opinions" or "conclusions." What was on the Committee's mind was simply whether what it called "evaluative reports" should be admissible. Illustrating the previous division among the courts on this subject, the Committee cited numerous cases in which the admissibility of such reports had been both sustained and denied. It also took note of various federal statutes that made certain kinds of evaluative reports admissible in evidence. What is striking about all of these examples is that these were *reports that stated conclusions*. *E. g.*, *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F. 2d 467, 472–473 (CA3 1950) (report of Bureau of Mines concerning the cause of a gas tank explosion admissible); *Franklin* v. *Skelly Oil Co.*, 141 F. 2d 568, 571–572 (CA10 1944) (report of state fire marshal on the cause of a gas explosion inadmissible); 42 U. S. C. § 269(b) (bill of health by appropriate official admissible as prima facie evidence of vessel's sanitary history and condition). The Committee's concern was clearly whether reports of this kind should be admissible. Nowhere in its comments is there the slightest indication that it even considered the solution of admitting only "factual" statements from such reports.[10]

Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.

[10] Our conclusion that the Committee was concerned only about the question of the admissibility *vel non* of "evaluative reports," without any distinction between statements of "fact" and "conclusions," draws support from the fact that this was the focus of scholarly debate on the official reports question prior to adoption of the Federal Rules. Indeed, the problem was often phrased as whether official reports could be admitted *in view of the fact that they contained the investigator's conclusions*. Thus Professor McCormick, in an influential article relied upon by the Committee, stated his position as follows: "[E]valuative reports of official investigators, though partly based upon statements of others, *and though embracing conclusions*, are admissible as evidence of the facts reported." McCormick, Can the Courts Make Wider Use of Reports of Official Investigations?, 42 Iowa L. Rev. 363, 365 (1957) (emphasis added).

Rather, the Committee referred throughout to "reports," without any such differentiation regarding the statements they contained. What the Committee referred to in the Rule's language as "reports . . . setting forth . . . factual findings" is surely nothing more or less than what in its commentary it called "evaluative reports." Its solution as to their admissibility is clearly stated in the final paragraph of its report on this Rule. That solution consists of two principles: First, "the rule . . . assumes admissibility in the first instance . . . ." Second, it provides "ample provision for escape if sufficient negative factors are present."

That "provision for escape" is contained in the final clause of the Rule: evaluative reports are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." This trustworthiness inquiry—and not an arbitrary distinction between "fact" and "opinion"—was the Committee's primary safeguard against the admission of unreliable evidence, and it is important to note that it applies to all elements of the report. Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof—whether narrow "factual" statements or broader "conclusions"—that she determines to be untrustworthy.[11] Moreover, safeguards built into other portions of

[11] The Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on this question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation (citing *Palmer* v. *Hoffman*, 318 U. S. 109 (1943)). Advisory Committee's Notes on Fed. Rule Evid. 803(8), 28 U. S. C. App., p. 725; see Note, The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C), 96 Harv. L. Rev. 492 (1982).

In a case similar in many respects to these, the trial court applied the trustworthiness requirement to hold inadmissible a JAG Report on the causes of a Navy airplane accident; it found the report untrustworthy because it "was prepared by an inexperienced investigator in a highly complex field of investigation." *Fraley* v. *Rockwell Int'l Corp.*, 470 F. Supp. 1264, 1267 (SD Ohio 1979). In the present litigation, the District Court found

the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them. And of course it goes without saying that the admission of a report containing "conclusions" is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions.

Our conclusion that neither the language of the Rule nor the intent of its framers calls for a distinction between "fact" and "opinion" is strengthened by the analytical difficulty of drawing such a line. It has frequently been remarked that the distinction between statements of fact and opinion is, at best, one of degree:

> "All statements in language are statements of opinion, i. e., statements of mental processes or perceptions. So-called 'statements of fact' are only more specific statements of opinion. What the judge means to say, when he asks the witness to state the facts, is: 'The nature of this case requires that you be more specific, if you can, in your description of what you saw.'" W. King & D. Pillinger, Opinion Evidence in Illinois 4 (1942) (footnote omitted), quoted in 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶701[01], p. 701–6 (1988).

See also E. Cleary, McCormick on Evidence 27 (3d ed. 1984) ("There is no conceivable statement however specific, detailed and 'factual,' that is not in some measure the product of inference and reflection as well as observation and memory"); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 449 (2d ed. 1982) ("A factual finding, unless it is a simple report of something observed, is an opinion as to what more basic facts imply"). Thus, the traditional requirement that lay witnesses give statements of fact rather than opinion may

---

the JAG Report to be trustworthy. App. 35. As no party has challenged that finding, we have no occasion to express an opinion on it.

be considered, "[l]ike the hearsay and original documents rules . . . a 'best evidence' rule." McCormick, Opinion Evidence in Iowa, 19 Drake L. Rev. 245, 246 (1970).

In the present action, the trial court had no difficulty in admitting as a factual finding the statement in the JAG Report that "[a]t the time of impact, the engine of 3E955 was operating but was operating at reduced power." Surely this "factual finding" could also be characterized as an opinion, which the investigator presumably arrived at on the basis of clues contained in the airplane wreckage. Rather than requiring that we draw some inevitably arbitrary line between the various shades of fact/opinion that invariably will be present in investigatory reports, we believe the Rule instructs us—as its plain language states—to admit "reports . . . setting forth . . . factual findings." The Rule's limitations and safeguards lie elsewhere: First, the requirement that reports contain factual findings bars the admission of statements not based on factual investigation. Second, the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, is sufficiently trustworthy to be admitted.

A broad approach to admissibility under Rule 803(8)(C), as we have outlined it, is also consistent with the Federal Rules' general approach of relaxing the traditional barriers to "opinion" testimony. Rules 702–705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on "ultimate issues." And Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact. We see no reason to strain to reach an interpretation of Rule 803(8)(C) that is contrary to the liberal thrust of the Federal Rules.[12]

---

[12] The cited Rules refer, of course, to situations—unlike that at issue—where the opinion testimony is subject to cross-examination. But the determination that cross-examination was not indispensable in regard to official investigatory reports has already been made, and our point is

We hold, therefore, that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.[13] As the trial judge in this action determined that certain of the JAG Report's conclusions were trustworthy, he rightly allowed them to be admitted into evidence. We therefore reverse the judgment of the Court of Appeals in respect of the Rule 803(8)(C) issue.

III

Respondents also contended on appeal that reversal was required because the District Court improperly restricted the cross-examination of plaintiff Rainey by his own counsel in regard to the letter Rainey had addressed to Lieutenant Commander Morgan. We agree with the unanimous holding of the Court of Appeals en banc that the District Court erred in refusing to permit Rainey to present a more complete picture of what he had written to Morgan.

We have no doubt that the jury was given a distorted and prejudicial impression of Rainey's letter. The theory of Rainey's case was that the accident was the result of a power failure, and, read in its entirety, his letter to Morgan was fully consistent with that theory. While Rainey did discuss problems his wife had encountered the morning of the accident which led her to attempt to cancel the flight, and also agreed that her airplane had violated pattern integrity in turning left prematurely, the thrust of his letter was to chal-

---

merely that imposing a rigid distinction between fact and opinion would run against the Rules' tendency to deemphasize that dichotomy.

[13] We emphasize that the issue in this litigation is whether Rule 803(8)(C) recognizes any difference between statements of "fact" and "opinion." There is no question here of any distinction between "fact" and "law." We thus express no opinion on whether legal conclusions contained in an official report are admissible as "findings of fact" under Rule 803(8)(C).

lenge Morgan's theory that the crash had been caused by a stall that took place when the pilots turned sharply right and pitched up in attempting to avoid the other plane. Thus Rainey argued that Morgan's hypothesis was inconsistent with the observations of eyewitnesses, the physical findings in the wreckage, and the likely actions of the two pilots. He explained at length his theory of power failure and attempted to demonstrate how the various pieces of evidence supported it. What the jury was told, however, through the defendants' direct examination of Rainey as an adverse witness, was that Rainey had written six months after the accident (1) that his wife had attempted to cancel the flight, partly because her student was tired and emotionally drained, and that "unnecessary pressure" was placed on them to proceed with it; and (2) that she or her student had abruptly initiated a hard right turn when the other aircraft unexpectedly came into view. It is plausible that a jury would have concluded from this information that Rainey did not believe in his theory of power failure and had developed it only later for purposes of litigation. Because the court sustained defense counsel's objection, Rainey's counsel was unable to counteract this prejudicial impression by presenting additional information about the letter on cross-examination.

The common-law "rule of completeness," which underlies Federal Rule of Evidence 106, was designed to prevent exactly the type of prejudice of which Rainey complains. In its aspect relevant to this litigation, the rule of completeness was stated succinctly by Wigmore: "[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." 7 J. Wigmore, Evidence in Trials at Common Law § 2113, p. 653 (J. Chadbourn rev. 1978).[14] The

[14] In addition to this concern that the court not be misled because portions of a statement are taken out of context, the rule has also addressed the danger that an out-of-context statement may create such prejudice that

Federal Rules of Evidence have partially codified the doctrine of completeness in Rule 106:

> "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

In proposing Rule 106, the Advisory Committee stressed that it "does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case." Advisory Committee's Notes on Fed. Rule Evid. 106, 28 U. S. C. App., p. 682. We take this to be a reaffirmation of the obvious: that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402. See 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 106[02], p. 106–20 (1986). The District Court's refusal to admit the proffered completion evidence was a clear abuse of discretion.

While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.[15]

Unfortunately for the clarity of the proceedings, the defendants' objection to the question put by Rainey's counsel was couched not in terms of relevance but rather as calling

---

it is impossible to repair by a *subsequent* presentation of additional material. The issue in this litigation, however, involves only the first concern.

[15] Nor, in view of our disposition of the action, need we address the alternative ground cited by the Court of Appeals for its decision, namely that Rainey's proposed testimony would have constituted a "prior consistent statement" under Rule 801(d)(1)(B).

for an opinion.[16] While the question put to Rainey indeed inquired about an opinion Rainey had earlier expressed, it should have been obvious from the context that the purpose of the question was not to elicit Rainey's opinion on the cause of the accident. Rather, Rainey was asked, in effect, whether he had made a certain statement in his letter. That was a question he was eminently qualified to answer.[17] Counsel's objection that Rainey was not entitled to give opinion evidence could not avail in view of the obvious purpose for which the statement was offered.[18]

---

[16] The colloquy before the District Court was as follows:

"Q. One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably *[sic]* primary cause of this mishap was rollback?

"Mr. Toothman: I would object to this, Your Honor. Probable cause is an opinion.

"The Court: I beg your pardon?

"Mr. Toothman: He's trying to get an opinion out of him now, not a fact.

"The Court: Objection sustained.

"Mr. Larry: Your Honor, he has had the ability—

"Mr. Toothman: I object to him arguing.

"Mr. Larry: May I be heard on this?

"The Court: Yes, sir. Go ahead.

"Mr. Larry: On the basis that this letter constitutes an admission by Commander Rainey, he has been asked to answer every single question Mr. Toothman had respecting—

"The Court: I don't recall going into anything except the matter about that right turn and so forth, and that's all he went into. He did express that opinion and that came in as an admission against him, I suppose, but that doesn't mean you can qualify him for the questions you are now asking. The objection is sustained." App. 77–78.

[17] The defendants would, of course, have been entitled to a limiting instruction pursuant to Rule 105 had they requested it.

[18] Nor would a hearsay objection have been availing. Although the question called for Rainey to testify to an out-of-court statement, that statement was not offered "to prove the truth of the matter asserted." Rule 801(c). Rather, it was offered simply to prove what Rainey had said about the accident six months after it happened, and to contribute to a fuller understanding of the material the defense had already placed in evidence.

Petitioners have also objected that Rainey waived the right to pursue this issue on appeal because he did not properly raise it in the trial court. We disagree. Rule 103(a)(2) requires, in the first place, that to preserve an argument that evidence was wrongly excluded the proponent must make known the substance of the evidence sought to be admitted by an offer of proof unless it "was apparent from the context within which questions were asked."[19] Here the nature of the proposed testimony was abundantly apparent from the very question put by Rainey's counsel. The proponent must also comply with Federal Rule of Civil Procedure 46, which requires that a party seeking to preserve an objection to the court's ruling must "mak[e] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor." Although, as is frequently the case in the heat of a trial, counsel did not explain the evidentiary basis of his argument as thoroughly as might ideally be desired, we are satisfied that he substantially satisfied the requirement of putting the court on notice as to his concern. In the colloquy following the defense objection to his question,[20] and before he was cut off first by defense counsel and then by the judge, Rainey's counsel began to articulate the argument that his question should be allowed because the defense had been able to question Rainey concerning his letter. Moreover, the judge's response[21] suggests that he perceived the completeness argument. We cannot say that the point was not sufficiently

---

[19] Rule 103(a) provides in relevant part:

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

. . . . .

"(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

[20] See n. 16, *supra*.

[21] "I don't recall going into anything except the matter about that right turn and so forth, and that's all he went into." App. 78.

made.[22] Rainey therefore was not barred from pursuing this issue on appeal.

IV

We hold, first, that statements in the form of opinions or conclusions are not by that fact excluded from the scope of Federal Rule of Evidence 803(8)(C). We therefore reverse the judgment of the Court of Appeals in that respect. Second, we hold that on the facts of this litigation the District Court abused its discretion in restricting the scope of cross-examination of respondent Rainey by his counsel, and to that extent we affirm the Court of Appeals' judgment. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

---

[22] Even if, as the dissent contends, counsel's "brief presentation" was "ambiguous at best," it is incumbent upon a reviewing court to take into consideration the circumstances under which this "brief presentation" was made. Rainey's counsel attempted twice to articulate the basis on which the proposed testimony should be admitted. After first being interrupted by an objection from opposing counsel and having obtained the court's permission to make his argument, he was interrupted anew, this time by the court, which cut him off and ruled on the defense objection before he had been allowed to complete even a single sentence. See n. 16, *supra*. We have no quarrel with the proposition that counsel must articulate the grounds on which evidence should be admitted, and Rainey's counsel had indeed begun to do so. Surely the degree of precision with which counsel is required to argue must be judged, among other things, in accordance with the leeway the court affords him in advancing his argument. None of the cases the dissent cites is to the contrary.

We add that we find surprising the degree of certainty manifested by the dissent as to what the trial judge understood Rainey's counsel to be arguing—so certain indeed that it would correct what he actually said. Compare n. 16, *supra* ("that doesn't mean you can qualify him"), with *post*, at 176 ("that doesn't mean you can['t] qualify him"). The dissent has the trial judge suggest that counsel qualify Rainey as an expert, and implicitly faults counsel for not having proceeded to do so. Yet there is no basis whatever—other than the dissent's apparent belief that it is what he *should* have said—for assuming that the trial judge meant to say "can't" when he in fact said "can."

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, but dissent from Part III. I do not believe the District Court abused its discretion in refusing to admit this particular testimony. The Court concedes that "counsel did not explain the evidentiary basis of his argument as thoroughly as might ideally be desired . . ." *ante*, at 174, but I would go further and say that counsel's brief presentation to the District Court was ambiguous at best.

Rainey's attorney was faced with an objection to testimony he wished to elicit from his client based on opposing counsel's perception that it would be nonexpert opinion.[1] He responded by saying "[o]n the basis that this letter constitutes an admission by Commander Rainey, he has been asked to answer every single question [opposing counsel] had respecting—." App. 77. At that point the court cut in with an explanation of why that answer was insufficient. The judge explained:

> "I don't recall going into anything except the matter about the right turn and so forth, and that's all he went into. He did express that opinion and that came in as an admission against him, I suppose, but that doesn't mean you can['t] qualify him for the questions you are now asking. The objection is sustained." *Id.*, at 78.

Rainey's lawyer seems to have been arguing that, because no one objected to Rainey's answers to defendant's questions about the letter as nonexpert opinion, Rainey should be able to answer similar questions put by his own attorney without that objection. The argument looks more like one based on

---

[1] The entire colloquy relevant to the exclusion of Rainey's testimony about the letter is set out *ante*, at 173, n. 16.

fairness or waiver (often known as "opening the door"[2]) than one based specifically on completeness. That is how the judge understood it. He explained his ruling sustaining the objection by noting that although the defense questioning had elicited some opinion, it was admissible on other grounds and then suggested that Rainey's lawyer qualify Rainey as an expert. Here the trial judge ruled on the basis of a reasonable understanding of respondents' stated reasons for allowing the evidence to be admitted, and the trial judge made this understanding clear to respondents' counsel. The evidence was not admissible under this view, and counsel made no attempt to clarify his position.

Today, the Court offers sound reasons for the admission of the testimony in question, but they are reasons which it has adduced from briefs and careful research, not the reasons expressed by counsel at trial.

> "If counsel specifies a purpose for which the proposed evidence is inadmissible and the judge excludes, counsel cannot complain of the ruling on appeal though it could have been rightly admitted for another purpose." E. Cleary, McCormick on Evidence § 51, p. 125 (3d ed. 1984).

Trial judges do not have the luxury of briefs or research when making a typical evidentiary ruling, and for this reason we have traditionally required the proponent of evidence to defend it against objection by showing why it should be admissible. Federal Rule of Evidence 103(a)(2) requires an "offer of proof" in order to preserve for review a perceived error excluding evidence.[3] Most courts and treatises have

---

[2] According to 21 C. Wright & K. Graham, Federal Practice and Procedure § 5039, p. 199 (1977) one doctrine which allows even a valid and timely objection to be defeated is variously known as "waiver," "estoppel," "opening the door," "fighting fire with fire," and "curative admissibility." The doctrine's soundness depends on the specific situation in which it is used and calls for an exercise of judicial discretion.

[3] For the full text of the Rule, see *ante*, at 174, n. 19.

interpreted the need for an "offer of proof" as requiring a specific and timely defense of the evidence. See 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103[03], pp. 103–36 to 103–38 (1988); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5040, pp. 209–211 (1977); *United States* v. *Peters*, 732 F. 2d 1004 (CA1 1984); *United States* v. *Grapp*, 653 F. 2d 189, 194 (CA5 1981); *Huff* v. *White Motor Corp.*, 609 F. 2d 286 (CA7 1979). The need for a showing of evidence is the same, whether it is an essential part of the "offer of proof," or, as the Court agrees, required by Federal Rule of Civil Procedure 46.[4]

The disagreement in these cases is not about applicable Rules of Evidence, but how a trial judge should fairly have understood an offer of proof under these circumstances. This Court, far removed from the factual context and on the basis of a cold record, is in no position to say that the trial court's ruling in this situation was an abuse of discretion. Cf. *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985).

---

[4] *Ante*, at 174.

Syllabus

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* TARKANIAN

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 87–1061. Argued October 5, 1988—Decided December 12, 1988

Petitioner National Collegiate Athletic Association (NCAA), an unincorporated association consisting of approximately 960 public and private universities and colleges, adopts rules governing member institutions' recruiting, admissions, academic eligibility, and financial aid standards for student athletes. The NCAA's Committee on Infractions conducts investigations, makes factual determinations, and is expressly authorized to impose penalties upon members that have violated the rules, but is not authorized to sanction a member institution's employees directly. After a lengthy investigation of allegedly improper recruiting practices by the University of Nevada, Las Vegas (UNLV), a state university, the Committee found 38 violations, including 10 by respondent Tarkanian, UNLV's basketball coach. The Committee imposed a number of sanctions upon UNLV, and requested it to show cause why additional penalties should not be imposed if it failed to suspend Tarkanian from its athletic program during a probation period. Facing demotion and a drastic cut in pay, Tarkanian brought suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U. S. C. § 1983. Ultimately, Tarkanian obtained injunctive relief and an award of attorney's fees against both UNLV and the NCAA. Concluding that the NCAA's conduct constituted state action for jurisdictional and constitutional purposes, the Nevada Supreme Court affirmed in relevant part.

Held: The NCAA's participation in the events that led to Tarkanian's suspension did not constitute "state action" prohibited by the Fourteenth Amendment and was not performed "under color of" state law within the meaning of § 1983. The NCAA cannot be deemed to be a state actor on the theory that it misused power it possessed by virtue of state law, since UNLV's decision to suspend Tarkanian, while in compliance with the NCAA's rules and recommendations, did not turn the NCAA's conduct into action under color of Nevada law. Although it must be assumed that UNLV, as an NCAA member and a participant in the promulgation of the Association's rules, had some minor impact on the NCAA's policy determinations, the source of the rules adopted by the NCAA is not Nevada but the collective membership, the vast majority of which was located in other States. Moreover, UNLV's decision to

adopt the NCAA's rules did not transform them into state rules and the NCAA into a state actor, since UNLV retained plenary power to withdraw from the NCAA and to establish its own standards. The NCAA's investigation, enforcement proceedings, and consequent recommendations did not constitute state action on the theory that they resulted from a delegation of power by UNLV, because: UNLV delegated no power to the NCAA to take specific action against any University employee; UNLV and the NCAA acted as adversaries throughout the proceedings; the NCAA enjoyed no governmental powers to facilitate its investigation; and the NCAA did not—indeed, could not—directly discipline Tarkanian, but could only threaten additional sanctions against UNLV if the University chose not to suspend its coach. Furthermore, even assuming the truth of Tarkanian's argument that the power of the NCAA is so great that UNLV had no practical alternative but to comply with the Association's demands, it does not follow that the NCAA was therefore acting under color of state law. Pp. 191–199.

103 Nev. 331, 741 P. 2d 1345, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 199.

Rex E. Lee argued the cause for petitioner. With him on the briefs were *George H. Gangwere*, *James H. McLarney*, and *Daniel L. Sailler*.

Samuel S. Lionel argued the cause for respondent. With him on the brief were *David N. Frederick* and *Mark A. Solomon*.

JUSTICE STEVENS delivered the opinion of the Court.

When he became head basketball coach at the University of Nevada, Las Vegas (UNLV), in 1973, Jerry Tarkanian inherited a team with a mediocre 14–14 record. App. 188, 205. Four years later the team won 29 out of 32 games and placed third in the championship tournament sponsored by the National Collegiate Athletic Association (NCAA), to which UNLV belongs. *Id.*, at 188.

Yet in September 1977 UNLV informed Tarkanian that it was going to suspend him. No dissatisfaction with Tarkan-

ian, once described as "the 'winningest' active basketball coach," *id.*, at 19, motivated his suspension. Rather, the impetus was a report by the NCAA detailing 38 violations of NCAA rules by UNLV personnel, including 10 involving Tarkanian. The NCAA had placed the university's basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian.

Facing demotion and a drastic cut in pay,[1] Tarkanian brought suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U. S. C. § 1983.[2] Ultimately Tarkanian obtained injunctive relief and an award of attorney's fees against both UNLV and the NCAA.[3] 103 Nev. 331, 741 P. 2d 1345 (1987) *(per curiam)*. NCAA's liability may be upheld only if its participation in the events that led to

---

[1] The trial court found that Tarkanian, as head basketball coach, "is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled 'THE JERRY TARKANIAN SHOW,' and appearing on a television program bearing the same name." App. 18. That compensation was "entirely contingent on [Tarkanian's] continued status as the Head Basketball Coach at UNLV." As a tenured professor alone, he would have earned about $53,000 a year, the court found. *Ibid.*

[2] That section provides, in part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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."

[3] The fees were awarded pursuant to 42 U. S. C. § 1988, which authorizes a court in its discretion to award the prevailing party in an action brought under § 1983 a reasonable attorney's fee as a part of the costs.

Tarkanian's suspension constituted "state action" prohibited by the Fourteenth Amendment and was performed "under color of" state law within the meaning of § 1983.[4] We granted certiorari to review the Nevada Supreme Court's holding that the NCAA engaged in state action when it conducted its investigation and recommended that Tarkanian be disciplined. 484 U. S. 1058 (1988). We now reverse.[5]

I

In order to understand the four separate proceedings that gave rise to the question we must decide, it is useful to begin with a description of the relationship among the three parties—Tarkanian, UNLV, and the NCAA.

Tarkanian initially was employed on a year-to-year basis but became a tenured professor in 1977. He receives an annual salary with valuable fringe benefits, and his status as a highly successful coach enables him to earn substantial additional income from sports-related activities such as broadcasting and the sponsorship of products.

---

[4] In this case the under-color-of-law requirement of 42 U. S. C. § 1983 and the state-action requirement of the Fourteenth Amendment are equivalent. See *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 838 (1982); see also *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 928–935 (1982).

[5] Although the NCAA's status as a state or private actor is a novel issue in this Court, lower federal courts have entertained the question for a number of years. Initially, Federal Courts of Appeals held that the NCAA was a state actor for § 1983 purposes. *E. g.*, *Regents of University of Minnesota* v. *NCAA*, 560 F. 2d 352 (CA8), cert. dism'd, 434 U. S. 978 (1977); *Howard University* v. *NCAA*, 166 U. S. App. D. C. 260, 510 F. 2d 213 (1975); *Parish* v. *NCAA*, 506 F. 2d 1028 (CA5 1975); *Associated Students, Inc.* v. *NCAA*, 493 F. 2d 1251 (CA9 1974) *(per curiam)*. Since our decisions in *Lugar* v. *Edmondson Oil Co.*, *supra*, *Rendell-Baker* v. *Kohn*, *supra*, and *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), all issued on the same day, lower courts have held to the contrary. *E. g.*, *McCormack* v. *NCAA*, 845 F. 2d 1338 (CA5 1988); *Karmanos* v. *Baker*, 816 F. 2d 258 (CA6 1987); *Graham* v. *NCAA*, 804 F. 2d 953 (CA6 1986); *Arlosoroff* v. *NCAA*, 746 F. 2d 1019 (CA4 1984). See *Spath* v. *NCAA*, 728 F. 2d 25, 28 (CA1 1984) (dictum).

UNLV is a branch of the University of Nevada, a state-funded institution. The university is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations. In performing their official functions, the executives of UNLV unquestionably act under color of state law.

The NCAA is an unincorporated association of approximately 960 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States. Basic policies of the NCAA are determined by the members at annual conventions. Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs.

One of the NCAA's fundamental policies "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports." App. 80. It has therefore adopted rules, which it calls "legislation," *ibid.*, governing the conduct of the intercollegiate athletic programs of its members. This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes. By joining the NCAA, each member agrees to abide by and to enforce such rules.

The NCAA's bylaws provide that its enforcement program shall be administered by a Committee on Infractions. The Committee supervises an investigative staff, makes factual determinations concerning alleged rule violations, and is expressly authorized to "impose appropriate penalties on a member found to be in violation, or recommend to the Council suspension or termination of membership."[6] In particu-

[6] App. 98. Among the sanctions that the Committee may impose "against an institution" are:

"(1) Reprimand and censure;

lar, the Committee may order a member institution to show cause why that member should not suffer further penalties unless it imposes a prescribed discipline on an employee; it is not authorized, however, to sanction a member institution's employees directly.[7] The bylaws also provide that representatives of member institutions "are expected to cooperate fully" with the administration of the enforcement program. *Id.*, at 97. The bylaws do not purport to confer any subpoena power on the Committee or its investigators. They state:

> "The enforcement procedures are an essential part of the intercollegiate athletic program of each member institu-

"(2) Probation for one year;

"(3) Probation for more than one year;

"(4) Ineligibility for one or more National Collegiate Championship events;

"(5) Ineligibility for invitational and postseason meets and tournaments;

"(6) Ineligibility for any television programs subject to the Association's control or administration;

"(7) Ineligibility of the member to vote or its personnel to serve on committees of the Association, or both;

"(8) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;

"(9) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period . . . ." *Id.*, at 103–104.

[7] Upon finding that misconduct by an employee of a member institution caused NCAA rules to be violated, the Committee may require the member to "show cause why:

"(i) a penalty or an additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests; or

"(ii) a recommendation should not be made to the membership that the institution's membership in the Association be suspended or terminated if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against the head coach of the sport involved, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests." *Id.*, at 104.

tion and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry." *Ibid.*

During its investigation of UNLV, the Committee on Infractions included three law professors, a mathematics professor, and the dean of a graduate school. Four of them were on the faculties of state institutions; one represented a private university.

The NCAA Investigation of UNLV

On November 28, 1972, the Committee on Infractions notified UNLV's president that it was initiating a preliminary inquiry into alleged violations of NCAA requirements by UNLV. As a result of that preliminary inquiry, some three years later the Committee decided that an "Official Inquiry" was warranted and so advised the UNLV president on February 25, 1976. That advice included a series of detailed allegations concerning the recruitment of student athletes during the period between 1971 and 1975. Many of the allegations implicated Tarkanian. It requested UNLV to investigate and provide detailed information concerning each alleged incident.

With the assistance of the Attorney General of Nevada and private counsel, UNLV conducted a thorough investigation of the charges. On October 27, 1976, it filed a comprehensive response containing voluminous exhibits and sworn affidavits. The response denied all of the allegations and specifically concluded that Tarkanian was completely innocent of wrongdoing. Thereafter, the Committee conducted four days of hearings at which counsel for UNLV and Tarkanian presented their views of the facts and challenged the credibility of the NCAA investigators and their informants. Ultimately the Committee decided that many of the charges could not be supported, but it did find 38 violations of NCAA

rules, including 10 committed by Tarkanian. Most serious was the finding that Tarkanian had violated the University's obligation to provide full cooperation with the NCAA investigation.[8] The Committee's findings and proposed discipline were summarized in great detail in its so-called "Confidential Report No. 123(47)." App. 122–204.

The Committee proposed a series of sanctions against UNLV, including a 2-year period of probation during which its basketball team could not participate in postseason games or appear on television. The Committee also requested UNLV to show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period. UNLV appealed most of the Committee's findings and proposed sanctions to the NCAA Council. After hearing arguments from attorneys representing UNLV and Tarkanian, the Council on August 25, 1977, unanimously approved the Committee's investigation and hearing process and adopted all its recommendations.

UNLV's Discipline of Tarkanian

Promptly after receiving the NCAA report, the president of UNLV directed the University's vice president to schedule a hearing to determine whether the Committee's recommended sanctions should be applied. Tarkanian and UNLV were represented at that hearing; the NCAA was not. Although the vice president expressed doubt concerning the sufficiency of the evidence supporting the Committee's findings,[9] he concluded that "given the terms of our adherence to

---

[8] See *id.*, at 141–150, 190, 196.

[9] "Most serious is the charge that Coach Tarkanian attempted to frustrate the NCAA's application of the rules by getting people to 'change their story' or to fabricate bodies of countervailing evidence. I am not convinced that the NCAA investigation adequately supports this charge and yet we must remember that the NCAA infractions committee and the

the NCAA we cannot substitute—biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and the Council." *Id.*, at 75. With respect to the proposed sanctions, he advised the president that he had three options:

> "1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, *e. g.*, possible extra years of probation.
>
> "2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
>
> "3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments." *Id.*, at 76.

Pursuant to the vice president's recommendation, the president accepted the second option and notified Tarkanian that he was to "be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation." *Id.*, at 70.

Tarkanian's Lawsuit Against UNLV

The day before his suspension was to become effective, Tarkanian filed an action in Nevada state court for declaratory and injunctive relief against UNLV and a number of its officers. He alleged that these defendants had, in violation of 42 U. S. C. § 1983, deprived him of property and liberty without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Based on a stipulation of facts and the testimony offered by Tarkanian,

---

NCAA Council, both composed of distinguished scholars, administrators, and lawyers, believed otherwise." *Id.*, at 72.

the trial court enjoined UNLV from suspending Tarkanian on the ground that he had been denied procedural and substantive due process of law. UNLV appealed.

The NCAA, which had not been joined as a party, filed an *amicus curiae* brief arguing that there was no actual controversy between Tarkanian and UNLV; thus, the suit should be dismissed. Alternatively, the NCAA contended that the trial court had exceeded its jurisdiction by effectively invalidating the enforcement proceedings of the NCAA, even though the Association was not a party to the suit. Should a controversy exist, the NCAA argued, it was a necessary party to litigate the scope of any relief. Finally, it contested the trial court's conclusion that Tarkanian had been denied due process. The Nevada Supreme Court concluded that there was an actual controversy but agreed that the NCAA was a necessary party and therefore reversed and remanded to permit joinder of the NCAA. *University of Nevada* v. *Tarkanian*, 95 Nev. 389, 594 P. 2d 1159 (1979).

The Lawsuit Against NCAA

Tarkanian consequently filed a second amended complaint adding the NCAA. The defendants promptly removed the suit to Federal District Court on the ground that joinder of the NCAA substantially had altered the nature of the litigation. The District Court held, however, that the original defendants had waived their right to remove the suit when it was first filed, and therefore granted Tarkanian's motion to remand the case to the state court. After a 4-year delay, the trial judge conducted a 2-week bench trial and resolved the issues in Tarkanian's favor. The court concluded that NCAA's conduct constituted state action for jurisdictional and constitutional purposes, and that its decision was arbitrary and capricious. It reaffirmed its earlier injunction barring UNLV from disciplining Tarkanian or otherwise enforcing the Confidential Report. Additionally, it enjoined the NCAA from conducting "any further proceedings against the

University," from enforcing its show-cause order, and from taking any other action against the University that had been recommended in the Confidential Report. App. 34.

Two weeks after the trial court's opinion was entered, Tarkanian filed a petition for attorney's fees pursuant to 42 U. S. C. § 1988. Asserting that this was the first time Tarkanian had claimed relief under § 1988, the NCAA again sought removal to Federal District Court on the ground that the litigation had changed substantially. When the university defendants declined to join the removal petition, the NCAA contended that they should be realigned as plaintiffs because they actually wanted Tarkanian to prevail. The District Court, however, again ordered the litigation remanded, and the Ninth Circuit agreed. App. to Pet. for Cert. A120. Even before the Ninth Circuit ruled, the Nevada trial court had awarded Tarkanian attorney's fees of almost $196,000, 90% of which was to be paid by the NCAA. App. 41–42. The NCAA appealed both the injunction and the fee order. Not surprisingly, UNLV, which had scored a total victory except for its obligation to pay a fraction of Tarkanian's fees, did not appeal.

The Nevada Supreme Court agreed that Tarkanian had been deprived of both property and liberty protected by the Constitution and that he was not afforded due process before suspension. It thus affirmed the trial court's injunction insofar as it pertained to Tarkanian, but narrowed its scope "only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties." 103 Nev., at 343, 741 P. 2d, at 1353. The court also reduced the award of attorney's fees.[10]

---

[10] The court held the NCAA was not liable for fees Tarkanian incurred during the first trial and first appeal to the State Supreme Court. Not only did those events occur before the NCAA was a party to the litigation, the court explained, but since the trial court's judgment was reversed, Tarkanian had not prevailed, and thus was not eligible for fees pursuant to § 1988. In a later opinion, the Supreme Court ordered that Tarkanian be

As a predicate for its disposition, the State Supreme Court held that the NCAA had engaged in state action. Several strands of argument supported this holding. First, the court assumed that it was reviewing "UNLV's and the NCAA's imposition of penalties against Tarkanian," *id.*, at 335, 741 P. 2d, at 1347, rather than the NCAA's proposed sanctions against UNLV if it failed to discipline Tarkanian appropriately. Second, it regarded the NCAA's regulatory activities as state action because "many NCAA member institutions were either public or government supported." *Ibid.* Third, it stated that the right to discipline a public employee "is traditionally the exclusive prerogative of the state" and that UNLV could not escape its responsibility for such disciplinary action by delegating that duty to a private entity. *Id.*, at 336, 741 P. 2d, at 1348. The court next pointed to our opinion in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982), in which we held that the deprivation of a federal right may be attributed to the State if it resulted from a state-created rule and the party charged with the deprivation can fairly be said to a state actor. Summing up its holding that the NCAA's activities constituted state action, the Nevada Supreme Court stated:

> "The first prong [of *Lugar*] is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted

---

allowed additional fees for services performed on his second appeal before that court.

jointly with the NCAA." 103 Nev., at 337, 741 P. 2d, at 1349.

II

Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause,[11] and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); see *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 349 (1974). As a general matter the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar*, 457 U. S., at 936–937. When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961). As we stated in *United States* v. *Classic*, 313 U. S. 299, 326 (1941):

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

In this case Tarkanian argues that the NCAA was a state actor because it misused power that it possessed by virtue of

[11] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

state law. He claims specifically that UNLV delegated its own functions to the NCAA, clothing the Association with authority both to adopt rules governing UNLV's athletic programs and to enforce those rules on behalf of UNLV. Similarly, the Nevada Supreme Court held that UNLV had delegated its authority over personnel decisions to the NCAA. Therefore, the court reasoned, the two entities acted jointly to deprive Tarkanian of liberty and property interests, making the NCAA as well as UNLV a state actor.

These contentions fundamentally misconstrue the facts of this case. In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, *e. g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); if it delegates its authority to the private actor, *e. g.*, *West* v. *Atkins*, 487 U. S. 42 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, *e. g.*, *Burton* v. *Wilmington Parking Authority*, *supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.[12]

This case uniquely mirrors the traditional state-action case. Here the final act challenged by Tarkanian—his suspension—was committed by UNLV. A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Accord, *Cleveland Board of Education* v. *Louder-*

[12] *E. g.*, *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself").

mill, 470 U. S. 532 (1985); *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972). Thus when UNLV notified Tarkanian that he was being separated from all relations with the university's basketball program, it acted under color of state law within the meaning of 42 U. S. C. § 1983.

The mirror image presented in this case requires us to step through an analytical looking glass to resolve the case. Clearly UNLV's conduct was influenced by the rules and recommendations of the NCAA, the private party. But it was UNLV, the state entity, that actually suspended Tarkanian. Thus the question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action.

We examine first the relationship between UNLV and the NCAA regarding the NCAA's rulemaking. UNLV is among the NCAA's members and participated in promulgating the Association's rules; it must be assumed, therefore, that Nevada had some impact on the NCAA's policy determinations. Yet the NCAA's several hundred other public and private member institutions each similarly affected those policies. Those institutions, the vast majority of which were located in States other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State.[13] Cf. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 501

[13] The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign. See *Clark* v. *Arizona Interscholastic Association*, 695 F. 2d 1126 (CA9 1982), cert. denied, 464 U. S. 818 (1983); *Louisiana High School Athletic Association* v. *St. Augustine High School*, 396 F. 2d 224 (CA5 1968). The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See *post*, at 202, n. 2.

(1988) ("Whatever *de facto* authority the [private standard-setting] Association enjoys, no official authority has been conferred on it by any government . . .").

State action nonetheless might lie if UNLV, by embracing the NCAA's rules, transformed them into state rules and the NCAA into a state actor. See *Lugar*, 457 U. S., at 937. UNLV engaged in state action when it adopted the NCAA's rules to govern its own behavior, but that would be true even if UNLV had taken no part in the promulgation of those rules. In *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), we established that the State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action. Those rules had been adopted *in toto* from the American Bar Association Code of Professional Responsibility. *Id.*, at 360, n. 12. It does not follow, however, that the ABA's formulation of those disciplinary rules was state action. The State Supreme Court retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own. See *id.*, at 362.[14] So here, UNLV retained the authority to withdraw

---

[14] Petitioners in *Bates*, contended that enforcement of disciplinary rules circumscribing attorney advertising violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and the First Amendment, made applicable to the States by the Fourteenth Amendment. 433 U. S., at 353. The Court unanimously concluded that state action existed in deciding that by the doctrine enunciated in *Parker* v. *Brown*, 317 U. S. 341 (1943), respondent was immune from Sherman Act liability. The Court reached the merits of petitioners' First and Fourteenth Amendment claims without discussing whether state action existed for Fourteenth Amendment purposes. 433 U. S., at 363–384.

Although by no means identical, analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state-action inquiry conducted pursuant to § 1983 and the Fourteenth Amendment. In both contexts, for example, courts examine whether the rule in question is a rule of the State. Compare *Hoover* v. *Ronwin*, 466 U. S. 558, 569 (1984) ("[T]he Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation") (citation omitted), with *Lugar*,

from the NCAA and establish its own standards. The university alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy.[15] Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance.

Tarkanian further asserts that the NCAA's investigation, enforcement proceedings, and consequent recommendations constituted state action because they resulted from a delegation of power by UNLV. UNLV, as an NCAA member, subscribed to the statement in the Association's bylaws that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." App. 97. It is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor. Thus, we recently held that a private physician who had contracted with a state prison to attend to the inmates' medical needs was a state actor. *West* v. *Atkins*, 487 U. S. 42 (1988). But UNLV delegated no power to the

---

457 U. S., at 937 ("[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible"). The degree to which the activities of the state entity and the arguably private entity are intertwined also is pertinent. Compare *Hoover*, 466 U. S., at 569–570, with *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 721–726 (1961).

[15] Furthermore, the NCAA's bylaws permit review of penalties, even after they are imposed, "upon a showing of newly discovered evidence which is directly related to the findings in the case, or that there was a prejudicial error in the procedure which was followed in the processing of the case by the Committee." App. 107. UNLV could have sought such a review, perhaps on the theory that the NCAA's investigator was biased against Tarkanian, as the Nevada trial court found in 1984. *Id.*, at 20. The NCAA Committee on Infractions was authorized to "reduce or eliminate any penalty" if the university had prevailed. *Id.*, at 108.

NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself.

Indeed, the notion that UNLV's promise to cooperate in the NCAA enforcement proceedings was tantamount to a partnership agreement or the transfer of certain university powers to the NCAA is belied by the history of this case. It is quite obvious that UNLV used its best efforts to retain its winning coach—a goal diametrically opposed to the NCAA's interest in ascertaining the truth of its investigators' reports. During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth. The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding. It is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of the NCAA's recruitment standards. Just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State, *Polk County* v. *Dodson*, 454 U. S. 312, 320 (1981), the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.[16]

---

[16] Tarkanian argues that UNLV and the NCAA were "joint participants" in state action. Brief for Respondent 42. He would draw support from *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), in which a lease relationship between a private restaurant and a publicly owned parking structure entailed "an incidental variety of mutual benefits," *id.*, at 724: tax exemptions for the restaurant, rent payments for the parking authority, and increased business for both. Because of this interdependence, we held, the restaurant and parking authority jointly violated the Fourteenth Amendment when the restaurant discriminated on account of race. *Id.*, at 725. In the case before us the state and private parties' relevant interests do not coincide, as they did in *Burton;* rather, they have clashed through-

The NCAA enjoyed no governmental powers to facilitate its investigation.[17] It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership. Contrary to the premise of the Nevada Supreme Court's opinion, the NCAA did not—indeed, could not—directly discipline Tarkanian or any other state university employee.[18] The ex-

---

out the investigation, the attempt to discipline Tarkanian, and this litigation. UNLV and the NCAA were antagonists, not joint participants, and the NCAA may not be deemed a state actor on this ground.

[17] In *Dennis* v. *Sparks*, 449 U. S. 24 (1980), on which the dissent relies, the parties had entered into a corrupt agreement to perform a judicial act. As we explained:

"[H]ere the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators. Indeed, his immunity is dependent on the challenged conduct being an official judicial act within his statutory jurisdiction, broadly construed. Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of law . . . ." *Id.*, at 28–29 (footnote and citations omitted).

In this case there is no suggestion of any impropriety respecting the agreement between the NCAA and UNLV. Indeed the dissent seems to assume that the NCAA's liability as a state actor depended not on its initial agreement with UNLV, but on whether UNLV ultimately accepted the NCAA's recommended discipline of Tarkanian. See *post*, at 203. In contrast, the conspirators in *Dennis* became state actors when they formed the corrupt bargain with the judge, and remained so through completion of the conspiracy's objectives. Cf. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 149–150, and n. 5 (1970) (private restaurant that denied plaintiff service in violation of federal law would be liable as state actor upon proof that it conspired with police officer to deprive plaintiff of her constitutional rights).

[18] Tarkanian urges us to hold, as did the Nevada Supreme Court, that the NCAA by its rules and enforcement procedures has usurped a tradi-

press terms of the Confidential Report did not demand the suspension unconditionally; rather, it requested "the University . . . to show cause" why the NCAA should not impose additional penalties if UNLV declines to suspend Tarkanian. App. 180. Even the university's vice president acknowledged that the Report gave the university options other than suspension: UNLV could have retained Tarkanian and risked additional sanctions, perhaps even expulsion from the NCAA, or it could have withdrawn voluntarily from the Association.

Finally, Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true,[19] but even if we assume that a private monopolist can

---

tional, essential state function. Quite properly, he does not point to the NCAA's overriding function of fostering amateur athletics at the college level. For while we have described that function as "critical," *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 120 (1984), by no means is it a traditional, let alone an exclusive, state function. Cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S. 522, 545 (1987) ("Neither the conduct nor the coordination of amateur sports has been a traditional government function"). Tarkanian argues instead that the NCAA has assumed the State's traditional and exclusive power to discipline its employees. "[A]s to state employees connected with intercollegiate athletics, the NCAA requires that its standards, procedures and determinations *become* the State's standards, procedures and determinations for disciplining state employees," he contends. "The State is *obligated* to impose NCAA standards, procedures and determinations making the NCAA a joint participant in the State's suspension of Tarkanian." Brief for Respondent 34–35 (emphases in original).

This argument overlooks the fact that the NCAA's own legislation prohibits it from taking any direct action against Tarkanian. Moreover, suspension of Tarkanian is one of many recommendations in the Confidential Report. Those recommendations as a whole were intended to bring UNLV's basketball program into compliance with NCAA rules. Suspension of Tarkanian was but one means toward achieving that goal.

[19] The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the

impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law. Cf. *Jackson*, 419 U. S., at 351–352 (State's conferral of monopoly status does not convert private party into state actor).

In final analysis the question is whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." *Lugar*, 457 U. S., at 937. It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings—is fairly attributable to the State of Nevada. It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.

The judgment of the Nevada Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, dissenting.

All agree that UNLV, a public university, is a state actor, and that the suspension of Jerry Tarkanian, a public employee, was state action. The question here is whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also became a state actor. I would hold that it did.

I agree with the majority that this case is different on its facts from many of our prior state-action cases. As the majority notes, in our "typical case raising a state-action issue, a private party has taken the decisive step that caused the

---

NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

harm to the plaintiff." *Ante*, at 192. In this case, however, which in the majority's view "uniquely mirrors the traditional state-action case," *ibid.*, the final act that caused the harm to Tarkanian was committed, not by a private party, but by a party conceded to be a state actor. Because of this difference, the majority finds it necessary to "step through an analytical looking glass" to evaluate whether the NCAA was a state actor. *Ante*, at 193.

But the situation presented by this case is not unknown to us and certainly is not unique. In both *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), and *Dennis* v. *Sparks*, 449 U. S. 24 (1980), we faced the question whether private parties could be held to be state actors in cases in which the final or decisive act was carried out by a state official. In both cases we held that the private parties could be found to be state actors, if they were "jointly engaged with state officials in the challenged action." *Id.*, at 27–28.

The facts of *Dennis* are illustrative. In *Dennis*, a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff. The injunction was later dissolved on appeal as having been issued illegally. The plaintiff then filed suit under 42 U. S. C. § 1983, alleging that the judge had conspired with the party seeking the original injunction—a private corporation—the sole owner of the corporation, and the two sureties on the injunction bond to deprive the plaintiff of due process by corruptly issuing the injunction. We held unanimously that under the facts as alleged the private parties were state actors because they were "willful participant[s] in joint action with the State or its agents." 449 U. S., at 27. See also *Adickes*, *supra*, at 152 (plaintiff entitled to relief under § 1983 against private party if she can prove that private party and police officer "reached an understanding" to cause her arrest on impermissible grounds).

On the facts of the present case, the NCAA acted jointly with UNLV in suspending Tarkanian. First, Tarkanian was suspended for violations of NCAA rules, which UNLV embraced in its agreement with the NCAA. As the Nevada

Supreme Court found in its first opinion in this case, *University of Nevada* v. *Tarkanian*, 95 Nev. 389, 391, 594 P. 2d 1159, 1160 (1979), "[a]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation." Indeed, NCAA rules provide that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." App. 97.

Second, the NCAA and UNLV also agreed that the NCAA would conduct the hearings concerning violations of its rules. Although UNLV conducted its own investigation into the recruiting violations alleged by the NCAA, the NCAA procedures provide that it is the NCAA Committee on Infractions that "determine[s] facts related to alleged violations," subject to an appeal to the NCAA Council. *Id.*, at 98, 101. As a result of this agreement, the NCAA conducted the very hearings the Nevada Supreme Court held to have violated Tarkanian's right to procedural due process.[1]

Third, the NCAA and UNLV agreed that the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV. By becoming a member of the NCAA, UNLV did more than merely "promise to cooperate in the NCAA enforcement proceedings." *Ante*, at 196. It agreed, as the university hearing officer appointed to rule on Tarkanian's suspension expressly found, to accept the NCAA's "findings of fact as in some way superior to [its] own." App. 74. By the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body, *id.*, at 101, and it was for that reason that UNLV suspended Tarkanian, despite concluding that many of those findings were wrong, *id.*, at 76.

---

[1] The NCAA's petition for certiorari challenged the Nevada Supreme Court's holding that the procedures here violated procedural due process. Our grant of the petition, however, was limited solely to the state-action question. I therefore take as a given, although I do not decide, that the hearings provided to Tarkanian were constitutionally inadequate.

In short, it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV. On these facts, the NCAA was "jointly engaged with [UNLV] officials in the challenged action," and therefore was a state actor.[2] See *Dennis*, *supra*, at 27–28.

The majority's objections to finding state action in this case were implicitly rejected by our decision in *Dennis*. Initially, the majority relies on the fact that the NCAA did not have any power to take action directly against Tarkanian as indicating that the NCAA was not a state actor. *Ante*, at 195–196. But the same was true in *Dennis:* the private parties did not have any power to issue an injunction against the plaintiff. Only the trial judge, using his authority granted under state law, could impose the injunction.

Next, the majority points out that UNLV was free to withdraw from the NCAA at any time. *Ante*, at 194–195. Indeed, it is true that when considering UNLV's options, the university hearing officer noted that one of those options was to "[p]ull out of the NCAA completely." App. 76. But of course the trial judge in *Dennis* could have withdrawn from his agreement at any time as well. That he had that option is simply irrelevant to finding that he had entered into an

---

[2] The Court notes that the United States Courts of Appeals have, since our decisions in *Rendell-Baker* v. *Kohn*, 457 U. S. 830 (1982), *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), and *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), held unanimously that the NCAA is not a state actor. *Ante*, at 182, n. 5. See *McCormack* v. *NCAA*, 845 F. 2d 1338, 1346 (CA5 1988); *Karmanos* v. *Baker*, 816 F. 2d 258, 261 (CA6 1987); *Graham* v. *NCAA*, 804 F. 2d 953, 958 (CA6 1986); *Arlosoroff* v. *NCAA*, 746 F. 2d 1019, 1021–1022 (CA4 1984). In none of those cases, however, did the courts address the theory before us here. *E. g.*, *McCormack*, *supra*, at 1346. Indeed, in *Arlosoroff*, on which the subsequent decisions principally rely, the plaintiff was challenging the actions of Duke, a private university. The issue of joint action between the NCAA and a public university would never have arisen in that case.

agreement. What mattered was not that he could have withdrawn, but rather that he did not do so.

Finally, the majority relies extensively on the fact that the NCAA and UNLV were adversaries throughout the proceedings before the NCAA. *Ante*, at 196. The majority provides a detailed description of UNLV's attempts to avoid the imposition of sanctions by the NCAA. But this opportunity for opposition, provided for by the terms of the membership agreement between UNLV and the NCAA, does not undercut the agreement itself. Surely our decision in *Dennis* would not have been different had the private parties permitted the trial judge to seek to persuade them that he should not grant the injunction before finally holding the judge to his agreement with them to do so. The key there, as with any conspiracy, is that ultimately the parties agreed to take the action.

The majority states in conclusion that "[i]t would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings—is fairly attributable to the State of Nevada." *Ante*, at 199. I agree. Had UNLV refused to suspend Tarkanian, and the NCAA responded by imposing sanctions against UNLV, it would be hard indeed to find any state action that harmed Tarkanian. But that is not this case. Here, UNLV did suspend Tarkanian, and it did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would. Under these facts, I would find that the NCAA acted jointly with UNLV and therefore is a state actor.[3]

I respectfully dissent.

---

[3] The NCAA does not argue that, if it is found to be a state actor, the injunction entered against it by the trial court is invalid. Tr. of Oral Arg. 49. I therefore express no opinion on that question.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GEORGETOWN UNIVERSITY HOSPITAL ET AL.

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

No. 87–1097. Argued October 11, 1988—Decided December 12, 1988

Under the Medicare program, the Government reimburses health care providers for expenses incurred in providing medical services to Medicare beneficiaries. The Medicare Act in 42 U. S. C. § 1395x(v)(1)(A) authorizes the Secretary of Health and Human Services (Secretary) to promulgate cost-reimbursement regulations and also provides that "[s]uch regulations shall . . . (ii) provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." In 1981, the Secretary issued a cost-limit schedule that changed the method for calculating the "wage index," a factor used to reflect the salary levels for hospital employees in different parts of the country. Under the prior rule, the wage index for a given geographic area was calculated by using the average salary levels for all hospitals in the area, but the 1981 rule excluded from that computation wages paid by Federal Government hospitals. After the Federal District Court invalidated the 1981 rule in a suit brought by various hospitals in the District of Columbia, and the Secretary settled the hospitals' cost reimbursement reports by applying the pre-1981 wage-index method, the Secretary in 1984 reissued the 1981 rule and proceeded to recoup the sums previously paid to the hospitals, including respondents, as a result of the District Court's ruling. After exhausting administrative remedies, respondents brought suit in Federal District Court, claiming that the retroactive schedule was invalid under, *inter alia*, the Medicare Act. The court granted summary judgment for respondents, and the Court of Appeals affirmed.

Held:

1. An administrative agency's power to promulgate regulations is limited to the authority delegated by Congress. As a general matter, statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms. Pp. 208–209.

2. The 1984 reinstatement of the 1981 cost-limit rule is invalid. Pp. 209–216.

(a) Section 1395x(v)(1)(A) does not authorize retroactive promulgation of cost-limit rules. The structure and language of the statute require the conclusion that clause (ii) applies not to rulemaking but only to case-by-case adjustments to reimbursement payments where the regulations prescribing computation methods do not reach the correct result in individual cases. This interpretation of clause (ii) is consistent with the Secretary's past implementation of that provision. Pp. 209–213.

(b) The Medicare Act's general grant of authority to the Secretary to promulgate cost-limit rules contains no express authorization for retroactive rulemaking. This absence of express authorization weighs heavily against the Secretary's position. Moreover, the legislative history of the cost-limit provision indicates that Congress intended to forbid retroactive cost-limit rules, and the Secretary's past administrative practice is consistent with this interpretation of the statute. Pp. 213–216.

261 U. S. App. D. C. 262, 821 F. 2d 750, affirmed.

KENNEDY, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, *post*, p. 216.

Richard J. Lazarus argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Ayer*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Merrill*, *Deputy Assistant Attorney General Spears*, *John F. Cordes*, *Mark W. Pennak*, *Ronald E. Robertson*, *Terry Coleman*, and *Henry R. Goldberg*.

Ronald N. Sutter argued the cause for respondents. With him on the brief were *Mary Susan Philp* and *Thomas K. Hyatt.**

JUSTICE KENNEDY delivered the opinion of the Court.

Under the Medicare program, health care providers are reimbursed by the Government for expenses incurred in providing medical services to Medicare beneficiaries. See Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U. S. C. § 1395 *et seq.* (the Medicare Act). Congress has

*Briefs of *amici curiae* urging affirmance were filed for Sisters of Mercy Health Corp. et al. by *James K. Robinson* and *Anthony A. Derezinski;* and for the American Hospital Association by *Linda A. Tomaselli* and *Robert A. Klein*.

authorized the Secretary of Health and Human Services to promulgate regulations setting limits on the levels of Medicare costs that will be reimbursed. The question presented here is whether the Secretary may exercise this rulemaking authority to promulgate cost limits that are retroactive.

I

The Secretary's authority to adopt cost-limit rules is established by § 223(b) of the Social Security Amendments of 1972, 86 Stat. 1393, amending 42 U. S. C. § 1395x(v)(1)(A). This authority was first implemented in 1974 by promulgation of a cost-limit schedule for hospital services; new cost-limit schedules were issued on an annual basis thereafter.

On June 30, 1981, the Secretary issued a cost-limit schedule that included technical changes in the methods for calculating cost limits. One of these changes affected the method for calculating the "wage index," a factor used to reflect the salary levels for hospital employees in different parts of the country. Under the prior rule, the wage index for a given geographic area was calculated by using the average salary levels for all hospitals in the area; the 1981 rule provided that wages paid by Federal Government hospitals would be excluded from that computation. 46 Fed. Reg. 33637, 33638–33639 (1981).

Various hospitals in the District of Columbia area brought suit in United States District Court seeking to have the 1981 schedule invalidated. On April 29, 1983, the District Court struck down the 1981 wage-index rule, concluding that the Secretary had violated the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.*, by failing to provide notice and an opportunity for public comment before issuing the rule. See *District of Columbia Hospital Assn.* v. *Heckler*, No. 82–2520, App. to Pet. for Cert. 49a (hereinafter *DCHA*). The court did not enjoin enforcement of the rule, however, finding it lacked jurisdiction to do so because the hospitals

had not yet exhausted their administrative reimbursement remedies. The court's order stated:

> "If the Secretary wishes to put in place a valid prospective wage index, she should begin proper notice and comment proceedings; any wage index currently in place that has been promulgated without notice and comment is invalid as was the 1981 schedule." *DCHA*, App. to Pet. for Cert. 64a.

The Secretary did not pursue an appeal. Instead, after recognizing the invalidity of the rule, see 48 Fed. Reg. 39998 (1983), the Secretary settled the hospitals' cost reimbursement reports by applying the pre-1981 wage-index method.

In February 1984, the Secretary published a notice seeking public comment on a proposal to reissue the 1981 wage-index rule, retroactive to July 1, 1981. 49 Fed. Reg. 6175 (1984). Because Congress had subsequently amended the Medicare Act to require significantly different cost reimbursement procedures, the readoption of the modified wage-index method was to apply exclusively to a 15-month period commencing July 1, 1981. After considering the comments received, the Secretary reissued the 1981 schedule in final form on November 26, 1984, and proceeded to recoup sums previously paid as a result of the District Court's ruling in *DCHA*. 49 Fed. Reg. 46495 (1984). In effect, the Secretary had promulgated a rule retroactively, and the net result was as if the original rule had never been set aside.

Respondents, a group of seven hospitals who had benefited from the invalidation of the 1981 schedule, were required to return over $2 million in reimbursement payments. After exhausting administrative remedies, they sought judicial review under the applicable provisions of the APA, claiming that the retroactive schedule was invalid under both the APA and the Medicare Act.

The United States District Court for the District of Columbia granted summary judgment for respondents. Applying the balancing test enunciated in *Retail, Wholesale and De-*

partment Store Union, AFL–CIO v. *NLRB*, 151 U. S. App. D. C. 209, 466 F. 2d 380 (1972), the court held that retroactive application was not justified under the circumstances of the case.

The Secretary appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed. 261 U. S. App. D. C. 262, 821 F. 2d 750 (1987). The court based its holding on the alternative grounds that the APA, as a general matter, forbids retroactive rulemaking, and that the Medicare Act, by specific terms, bars retroactive cost-limit rules. We granted certiorari, 485 U. S. 903 (1988), and we now affirm.

II

It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E. g.*, *Greene* v. *United States*, 376 U. S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U. S. 141, 164 (1944); *Miller* v. *United States*, 294 U. S. 435, 439 (1935); *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162–163 (1928). By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See *Brimstone R. Co.* v. *United States*, 276 U. S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts

should be reluctant to find such authority absent an express statutory grant.

The Secretary contends that the Medicare Act provides the necessary authority to promulgate retroactive cost-limit rules in the unusual circumstances of this case. He rests on alternative grounds: first, the specific grant of authority to promulgate regulations to "provide for the making of suitable retroactive corrective adjustments," 42 U. S. C. § 1395x(v)(1)(A)(ii); and second, the general grant of authority to promulgate cost limit rules, §§ 1395x(v)(1)(A), 1395hh, 1395ii. We consider these alternatives in turn.

A

The authority to promulgate cost-reimbursement regulations is set forth in § 1395x(v)(1)(A). That subparagraph also provides that:

> "Such regulations shall . . . (ii) provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." *Ibid.*

This provision on its face permits some form of retroactive action. We cannot accept the Secretary's argument, however, that it provides authority for the retroactive promulgation of cost-limit rules. To the contrary, we agree with the Court of Appeals that clause (ii) directs the Secretary to establish a procedure for making case-by-case adjustments to reimbursement payments where the regulations prescribing computation methods do not reach the correct result in individual cases. The structure and language of the statute require the conclusion that the retroactivity provision applies only to case-by-case adjudication, not to rulemaking.[1]

[1] The Courts of Appeals have not spoken in one voice in construing this provision. Some courts have held that clause (ii) permits the Secretary to promulgate retroactive regulations. *E. g.*, *Tallahassee Memorial Regional Medical Center* v. *Bowen*, 815 F. 2d 1435, 1453–1454 (CA11 1987),

Section 1395x(v)(1)(A), of which clause (ii) is a part, directs the Secretary to promulgate regulations (including cost-limit rules) establishing the methods to be used in determining reasonable costs for "institutions" and "providers" that participate in the Medicare program. Clause (i) of § 1395x(v)(1)(A) requires these cost-method regulations to take into account both direct and indirect costs incurred by "providers." Clause (ii) mandates that the cost-method regulations include a mechanism for making retroactive corrective adjustments. These adjustments are required when, for "*a provider*," the "aggregate reimbursement produced by the methods of determining costs" is too low or too high. By its terms, then, clause (ii) contemplates a mechanism for adjusting the reimbursement received by *a* provider, while the remainder of § 1395x(v)(1)(A) speaks exclusively in the plural. The distinction suggests that clause (ii), rather than permitting modifications to the cost-method rules in their general formulation, is intended to authorize case-by-case inquiry into the accuracy of reimbursement determinations for individual providers. Indeed, it is difficult to see how a corrective adjustment could be made to the aggregate reimbursement paid "a provider" without performing an individual examination of the provider's expenditures in retrospect.

Our conclusion is buttressed by the statute's use of the term "adjustments." Clause (ii) states that the cost-method

---

cert. denied, 485 U. S. 1020 (1988); *Fairfax Nursing Center, Inc.* v. *Califano*, 590 F. 2d 1297, 1300 (CA4 1979); *Springdale Convalescent Center* v. *Mathews*, 545 F. 2d 943, 954–955 (CA5 1977). The Court of Appeals for the Third Circuit has reached the opposite conclusion, construing clause (ii) to provide for nothing more than a year-end balancing of individual providers' cost-reimbursement accounts. *Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F. 2d 1250, 1258, n. 23 (1978). Other courts, without deciding whether clause (ii) permits rulemaking, have held that it requires the Secretary to make case-by-case adjustments to reimbursement determinations. *E. g.*, *St. Paul-Ramsey Medical Center* v. *Bowen*, 816 F. 2d 417, 419–420 (CA8 1987); *Regents of the University of California* v. *Heckler*, 771 F. 2d 1182, 1188–1189 (CA9 1985).

regulations shall "provide for the making of . . . adjustments." In order to derive from this language the authority to promulgate cost-limit rules, the "adjustments" that the cost-method regulations must "provide for the making of" would themselves be additional cost-method regulations. Had Congress intended the Secretary to promulgate regulations providing for the issuance of further amendatory regulations, we think this intent would have been made explicit.

It is also significant that clause (ii) speaks in terms of adjusting the aggregate reimbursement amount computed by one of the methods of determining costs. As the Secretary concedes, the cost-limit rules are one of the methods of determining costs, and the retroactive 1984 rule was therefore an attempt to change one of those methods. Yet nothing in clause (ii) suggests that it permits changes in the *methods* used to compute costs; rather, it expressly contemplates corrective adjustments to the *aggregate amounts* of reimbursement produced pursuant to those methods. We cannot find in the language of clause (ii) an independent grant of authority to promulgate regulations establishing the methods of determining costs.

Our interpretation of clause (ii) is consistent with the Secretary's past implementation of that provision. The regulations promulgated immediately after enactment of the Medicare Act established a mechanism for making retroactive corrective adjustments that remained essentially unchanged throughout the periods relevant to this case. Compare 20 CFR §§ 405.451(b)(1), 405.454(a), (f) (1967), with 42 CFR §§ 405.451(b)(1), 405.454(a), (f) (1983).[2] These regulations

---

[2] It is clear from the language of these provisions that they are intended to implement the Secretary's authority under clause (ii):

"These regulations also provide for the making of suitable retroactive adjustments after the provider has submitted fiscal and statistical reports. The retroactive adjustment will represent the difference between the amount received by the provider during the year for covered services from both [the Medicare program] and the beneficiaries and the amount deter-

provide for adjusting the amount of interim payments received by a provider, to bring the aggregate reimbursement into line with the provider's actual reasonable costs.

These are the only regulations that expressly contemplate the making of retroactive corrective adjustments. The 1984 reissuance of the 1981 wage-index rule did not purport to be such a provision; indeed, it is only in the context of this litigation that the Secretary has expressed any intent to characterize the rule as a retroactive corrective adjustment under clause (ii).

Despite the novelty of this interpretation, the Secretary contends that it is entitled to deference under *Young* v. *Community Nutrition Institute*, 476 U. S. 974, 980–981 (1986), *Chemical Mfrs. Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985), and *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984). We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Company Institute* v. *Camp*, 401 U. S. 617, 628 (1971); cf. *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency [orders]"). Even if we were to sanction departure from this principle in some cases, we would not do so here. Far from being a reasoned and consistent view of the scope of clause (ii), the Secretary's current interpretation of clause (ii) is contrary to the narrow

---

mined in accordance with an accepted method of cost apportionment to be the actual cost of services rendered to beneficiaries during the year." 20 CFR § 405.451(b)(1) (1967); 42 CFR § 405.451(b)(1) (1983).

view of that provision advocated in past cases, where the Secretary has argued that clause (ii) "merely contemplates a year-end balancing of the monthly installments received by a provider with the aggregate due it for the year." *Regents of the University of California* v. *Heckler*, 771 F. 2d 1182, 1189 (CA9 1985); see also *Whitecliff, Inc.* v. *United States*, 210 Ct. Cl. 53, 60, n. 11, 536 F. 2d 347, 352, n. 11 (1976), cert. denied, 430 U. S. 969 (1977). Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate. Accordingly, the retroactive rule cannot be upheld as an exercise of the Secretary's authority to make retroactive corrective adjustments.

B

The statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking.[3] Any light that might be shed on this matter by suggestions of legislative intent also indicates that no such authority was contemplated. In the first place, where Congress intended to grant the Secretary the authority to act retroactively, it made that intent explicit. As discussed above, § 1395x(v)(1)(A)(ii) directs the Secretary to establish procedures for making retroactive corrective ad-

[3] Section 223(b) of the 1972 amendments amended the Medicare Act to state that the Secretary's regulations for computing reasonable costs may "provide for the establishment of limits on the direct or indirect overall incurred costs or incurred costs of specific items or services or groups of items or services to be recognized as reasonable based on estimates of the costs necessary in the efficient delivery of needed health services to individuals covered by the insurance programs established under this subchapter . . . ." 42 U. S. C. § 1395x(v)(1)(A).

Section 1395hh provides that "[t]he Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter." Finally, § 1395ii incorporates 42 U. S. C. § 405(a), which provides that "[t]he Secretary shall have full power and authority to make rules and regulations . . . , not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions . . . ."

justments; in view of this indication that Congress considered the need for retroactive agency action, the absence of any express authorization for retroactive cost-limit rules weighs heavily against the Secretary's position.

The legislative history of the cost-limit provision directly addresses the issue of retroactivity. In discussing the authority granted by § 223(b) of the 1972 amendments, the House and Senate Committee Reports expressed a desire to forbid retroactive cost-limit rules: "The proposed new authority to set limits on costs . . . would be exercised on a prospective, rather than retrospective, basis so that the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable." H. R. Rep. No. 92–231, p. 83 (1971); see S. Rep. No. 92–1230, p. 188 (1972).

The Secretary's past administrative practice is consistent with this interpretation of the statute. The first regulations promulgated under § 223(b) provided that "[t]hese limits will be imposed prospectively . . . ." 20 CFR § 405.460(a) (1975). Although the language was dropped from subsection (a) of the regulation when it was revised in 1979, the revised regulation continued to refer to "the prospective periods to which limits are being applied," and it required that notice of future cost limits be published in the Federal Register "[p]rior to the beginning of a cost period to which limits will be applied . . . ." 42 CFR §§ 405.460(b)(2), (3) (1980). Finally, when the regulations were amended again in 1982, the Secretary reinserted the requirement that the limits be applied with prospective effect, noting that the language had been "inadvertently omitted" in the previous amendment but that the reinsertion would "have no effect on the way we develop or apply the limits." 47 Fed. Reg. 43282, 43286 (1982); see 42 CFR § 405.460(a)(2) (1983).

Other examples of similar statements by the agency abound. Every cost-limit schedule promulgated by the Secretary be-

tween 1974 and 1981, for example, included a statement that § 223 permits the Secretary to establish "prospective" limits on the costs that are reimbursed under Medicare.[4] The Secretary's administrative rulings have also expressed this understanding of § 223(b). See *Beth Israel Hospital* v. *Blue Cross Assn./Blue Cross/Blue Shield of Massachusetts*, CCH Medicare and Medicaid Guide ¶ 31,645 (Nov. 7, 1981).

The Secretary nonetheless suggests that, whatever the limits on his power to promulgate retroactive regulations in the normal course of events, judicial invalidation of a prospective rule is a unique occurrence that creates a heightened need, and thus a justification, for retroactive curative rulemaking. The Secretary warns that congressional intent and important administrative goals may be frustrated unless an invalidated rule can be cured of its defect and made applicable to past time periods. The argument is further advanced that the countervailing reliance interests are less compelling than in the usual case of retroactive rulemaking, because the original, invalidated rule provided at least some notice to the individuals and entities subject to its provisions.

Whatever weight the Secretary's contentions might have in other contexts, they need not be addressed here. The case before us is resolved by the particular statutory scheme in question. Our interpretation of the Medicare Act compels the conclusion that the Secretary has no authority to promulgate retroactive cost-limit rules.

---

[4] See 46 Fed. Reg. 48010 (1981); *id.*, at 33637; 45 Fed. Reg. 41868 (1980); 44 Fed. Reg. 31806 (1979); 43 Fed. Reg. 43558 (1978); 42 Fed. Reg. 53675 (1977); 41 Fed. Reg. 26992 (1976); 40 Fed. Reg. 23622 (1975); 39 Fed. Reg. 20168 (1974); see also 48 Fed. Reg. 39998 (1983) (notice of invalidation of 1981 cost-limit schedule). Even the notice of proposed rulemaking concerning reissuance of the 1981 schedule contained the statement that § 223 "authorizes the Secretary to set prospective limits on the costs that are reimbursed under Medicare." 49 Fed. Reg. 6175, 6176 (1984). Interestingly, this statement does not appear in the final notice announcing the reissuance of the 1981 schedule. *Id.*, at 46495.

The 1984 reinstatement of the 1981 cost-limit rule is invalid. The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, concurring.

I agree with the Court that general principles of administrative law suggest that § 223(b) of the Medicare Act, 42 U. S. C. § 1395x(v)(1)(A), does not permit retroactive application of the Secretary of Health and Human Service's 1984 cost-limit rule. I write separately because I find it incomplete to discuss general principles of administrative law without reference to the basic structural legislation which is the embodiment of those principles, the Administative Procedure Act (APA), 5 U. S. C. §§ 551–552, 553–559, 701–706, 1305, 3105, 3344, 5372, 7521. I agree with the District of Columbia Circuit that the APA independently confirms the judgment we have reached.

The first part of the APA's definition of "rule" states that a rule

> "means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U. S. C. § 551(4) (emphasis added).

The only plausible reading of the italicized phrase is that rules have legal consequences only for the future. It could not possibly mean that merely *some* of their legal consequences must be for the future, though they may also have legal consequences for the past, since that description would not enable rules to be distinguished from "orders," see 5 U. S. C. § 551(6), and would thus destroy the entire dichotomy upon which the most significant portions of the APA are based. (Adjudication—the process for formulating orders, see § 551(7)—has future as well as past legal consequences, since the principles announced in an adjudication cannot be

departed from in future adjudications without reason. See, *e. g.*, *Local 32, American Federation of Government Employees* v. *FLRA*, 248 U. S. App. D. C. 198, 202, 774 F. 2d 498, 502 (1985) (McGowan, J.); *Greater Boston Television Corp.* v. *FCC*, 143 U. S. App. D. C. 383, 393, 444 F. 2d 841, 852 (1970) (Leventhal, J.), cert. denied, 403 U. S. 923 (1971)).

Nor could "future effect" in this definition mean merely "*taking effect* in the future," that is, having a future effective date even though, once effective, altering the law applied in the past. That reading, urged by the Secretary of Health and Human Services (Secretary), produces a definition of "rule" that is meaningless, since obviously *all* agency statements have "future effect" in the sense that they do not take effect until after they are made. (One might argue, I suppose, that "future effect" excludes agency statements that take effect immediately, as opposed to one second after promulgation. Apart from the facial silliness of making the central distinction between rulemaking and adjudication hang upon such a thread, it is incompatible with § 553(d), which makes clear that, if certain requirements are complied with, a rule can be effective immediately.) Thus this reading, like the other one, causes § 551(4) to fail in its central objective, which is to distinguish rules from orders. All orders have "future effect" in the sense that they are not effective until promulgated.

In short, there is really no alternative except the obvious meaning, that a rule is a statement that has legal consequences only for the future. If the first part of the definition left any doubt of this, however, it is surely eliminated by the second part (which the Secretary's brief regrettably submerges in ellipsis). After the portion set forth above, the definition continues that a rule

> "includes the approval or prescription *for the future* of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or account-

ing, or practices bearing on any of the foregoing." 5 U. S. C. § 551(4) (emphasis added).

It seems to me clear that the phrase "for the future"—which even more obviously refers to future operation rather than a future effective date—is not meant to add a requirement to those contained in the earlier part of the definition, but rather to repeat, in a more particularized context, the prior requirement "of future effect." And even if one thought otherwise it would not matter for purposes of the present case, since the HHS "cost-limit" rules governing reimbursement are a "prescription" of "practices bearing on" "allowances" for "services."

The position the Secretary takes in this litigation is out of accord with the Government's own most authoritative interpretation of the APA, the 1947 Attorney General's Manual on the Administrative Procedure Act (AG's Manual), which we have repeatedly given great weight. See, *e. g.*, *Steadman* v. *SEC*, 450 U. S. 91, 103, n. 22 (1981); *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302, n. 31 (1979); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 546 (1978). That document was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued "as a guide to the agencies in adjusting their procedures to the requirements of the Act." AG's Manual 6. Its analysis is plainly out of accord with the Secretary's position here:

> "Of particular importance is the fact that 'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law.
>
> . . . . .
>
> "[T]he entire Act is based upon a dichotomy between rule making and adjudication. . . . Rule making is agency action which regulates the future conduct of either

> groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities." *Id.*, at 13–14.

These statements cannot conceivably be reconciled with the Secretary's position here that a rule has future effect merely because it is made effective in the future. Moreover, the clarity of these statements cannot be disregarded on the basis of the single sentence, elsewhere in the Manual, that "[n]othing in the Act precludes the issuance of retroactive rules when otherwise legal and accompanied by the finding required by section 4(c)." *Id.*, at 37. What that statement means (apart from the inexplicable reference to § 4(c), 5 U. S. C. § 553(d), which would appear to have no application, no matter which interpretation is adopted), is clarified by the immediately following citation to the portion of the legislative history supporting it, namely, H. R. Rep. No. 1980, 79th Cong., 2d Sess., 49, n. 1 (1946). That Report states that "[t]he phrase 'future effect' does not preclude agencies from considering and, so far as legally authorized, dealing with past transactions in prescribing rules for the future." *Ibid.* The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable—whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, *i. e.*, in the sense of altering the *past* legal consequences of past actions. Rather, it is what has been characterized as "secondary" retroactivity, see McNulty, Corporations and the Intertemporal Conflict of Laws, 55 Cal. L. Rev. 12, 58–60 (1967). A rule with exclusively future effect (taxation of future trust income) can unquestionably *affect* past transactions (rendering the previously established trusts less desir-

able in the future), but it does not for that reason cease to be a rule under the APA. Thus, with respect to the present matter, there is no question that the Secretary could have applied her new wage-index formulas to respondents in the future, even though respondents may have been operating under long-term labor and supply contracts negotiated in reliance upon the pre-existing rule. But when the Secretary prescribed such a formula for costs reimbursable while the prior rule was in effect, she changed the *law* retroactively, a function not performable by rule under the APA.

A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be "arbitrary" or "capricious," see 5 U. S. C. § 706, and thus invalid. In reference to such situations, there are to be found in many cases statements to the effect that "[w]here a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable." *General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 863 (CA5 1971). See also *National Assn. of Independent Television Producers and Distributors* v. *FCC*, 502 F. 2d 249, 255 (CA2 1974) ("Any implication by the FCC that this court may not consider the reasonableness of the retroactive effect of a rule is clearly wrong"). It is erroneous, however, to extend this "reasonableness" inquiry to purported rules that not merely affect past transactions but change what was the law in the past. Quite simply, a rule is an agency statement "of future effect," not "of future effect and/or reasonable past effect."

The profound confusion characterizing the Secretary's approach to this case is exemplified by its reliance upon our opinion in *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). Even apart from the fact that that case was not decided under the APA, it has nothing to do with the issue before us here, since it involved adjudication rather than rulemaking. Thus, though it is true that our opinion permitted the Secre-

tary, after his correction of the procedural error that caused an initial reversal, see *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), to reach the same substantive result with retroactive effect, the utterly crucial distinction is that *Chenery* involved that form of administrative action where retroactivity is not only permissible but standard. Adjudication *deals* with what the law was; rulemaking deals with what the law will be. That is why we said in *Chenery:*

> "Since the Commission, unlike a court, *does have the ability to make new law prospectively through the exercise of its rule-making powers*, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct . . . . The function of filling in the interstices of the Act should be performed, as much as possible, *through this quasi-legislative promulgation of rules to be applied in the future.*" 332 U. S., at 202 (emphasis added).

And just as *Chenery* suggested that rulemaking was prospective, the opinions in *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1969), suggested the obverse: that adjudication could *not* be purely prospective, since otherwise it would constitute rulemaking. Both the plurality opinion, joined by four of the Justices, and the dissenting opinions of Justices Douglas and Harlan expressed the view that a rule of law announced in an adjudication, but with exclusively prospective effect, could not be accepted as binding (without new analysis) in subsequent adjudications, since it would constitute rulemaking and as such could only be achieved by following the prescribed rulemaking procedures. See *id.*, at 764–766 (plurality opinion); *id.*, at 777 (Douglas, J., dissenting); *id.*, at 780–781 (Harlan, J., dissenting). Side by side these two cases, *Chenery* and *Wyman-Gordon*, set forth quite nicely the "dichotomy between rulemaking and adjudication" upon which "the entire [APA] is based." AG's Manual 14.

Although the APA was enacted over 40 years ago, this Court has never directly confronted whether the statute au-

thorizes retroactive rules. This in itself casts doubt on the Secretary's position. If so obviously useful an instrument was available to the agencies, one would expect that we would previously have had occasion to review its exercise. The only Supreme Court case the Government cites, however, is the *pre*-APA case of *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607 (1944). That case does not stand for a general authority to issue retroactive rules before the APA was enacted, much less for authority to do so in the face of § 551(4). *Addison* involved the promulgation of a definition of "area of production" by the Administrator of the Wage and Hour Division, for purposes of an exemption to the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* We found his definition unlawful—but instead of directing the entry of judgment for the employees who were claiming higher wages, we remanded the case to the District Court "with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress." 322 U. S., at 619. It is not entirely clear that we required this determination to be made by regulation rather than by a declaratory order applicable to the case at hand. Where an interpretive rule is held invalid, and there is no pre-existing rule which it superseded, it is obviously available to the agency to "make" law retroactively through adjudication, just as courts routinely do (and just as we indicated the Secretary of Agriculture could have done in *United States* v. *Morgan*, 307 U. S. 183, 193 (1939)). Perhaps that is all *Addison* stands for. Arguably, however, the Administrator was *obliged* to act by regulation rather than by adjudication, since the statutory exemption in question referred to "area of production (as defined by the Administrator)." See 322 U. S., at 608. If the parenthetical had the effect of requiring specification by rule (rather than through adjudication), then the Court *would* have been authorizing a retroactive regulation. But it would have been doing so in a situa-

tion where one of two legal commands had to be superseded. In these circumstances, either the Administrator had to contravene normal law by promulgating a retroactive regulation, or else the Administrator would, by his inaction, have totally eliminated the congressionally prescribed "area of production" exemption. Something had to yield. If this case involves retroactive rulemaking at all, it does not stand for the Government's asserted principle of the general permissibility of retroactive rules so long as they are reasonable, but rather for the much narrower (and unexceptional) proposition that a particular statute may in some circumstances implicitly authorize retroactive rulemaking.

This case cannot be disposed of, as the Secretary suggests, by simply noting that retroactive rulemaking is similar to retroactive legislation, and that the latter has long been upheld against constitutional attack where reasonable. See, *e. g.*, *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984); *Baltimore & Susquehanna R. Co.* v. *Nesbit*, 10 How. 395 (1851). See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). The issue here is not constitutionality, but rather whether there is any good reason to doubt that the APA means what it says. For purposes of resolving that question, it does not at all follow that, since Congress itself possesses the power retroactively to change its laws, it must have meant agencies to possess the power retroactively to change their regulations. Retroactive legislation has always been looked upon with disfavor, see Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936); 2 J. Story, Commentaries on the Constitution of the United States § 1398, p. 272 (5th ed. 1891), and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation, see *Pension Benefit Guaranty Corp.*, *supra*, at 730; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976). It is en-

tirely unsurprising, therefore, that even though Congress wields such a power itself, it has been unwilling to confer it upon the agencies. Given the traditional attitude towards retroactive legislation, the regime established by the APA is an entirely reasonable one: Where quasi-legislative action is required, an agency cannot act with retroactive effect without some special congressional authorization. That is what the APA says, and there is no reason to think Congress did not mean it.

The dire consequences that the Secretary predicts will ensue from reading the APA as it is written (and as the Justice Department originally interpreted it) are not credible. From the more than 40 years of jurisprudence since the APA has been in effect, the Secretary cites only one holding and one alternative holding (set forth in a footnote) sustaining retroactive regulations. See *Citizens to Save Spencer County* v. *EPA*, 195 U. S. App. D. C. 30, 600 F. 2d 844 (1979); *National Helium Corp.* v. *FEA*, 569 F. 2d 1137, 1145, n. 18 (Temp. Emerg. Ct. App. 1977). They are evidently not a device indispensable to efficient government. It is important to note that the retroactivity limitation applies *only* to rulemaking. Thus, where legal consequences hinge upon the interpretation of statutory requirements, and where no preexisting interpretive rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 293–294 (1974); *SEC* v. *Chenery Corp.*, 332 U. S., at 202–203. Moreover, if and when an agency believes that the extraordinary step of retroactive rulemaking is crucial, all it need do is persuade Congress of that fact to obtain the necessary ad hoc authorization. It may even be that implicit authorization of particular retroactive rulemaking can be found in existing legislation. If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite

the limitation of the APA. (Such a situation would bear some similarity to that in *Addison*.)

I need not discuss what other exceptions, with basis in the law, may permit an agency to issue a retroactive rule. The only exception suggested by the Secretary to cover the present case has no basis in the law. The Secretary contends that the evils generally associated with retroactivity do not apply to reasonable "curative" rulemaking—that is, the correction of a mistake in an earlier rulemaking proceeding. Because the invalidated 1981 wage-index rule furnished respondents with "ample notice" of the standard that would be applied, the Secretary asserts that it is not unfair to apply the identical 1984 rule retroactively. I shall assume that the invalidated rule provided ample notice, though that is not at all clear. It makes no difference. The issue is not whether retroactive rulemaking is fair; it undoubtedly may be, just as may prospective adjudication. The issue is whether it is a permissible form of agency action under the particular structure established by the APA. The Secretary provides nothing that can bring it within that structure. I might add that even if I felt free to construct my own model of desirable administrative procedure, I would assuredly not sanction "curative" retroactivity. I fully agree with the District of Columbia Circuit that acceptance of the Secretary's position would "make a mockery . . . of the APA," since "agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to 'reissue' that rule on a retroactive basis." 261 U. S. App. D. C. 262, 270, 821 F. 2d 750, 758 (1987).

For these reasons in addition to those stated by the Court, I agree that the judgment of the District of Columbia Circuit must be affirmed.

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC. *v.* BRIECK

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

No. 87–271. Argued October 31, 1988—Decided December 12, 1988

822 F. 2d 52, dismissed.

Andrew M. Kramer argued the cause for petitioner. With him on the briefs were *Erwin N. Griswold*, *David A. Copus*, *Patricia A. Dunn*, and *James P. Hollihan*.

Brian J. Martin argued the cause for the United States et al. as *amici curiae* urging affirmance. On the brief were *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Merrill*, *Charles A. Rothfeld*, and *Charles A. Shanor*.

James H. Logan argued the cause for respondent. With him on the brief were *Julius L. Chambers*, *Charles Stephen Ralston*, *Ronald L. Ellis*, and *Eric Schnapper*.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

JUSTICE WHITE dissents.

---

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *John C. Unkovic* and *Stephen A. Bokat;* and for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Ann Elizabeth Reesman*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Alfred Miller*, *Steven S. Honigman*, *Christopher G. Mackaronis*, and *Cathy Ventrell-Monsees;* and for the Plaintiff Employment Lawyers Association by *Paul H. Tobias*.

OLDEN *v.* KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 88–5223. Decided December 12, 1988

Petitioner and one Harris, who are black, were charged with the kidnaping, rape, and forcible sodomy of Starla Matthews, a white woman. In his defense, petitioner asserted that he and Matthews had engaged in consensual sex, an account corroborated by several witnesses. Matthews' story was corroborated only by the testimony of one Russell. Petitioner claimed that, at the time of the incident, Matthews and Russell had been engaged in an extramarital affair, and that she had lied to Russell to protect that relationship. In order to show that Matthews had a motive to lie, petitioner wanted to introduce evidence that Matthews and Russell were living together at the time of the trial. However, the trial court granted the prosecutor's motion to keep such evidence from the jury and sustained the prosecutor's objection when the defense attempted to cross-examine Matthews about the matter after she had testified that she was living with her mother. The jury acquitted Harris of all charges and found petitioner guilty only of forcible sodomy. On appeal, petitioner claimed, *inter alia*, that the court's failure to allow him to impeach Matthews' testimony deprived him of his Sixth Amendment right to confront the witnesses against him. The Court of Appeals of Kentucky upheld the conviction. While acknowledging the relevance of the testimony, it found that the probative value of the evidence was outweighed by the possibility of prejudice against Matthews that might result from revealing her interracial relationship to the jury.

Held: Petitioner was denied his right to confront the witnesses against him, and, considering the relevant factors enumerated in *Delaware* v. *Van Arsdall*, 475 U. S. 673, that error was not harmless beyond a reasonable doubt. Matthews' testimony was crucial to the prosecution's case. Her account was directly contradicted by petitioner and was corroborated only by the testimony of Russell, whose impartiality may have been impugned by evidence of his relationship with Matthews. In addition, as the jury's verdicts show, the State's case was far from overwhelming.

Certiorari granted; reversed and remanded.

PER CURIAM.

Petitioner James Olden and his friend Charlie Ray Harris, both of whom are black, were indicted for kidnaping, rape, and forcible sodomy. The victim of the alleged crimes, Starla Matthews, a young white woman, gave the following account at trial: She and a friend, Regina Patton, had driven to Princeton, Kentucky, to exchange Christmas gifts with Bill Russell, petitioner's half brother. After meeting Russell at a local car wash and exchanging presents with him, Matthews and Patton stopped in J.R.'s, a "boot-legging joint" serving a predominantly black clientele, to use the restroom. Matthews consumed several glasses of beer. As the bar became more crowded, she became increasingly nervous because she and Patton were the only white people there. When Patton refused to leave, Matthews sat at a separate table, hoping to demonstrate to her friend that she was upset. As time passed, however, Matthews lost track of Patton and became somewhat intoxicated. When petitioner told her that Patton had departed and had been in a car accident, she left the bar with petitioner and Harris to find out what had happened. She was driven in Harris' car to another location, where, threatening her with a knife, petitioner raped and sodomized her. Harris assisted by holding her arms. Later, she was driven to a dump, where two other men joined the group. There, petitioner raped her once again. At her request, the men then dropped her off in the vicinity of Bill Russell's house.

On cross-examination, petitioner's counsel focused on a number of inconsistencies in Matthews' various accounts of the alleged crime. Matthews originally told the police that she had been raped by four men. Later, she claimed that she had been raped by only petitioner and Harris. At trial, she contended that petitioner was the sole rapist. Further, while Matthews testified at trial that petitioner had threatened her with a knife, she had not previously alleged that petitioner had been armed.

Russell, who also appeared as a State's witness, testified that on the evening in question he heard a noise outside his home and, when he went out to investigate, saw Matthews get out of Harris' car. Matthews immediately told Russell that she had just been raped by petitioner and Harris.

Petitioner and Harris asserted a defense of consent. According to their testimony, Matthews propositioned petitioner as he was about to leave the bar, and the two engaged in sexual acts behind the tavern. Afterwards, on Matthews' suggestion, Matthews, petitioner, and Harris left in Harris' car in search of cocaine. When they discovered that the seller was not at home, Matthews asked Harris to drive to a local dump so that she and petitioner could have sex once again. Harris complied. Later that evening, they picked up two other men, Richard Hickey and Chris Taylor, and drove to an establishment called The Alley. Harris, Taylor, and Hickey went in, leaving petitioner and Matthews in the car. When Hickey and Harris returned, the men gave Hickey a ride to a store and then dropped Matthews off, at her request, in the vicinity of Bill Russell's home.

Taylor and Hickey testified for the defense and corroborated the defendants' account of the evening. While both acknowledged that they joined the group later than the time when the alleged rape occurred, both testified that Matthews did not appear upset. Hickey further testified that Matthews had approached him earlier in the evening at J.R.'s and told him that she was looking for a black man with whom to have sex. An independent witness also appeared for the defense and testified that he had seen Matthews, Harris, and petitioner at a store called Big O's on the evening in question, that a policeman was in the store at the time, and that Matthews, who appeared alert, made no attempt to signal for assistance.

Although Matthews and Russell were both married to and living with other people at the time of the incident, they were apparently involved in an extramarital relationship. By the

time of trial the two were living together, having separated from their respective spouses. Petitioner's theory of the case was that Matthews concocted the rape story to protect her relationship with Russell, who would have grown suspicious upon seeing her disembark from Harris' car. In order to demonstrate Matthews' motive to lie, it was crucial, petitioner contended, that he be allowed to introduce evidence of Matthews' and Russell's current cohabitation. Over petitioner's vehement objections, the trial court nonetheless granted the prosecutor's motion *in limine* to keep all evidence of Matthews' and Russell's living arrangement from the jury. Moreover, when the defense attempted to cross-examine Matthews about her living arrangements, after she had claimed during direct examination that she was living with her mother, the trial court sustained the prosecutor's objection.

Based on the evidence admitted at trial, the jury acquitted Harris of being either a principal or an accomplice to any of the charged offenses. Petitioner was likewise acquitted of kidnaping and rape. However, in a somewhat puzzling turn of events, the jury convicted petitioner alone of forcible sodomy. He was sentenced to 10 years' imprisonment.

Petitioner appealed, asserting, *inter alia*, that the trial court's refusal to allow him to impeach Matthews' testimony by introducing evidence supporting a motive to lie deprived him of his Sixth Amendment right to confront witnesses against him. The Kentucky Court of Appeals upheld the conviction. No. 86–CR–006 (May 11, 1988). The court specifically held that evidence that Matthews and Russell were living together at the time of trial was not barred by the State's rape shield law. Ky. Rev. Stat. Ann. § 510.145 (Michie 1985). Moreover, it acknowledged that the evidence in question was relevant to petitioner's theory of the case. But it held, nonetheless, that the evidence was properly excluded as "its probative value [was] outweighed by its possibility for prejudice." App. to Pet. for Cert. A6. By way

of explanation, the court stated: "[T]here were the undisputed facts of race; Matthews was white and Russell was black. For the trial court to have admitted into evidence testimony that Matthews and Russell were living together at the time of the trial may have created extreme prejudice against Matthews." Judge Clayton, who dissented but did not address the evidentiary issue, would have reversed petitioner's conviction both because he believed the jury's verdicts were "manifestly inconsistent," and because he found Matthews' testimony too incredible to provide evidence sufficient to uphold the verdict. *Id.*, at A7.

The Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right "to be confronted with the witnesses against him." That right, incorporated in the Fourteenth Amendment and therefore available in state proceedings, *Pointer* v. *Texas*, 380 U. S. 400 (1965), includes the right to conduct reasonable cross-examination. *Davis* v. *Alaska*, 415 U. S. 308, 315–316 (1974).

In *Davis* v. *Alaska*, we observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . , the cross-examiner has traditionally been allowed to impeach, *i. e.*, discredit, the witness." *Id.*, at 316. We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.*, at 316–317, citing *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959). Recently, in *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986), we reaffirmed *Davis*, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" 475 U. S., at 680, quoting *Davis*, *supra*, at 318.

In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews—out of fear of jeopardizing her relationship with Russell—lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Delaware* v. *Van Arsdall*, *supra*, at 680.

The Kentucky Court of Appeals did not dispute, and indeed acknowledged, the relevance of the impeachment evidence. Nonetheless, without acknowledging the significance of, or even adverting to, petitioner's constitutional right to confrontation, the court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' interracial relationship would prejudice the jury against her. While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant," *Delaware* v. *Van Arsdall*, *supra*, at 679, the limitation here was beyond reason. Speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony.

In *Delaware* v. *Van Arsdall*, *supra*, we held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* [v. *California*, 386 U. S. 18 (1967)] harmless-error analysis." *Id.*, at 684. Thus we stated:

> "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Ibid.*

Here, Matthews' testimony was central, indeed crucial, to the prosecution's case. Her story, which was directly contradicted by that of petitioner and Harris, was corroborated only by the largely derivative testimony of Russell, whose impartiality would also have been somewhat impugned by revelation of his relationship with Matthews. Finally, as demonstrated graphically by the jury's verdicts, which cannot be squared with the State's theory of the alleged crime, and by Judge Clayton's dissenting opinion below, the State's case against petitioner was far from overwhelming. In sum, considering the relevant *Van Arsdall* factors within the context of this case, we find it impossible to conclude "beyond a reasonable doubt" that the restriction on petitioner's right to confrontation was harmless.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment of the Kentucky Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts. See *Pennsylvania* v. *Bruder*, *ante*, p. 11 (MAR-

SHALL, J., dissenting); *Rhodes* v. *Stewart*, *ante*, p. 4 (MARSHALL, J., dissenting); *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265, 269 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7 (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the decision below.

OWENS ET AL. *v.* OKURE

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

No. 87–56. Argued November 1, 1988—Decided January 10, 1989

Twenty-two months after respondent was allegedly unlawfully arrested and beaten by petitioners, two State University of New York police officers, he brought suit against them in the Federal District Court, seeking damages under 42 U. S. C. § 1983 on the ground that he had sustained personal injuries, mental anguish, shame, humiliation, legal expenses, and the deprivation of his constitutional rights. In denying petitioners' motion to dismiss the suit as time barred, the court rejected their contention that § 1983 actions were governed by New York's 1-year statute of limitations covering assault, battery, false imprisonment, and five other intentional torts. The court concluded instead that the State's 3-year residual statute of limitations for personal injury claims not embraced by specific statutes of limitations was applicable. The Court of Appeals affirmed.

Held: Where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the State's general or residual personal injury statute of limitations. Pp. 239–250.

(a) Although *Wilson* v. *Garcia*, 471 U. S. 261, held that 42 U. S. C. § 1988 requires courts to borrow and apply to all § 1983 claims a State's personal injury statute of limitations, *Wilson* did not indicate which statute of limitations applies in States with multiple personal injury statutes. Pp. 239–242.

(b) In light of *Wilson*'s practical approach of eliminating uncertainty by providing "one simple, broad characterization" of all § 1983 actions, 471 U. S., at 272, a rule endorsing the choice of the state statute of limitations for intentional torts would be manifestly inappropriate, since every State has multiple intentional tort limitations provisions. In contrast, every State has one general or residual personal injury statute of limitations, which is easily identifiable by language or application. Petitioners' argument that intentional tort limitations periods should be borrowed because such torts are most analogous to § 1983 claims fails to recognize the enormous practical disadvantages of such a selection in terms of the confusion and unpredictability the selection would cause for potential § 1983 plaintiffs and defendants. Moreover, the analogy between § 1983 claims and state causes of action is too imprecise to justify such a result,

in light of the wide spectrum of claims which § 1983 has come to span, many of which bear little if any resemblance to a common-law intentional tort. Pp. 242–250.

816 F. 2d 45, affirmed.

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

Peter H. Schiff, Deputy Solicitor General of New York, argued the cause for petitioners. With him on the briefs were *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, and *Charles R. Fraser*, Assistant Attorney General.

Kenneth Kimerling argued the cause for respondent. With him on the brief were *Arthur N. Eisenberg*, *John A. Powell*, *Steven Shapiro*, *Helen Hershkoff*, and *Joseph M. Brennan*.*

JUSTICE MARSHALL delivered the opinion of the Court.

In *Wilson* v. *Garcia*, 471 U. S. 261 (1985), we held that courts entertaining claims brought under 42 U. S. C. § 1983 should borrow the state statute of limitations for personal injury actions. This case raises the question of what limitations period should apply to a § 1983 action where a State has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions. We hold that the residual or general personal injury statute of limitations applies.

---

*Briefs of *amici curiae* urging reversal were filed for the State of Nebraska et al. by *Robert M. Spire*, Attorney General of Nebraska, and *Mark D. Starr*, Assistant Attorney General, *Joseph B. Meyer*, Attorney General of Wyoming, *John Steven Clark*, Attorney General of Arkansas, *Robert H. Henry*, Attorney General of Oklahoma, and *David Lee*, Assistant Attorney General, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Donald J. Hanaway*, Attorney General of Wisconsin, *T. Travis Medlock*, Attorney General of South Carolina, *Robert T. Stephan*, Attorney General of Kansas, and *William L. Webster*, Attorney General of Missouri; and for the city of New York by *Peter L. Zimroth*, *Leonard J. Koerner*, *Edward F. X. Hart*, and *John P. Woods*.

I

On November 13, 1985, respondent Tom U. U. Okure brought suit in the District Court for the Northern District of New York, seeking damages under § 1983 from petitioners Javan Owens and Daniel G. Lessard, two State University of New York (SUNY) police officers. Okure alleged that, on January 27, 1984, the officers unlawfully arrested him on the SUNY campus in Albany and charged him with disorderly conduct. The complaint stated that Okure was "forcibly transported" to a police detention center, "battered and beaten by [the police officers] and forced to endure great emotional distress, physical harm, and embarrassment." App. 5–6. As a result of the arrest and beating, Okure claimed, he "sustained personal injuries, including broken teeth and a sprained finger, mental anguish, shame, humiliation, legal expenses and the deprivation of his constitutional rights." *Id.*, at 6.

The officers moved to dismiss the complaint, which had been filed 22 months after the alleged incident, as time barred. They contended that § 1983 actions were governed by New York's 1-year statute of limitations covering eight intentional torts: "assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, [and] a violation of the right of privacy." N. Y. Civ. Prac. Law § 215(3) (McKinney 1972).

The District Court denied the motion to dismiss. 625 F. Supp. 1568 (1986). Borrowing "a narrowly drawn statute which is applicable only to certain intentional torts," *id.*, at 1570, the court stated, was inconsistent with this Court's endorsement of "a simple, broad characterization of all § 1983 claims." *Ibid.* (citing *Wilson*, *supra*, at 272). Moreover, a 1-year statute of limitations on § 1983 claims "would improperly restrict the scope of § 1983 and controvert federal policy." 625 F. Supp., at 1571. The court concluded

that New York's 3-year residual statute of limitations for claims of personal injury not embraced by specific statutes of limitations, N. Y. Civ. Prac. Law § 214(5) (McKinney Supp. 1988),[1] was applicable to § 1983 actions, and that Okure's complaint was therefore timely. The court then certified an interlocutory appeal on this question pursuant to 28 U. S. C. § 1292(b) (1982 ed., Supp. IV) and Rule 5(a) of the Federal Rules of Appellate Procedure.

The Court of Appeals for the Second Circuit granted permission for the appeal and affirmed. 816 F. 2d 45 (1987). It stated that *Wilson*'s description of § 1983 claims as general personal injury actions required a statute of limitations "expansive enough to accommodate the diverse personal injury torts that section 1983 has come to embrace." *Id.*, at 48. As between the two New York statutes of limitations, the court observed: "By nature, section 214(5) is general; section 215(3) is more specific and exceptional. This dichotomy survives no matter how many similar intentional torts are judicially added to those enumerated in section 215(3)." *Ibid.* The Court of Appeals favored § 214(5) for another reason: its 3-year period of limitations "more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does the restrictive one year limit." *Id.*, at 49. Injuries to personal rights are not "necessarily apparent to the victim at the time they are inflicted," the court explained, and "[e]ven where the injury itself is obvious, the constitutional dimensions of the tort may not be." *Id.*, at 48.

The dissent argued that § 1983 actions are best analogized to intentional torts, *id.*, at 51, and that, because § 215(3) governs "almost every intentional injury to the person," *id.*, at

---

[1] New York Civ. Prac. Law § 214 provides in relevant part:

"The following actions must be commenced within three years:

. . . . . .

"5. an action to recover damages for a personal injury except as provided in sections 214–b, 214–c and 215 . . . ."

50, it is more appropriate for § 1983 claims than § 214(5), which it contended had been confined primarily to negligence claims. *Ibid.* The dissent added that using § 215(3)'s 1-year limitations period is not "inherently inconsistent with the policies underlying the Civil Rights Act." *Id.*, at 54. We granted certiorari, 485 U. S. 958 (1988), and now affirm.

II

A

In this case, we again confront the consequences of Congress' failure to provide a specific statute of limitations to govern § 1983 actions. Title 42 U. S. C. § 1988 endorses the borrowing of state-law limitations provisions where doing so is consistent with federal law; § 1988 does not, however, offer any guidance as to which state provision to borrow.[2] To fill this void, for years we urged courts to select the state statute of limitations "most analogous," *Board of Regents, Univ. of New York* v. *Tomanio*, 446 U. S. 478, 488 (1980), and "most appropriate," *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975), to the particular § 1983 action, so long as the chosen limitations period was consistent with federal law and policy. *Occidental Life Ins. Co. of California* v. *EEOC*, 432 U. S. 355, 367 (1977); *Johnson*, *supra*, at 465.

---

[2] In relevant part, § 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ." 42 U. S. C. § 1988.

The practice of seeking state-law analogies for particular § 1983 claims bred confusion and inconsistency in the lower courts and generated time-consuming litigation. Some courts found analogies in common-law tort, others in contract law, and still others in statutory law.[3] Often the result had less to do with the general nature of § 1983 relief than with counsel's artful pleading and ability to persuade the court that the facts and legal theories of a particular § 1983 claim resembled a particular common-law or statutory cause of action. Consequently, plaintiffs and defendants often had no idea whether a federal civil rights claim was barred until a court ruled on their case. Predictability, a primary goal of statutes of limitations, was thereby frustrated.

In *Wilson*, we sought to end this "conflict, confusion and uncertainty." 471 U. S., at 266. Recognizing the problems inherent in the case-by-case approach, we determined that 42 U. S. C. § 1988 requires courts to borrow and apply to all § 1983 claims the one most analogous state statute of limitations. *Ibid.* See *id.*, at 275 ("[F]ederal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach"); see also *id.*, at 272 ("[A] simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose"). We concluded, based upon the legislative history of § 1983 and the wide array of claims now embraced by that provision, that § 1983 "confer[s] a general remedy for injuries to personal rights." *Id.*, at 278. Because "§ 1983 claims are best characterized as personal injury actions," we held that a

---

[3] See Shapiro, Choosing the Appropriate State Statute of Limitations for Section 1983 Claims After *Wilson* v. *Garcia*: A Theory Applied to Maryland Law, 16 Balt. L. Rev. 242, 251–256 (1987) (describing different approaches to determining the appropriate statute of limitations for § 1983 actions); Note, Retroactive Application of *Wilson* v. *Garcia*: Continued Confusion to a Troubled Topic, 44 Wash. & Lee L. Rev. 135, 135, n. 4 (1987) (same); Comment, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. S. L. J. 97, 116–126 (same).

State's personal injury statute of limitations should be applied to all § 1983 claims. *Id.*, at 280.

As the instant case indicates, *Wilson* has not completely eliminated the confusion over the appropriate limitations period for § 1983 claims. In States where one statute of limitations applies to all personal injury claims, *Wilson* supplies a clear answer. Courts considering § 1983 claims in States with multiple statutes of limitations for personal injury actions, however, have differed over how to determine which statute applies.[4] Several Courts of Appeals have held that the appropriate period is that which the State assigns to certain enumerated intentional torts. These courts have reasoned that intentional torts are most closely analogous to the claims Congress envisioned being brought under the Civil Rights Act, and to the paradigmatic claims brought today under § 1983.[5] Other Courts of Appeals, by contrast, have

---

[4] See *Preuit & Mauldin* v. *Jones*, 474 U. S. 1105, 1108 (1986) (WHITE, J., dissenting from denial of certiorari) ("[C]onflicting principles . . . have determined the statutes of limitations chosen for § 1983 actions in the Tenth Circuit on the one hand and the Fifth and Eleventh Circuits on the other"); *Wilson*, 471 U. S., at 286–287 (O'CONNOR, J., dissenting) (anticipating dilemma facing courts in States with more than one statute of limitations for personal injury claims).

[5] See, *e. g.*, *Mulligan* v. *Hazard*, 777 F. 2d 340 (CA6 1985) (selecting Ohio statute of limitations for libel, slander, assault, battery, malicious prosecution, false imprisonment, and malpractice, and rejecting statute of limitations for bodily injury or for injury to the rights of the plaintiff not enumerated elsewhere), cert. denied, 476 U. S. 1174 (1986); *Gates* v. *Spinks*, 771 F. 2d 916 (CA5 1985) (selecting Mississippi statute of limitations for most intentional torts, and rejecting statute for causes of action not otherwise provided for), cert. denied, 475 U. S. 1065 (1986); *Jones* v. *Preuit & Mauldin*, 763 F. 2d 1250, 1254 (CA11 1985) (selecting Alabama statute of limitations for actions for "'any trespass to person or liberty, such as false imprisonment or assault and battery,'" and rejecting statute for "'any injury to the person or rights of another not arising from contract and not specifically enumerated in this section'"), cert. denied, 474 U. S. 1105 (1986). The Fifth and Sixth Circuits, however, on several occasions have departed from this approach. See, *e. g.*, *Kline* v. *North Texas State Univ.*, 782 F. 2d 1229 (CA5 1986) (selecting Texas statute of limitations for

endorsed the use of the state residuary statute of limitations for § 1983 actions. These courts have observed that § 1983 embraces a broad array of actions for injury to personal rights, and that the intentional tort is therefore too narrow an analogy to a § 1983 claim.[6] The Court of Appeals for the Second Circuit followed this second approach when it concluded that New York's statute of limitations for certain enumerated intentional torts did not reflect the diversity of § 1983 claims.

B

In choosing between the two alternatives endorsed by the Courts of Appeals—the intentional torts approach and the general or residual personal injury approach—we are mindful that ours is essentially a practical inquiry. *Wilson*, 471 U. S., at 272. Our decision in *Wilson* that one "simple broad characterization" of all § 1983 actions was appropriate under § 1988 was, after all, grounded in the realization that the po-

---

injury done to the person of another); *Carroll* v. *Wilkerson*, 782 F. 2d 44, 45 (CA6) *(per curiam)* (selecting Michigan general personal injury statute of limitations), cert. denied *sub nom. County of Wayne* v. *Wilkerson*, 479 U. S. 923 (1986).

[6] See, *e. g.*, *Meade* v. *Grubbs*, 841 F. 2d 1512, 1523–1524, and 1524, n. 11 (CA10 1988) (selecting Oklahoma statute of limitations for " 'injury to the rights of another, not arising on contract and not hereinafter enumerated,' " and rejecting statute for assault or battery); *Banks* v. *Chesapeake & Potomac Tel. Co.*, 256 U. S. App. D. C. 22, 33, 802 F. 2d 1416, 1427 (1986) (stating in dicta that it "might well" apply District of Columbia statute of limitations for claims not otherwise provided for and rejecting statute for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest, or false imprisonment); *Small* v. *Inhabitants of Belfast*, 796 F. 2d 544, 546–547 (CA1 1986) (selecting Maine's statute of limitations for " '[a]ll civil actions . . . except as otherwise specifically provided,' " and rejecting statute for assault and battery, false imprisonment, slander, libel, and medical malpractice); *McKay* v. *Hammock*, 730 F. 2d 1367, 1370 (CA10 1984) (en banc) (selecting Colorado statute of limitations for " '[a]ll other actions of every kind for which no other period of limitation is provided by law,' " and rejecting statutes for trespass and trespass on the case).

tential applicability of different state statutes of limitations had bred chaos and uncertainty. *Id.*, at 275; see also *Burnett* v. *Grattan*, 468 U. S. 42, 50 (1984) (courts selecting a state statute of limitations for § 1983 actions must "tak[e] into account practicalities that are involved in litigating federal civil rights claims"); accord, *Felder* v. *Casey*, 487 U. S. 131 (1988). Thus, our task today is to provide courts with a rule for determining the appropriate personal injury limitations statute that can be applied with ease and predictability in all 50 States.

A rule endorsing the choice of the state statute of limitations for intentional torts would be manifestly inappropriate. Every State has multiple intentional tort limitations provisions, carving up the universe of intentional torts into different configurations. In New York, for example, § 215(3), the intentional tort statute endorsed by petitioners, covers eight enumerated torts. See *supra*, at 237. But different provisions cover other specified intentional torts. Malpractice actions are governed by one provision; certain veterans' claims, by another.[7] In Michigan, separate statutes of limitations govern "assault, battery, or false imprisonment," Mich. Comp. Laws § 600.5805(2) (1979), "malicious prosecution,"

---

[7] See N. Y. Civ. Prac. Law § 214(6) (McKinney Supp. 1988) (3-year statute of limitations covers all malpractice claims not provided for in § 214–a); § 214–a (2½-year statute of limitations for all medical, dental, and podiatric malpractice torts); § 214–b (2-year statute of limitations for Vietnam veterans' claims of exposure to phenoxy herbicides, commonly known as Agent Orange). Thus, it is irrelevant that courts have construed § 215(3) to provide the appropriate limitations period for a few intentional torts that are not enumerated in that statute, see, *e. g.*, *Koster* v. *Chase Manhattan Bank*, 609 F. Supp. 1191, 1198 (SDNY 1985) (construing § 215(3) to cover intentional infliction of emotional distress); *Rio* v. *Presbyterian Hospital in City of New York*, 561 F. Supp. 325, 328 (SDNY 1983) (construing § 215(3) to cover intentional interference with contractual relations); *Hansen* v. *Petrone*, 124 App. Div. 2d 782, 508 N. Y. S. 2d 500 (1986) (mem.) (construing § 215(3) to cover abuse of process and intentional infliction of emotional distress); accord, 2 Carmody-Wait 2d § 13.74 (1965); 35 N. Y. Jur., Limitations and Laches § 35, pp. 527–528 (1964).

§ 600.5805(3), "libel or slander," § 600.5805(7), and "all other actions to recover damages for the death of a person or for injury to a person . . . ," § 600.5805(8). In Ohio, separate provisions govern "bodily injury," Ohio Rev. Code Ann. § 2305.10 (Supp. 1987), "libel, slander, malicious prosecution, or false imprisonment," § 2305.11, and "assault or battery," § 2305.111. Similarly, in Pennsylvania, separate provisions govern "libel, slander or invasion of privacy," 42 Pa. Cons. Stat. § 5523(1) (1988), "assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process," § 5524(1), "injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another," § 5524(2), and "[a]ny other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct." § 5524(7). Were we to call upon courts to apply the state statute of limitations governing intentional torts, we would succeed only in transferring the present confusion over the choice among multiple personal injury provisions to a choice among multiple intentional tort provisions.[8]

---

[8] The following nonexhaustive list illustrates the frequency with which States have enacted multiple statutes of limitations governing intentional torts. See, *e. g.*, Ala. Code §§ 6–2–34 (1) (1977) (six years "for any trespass to person or liberty, such as false imprisonment or assault and battery"); Ala. Code §§ 6–2–38 (h), (i), (k), (l) (Supp. 1987) (two years for malicious prosecution, libel or slander, seduction, or any injury to the person, or rights of another not arising from contract and not specifically enumerated); Alaska Stat. Ann. § 09.10.070 (1983) (two years for libel, slander, assault, battery, seduction, false imprisonment); § 09.10.055 (six years for injuries resulting from construction-related torts); Ariz. Rev. Stat. Ann. § 12–541 (1982) (one year for malicious prosecution, false imprisonment, or injuries done to character or reputation of another by libel or slander, seduction); Ariz. Rev. Stat. Ann. § 12–542(2) (Supp. 1988) (two years for "injuries done to the person of another"); Ariz. Rev. Stat. Ann. § 12–551 (1982) (two years for injuries resulting from product liability); Ark. Code Ann. § 16–56–104 (1987) (one year for special actions on the case, criminal conversation, alienation of affection, assault and battery, false imprison-

In marked contrast to the multiplicity of state intentional tort statutes of limitations, every State has one general or residual statute of limitations governing personal injury ac-

---

ment, slander, libel with special damages); § 16–56–105 (three years for libel); § 16–56–106 (18 months for medical malpractice); § 16–56–112(b)(2) (five years for injuries resulting from construction-related torts); Cal. Civ. Proc. Code Ann. § 340 (West Supp. 1988) (one year for libel, slander, assault, battery, false imprisonment, seduction, injury, or death from wrongful act or neglect); § 340.1 (three years for actions based on incestuous relationship with a minor); Cal. Civ. Proc. Code Ann. § 340.2 (West 1982) (one year for asbestos-related torts); § 340.5 (three years for medical malpractice); § 340.6 (one year for attorney malpractice); Cal. Civ. Code Ann. § 29 (West 1982) (six years for injuries to "[a] child conceived, but not yet born"); Colo. Rev. Stat. § 13–80–102(a) (1987) (two years for "[t]ort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships"); Colo. Rev. Stat. § 13–80–102.5 (Supp. 1988) (two years for medical malpractice); Colo. Rev. Stat. § 13–80–103(a) (1987) (one year for assault, battery, false imprisonment, false arrest, libel, slander); D. C. Code § 12–301(4) (1981) (one year for libel, slander, assault, battery, false imprisonment, mayhem, wounding, malicious prosecution, false arrest); § 12–301(8) (three years for actions not otherwise prescribed); Fla. Stat. § 95.11(3)(o) (1987) (four years for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided elsewhere); § 95.11(3)(p) (four years for actions not specifically provided for); § 95.11(4)(b) (two years for medical and professional malpractice and wrongful death); Ga. Code Ann. § 9–3–33 (1982) (one year for injury to reputation; two years for injury to the person; four years for injury to the person involving a loss of consortium); Haw. Rev. Stat. § 657–4 (1985) (two years for libel or slander); Haw. Rev. Stat. § 657–7.3 (Supp. 1987) (two to six years for medical torts depending on time of discovery of the injury); Ill. Rev. Stat., ch. 110, ¶ 13–201 (1984) (one year for libel, slander, or publication of matter violating right of privacy); ¶ 13–202 (two years for false imprisonment, malicious prosecution, abduction, or seduction, criminal conversation); Kan. Stat. Ann. § 60–513(a)(4) (Supp. 1987) (two years for "injury to the rights of another, not arising on contract, and not herein enumerated"); Kan. Stat. Ann. § 60–514 (1983) (one year for libel, slander, assault, battery, malicious prosecution, or false imprisonment); Ky. Rev. Stat. Ann. § 413.120(6) (Baldwin 1988) (five years for "injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated"); § 413.135 (five years for injury resulting from con-

tions. Some States have a general provision which applies to all personal injury actions with certain specific exceptions.[9] Others have a residual provision which applies to all

---

struction of improvements to real estate); §§ 413.140(1)(d)–(e) (one year for libel, slander, and malpractice); Me. Rev. Stat. Ann., Tit. 14, § 752 (1980) (six years for civil actions except as otherwise specifically provided); § 752(A) (four years for malpractice by design professionals); § 752(B) (two years for injuries suffered during "participation in skiing or hang-gliding or the use of a tramway associated with skiing or hang-gliding"); Me. Rev. Stat. Ann., Tit. 14, § 752–C (Supp. 1988) (six years for actions based on sexual act with a minor); § 753 (two years for assault and battery, false imprisonment, slander, libel); Md. Cts. & Jud. Proc. Code Ann. § 5–101 (1984) (three years for all civil actions); § 5–105 (one year for assault, battery, libel, slander); § 5–108 (20 years for injury to person occurring after improvement to realty); Md. Cts. & Jud. Proc. Code Ann. § 5–109 (Supp. 1988) (five years for medical torts); Mass. Gen. Laws § 260:2A (1986) (three years for tort actions except as otherwise provided for); § 260:4 (three years for assault, battery, false imprisonment, slander, libel, and malpractice); Mo. Rev. Stat. § 516.120(1) (1986) (five years for all liabilities "except where a different time is herein limited"); § 516.140 (two years for libel, slander, assault, battery, false imprisonment, criminal conversation, and malicious prosecution); Neb. Rev. Stat. § 25–207(3) (1985) (four years for "injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated"); § 25–208 (one year for libel, slander, assault and battery, false imprisonment, and malicious prosecution); Nev. Rev. Stat. § 11.190(4)(c) (1987) (two years for libel, slander, assault, battery, false imprisonment, and seduction); § 11.190(4)(e) (two years for injuries to or death of a person caused by the wrongful act or neglect of another); N. J. Stat. Ann. § 2A:14–1 (West 1987) (six years for any tortious injury to the rights of another not stated elsewhere); § 2A:14–2 (two years for injury to the person caused by the wrongful act, neglect, or default of any person); § 2A:14–3 (one year for libel or slander); N. C. Gen. Stat. § 1–52(5) (1988) (three years for "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated"); § 1–54 (one year for libel, slander, assault, battery, or false imprisonment); N. D. Cent. Code § 28–01–16(5) (Supp. 1987) (six years for injury to the person or rights of another not arising under contract, when not otherwise expressly provided); N. D. Cent. Code § 28–01–18(1) (1974) (one year for libel, slander, assault, battery, or false imprisonment); N. D. Cent. Code § 28–01–18(4) (Supp. 1987) (two years for injuries done to the person of another, when

[Footnote 9 is on p. 248]

actions not specifically provided for, including personal injury actions.[10] Whichever form they take, these provisions are easily identifiable by language or application. Indeed, the

---

death ensues); Okla. Stat., Tit. 12, § 95 (Third) (1981) (two years "for injury to the rights of another, not arising on contract, and not hereinafter enumerated"); § 95 (Fourth) (one year for libel, slander, assault, battery, malicious prosecution, or false imprisonment); R. I. Gen. Laws § 9–1–14(a) (1985) (one year for slander); § 9–1–14(b) (three years for injuries to the person); R. I. Gen. Laws § 9–1–14.1 (Supp. 1988) (three years for malpractice); R. I. Gen. Laws § 9–1–14.2 (1985) (three years for Agent Orange-related torts); S. C. Code § 15–3–530(5) (Supp. 1987) (six years for criminal conversation or "for any other injury to the person or rights of another, not arising on contract, not hereinafter enumerated"); S. C. Code § 15–3–550(1) (1977) (two years for libel, slander, assault, battery, or false imprisonment); S. D. Codified Laws § 15–2–13(5) (1984) (six years for "criminal conversation or for any other injury to the rights of another not arising on contract and not otherwise specifically enumerated"); § 15–2–14.1 (two years for medical malpractice); § 15–2–15(1) (two years for libel, slander, assault, battery, or false imprisonment); Tex. Civ. Prac. & Rem. Code Ann. § 16.002 (1980) (one year for malicious prosecution, libel, slander, or breach of promise of marriage); § 16.003 (two years for "personal injury"); Utah Code Ann. § 78–12–25(3) (Supp. 1988) (four years for "action for relief not otherwise provided for by law"); Utah Code Ann. § 78–12–28(2) (1987) (two years for death caused by wrongful act or neglect); Utah Code Ann. § 78–12–29(4) (Supp. 1988) (one year for libel, slander, assault, battery, false imprisonment, or seduction); Va. Code § 8.01–243A (Supp. 1988) (two years for personal injuries unless otherwise provided for); Va. Code § 8.01–244 (1984) (two years for wrongful death); § 8.01–248 (one year for "personal action, for which no limitation is otherwise prescribed"); Wash. Rev. Code § 4.16.080(2) (1987) (three years "for injury to the person or rights of another not hereinafter enumerated"); § 4.16.100(1) (two years for libel, slander, assault, assault and battery, or false imprisonment); Wash. Rev. Code § 4.16.340 (Supp. 1988) (three years for intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse); § 4.16.350 (three years for torts involving medical malpractice); Wis. Stat. § 893.54 (1985–1986) (three years for injuries to the person); § 893.55 (three years for medical malpractice); § 893.57 (two years for libel, slander, assault, battery, false imprisonment, or "other intentional tort"); § 893.585 (three years for sexual exploitation by a therapist); Wis. Stat. § 893.587 (Supp. 1988) (three years for incest-related

[Footnote 10 is on p. 248]

very idea of a general or residual statute suggests that each State would have no more than one. Potential § 1983 plaintiffs and defendants therefore can readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period in advance of filing a § 1983 action.

Petitioners' argument that courts should borrow the intentional tort limitations periods because intentional torts are most analogous to § 1983 claims fails to recognize the enormous practical disadvantages of such a selection. Moreover, this analogy is too imprecise to justify such a result. In *Wilson*, we expressly rejected the practice of drawing narrow analogies between § 1983 claims and state causes of action. 471 U. S., at 272. We explained that the Civil Rights Acts provided

> "[a] unique remedy mak[ing] it appropriate to accord the statute 'a sweep as broad as its language.' Because the § 1983 remedy is one that can 'override certain kinds of state laws,' *Monroe* v. *Pape*, 365 U. S. 167, 173 (1961), and is, in all events, 'supplementary to any remedy any State might have,' *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963), it can have no precise counterpart in state law. *Monroe* v. *Pape*, 365 U. S., at 196, n. 5 (Harlan, J., concurring). Therefore, it is 'the purest coincidence,' *ibid.*, when state statutes or the common law provide for equivalent remedies; any analogies to those

---

torts); Wyo. Stat. § 1–3–105(a)(iv)(C) (1988) (four years for "injury to the rights of the plaintiff, not arising on contract and not herein enumerated"); § 1–3–105(a)(v) (one year for libel, slander, assault, battery, malicious prosecution, and false imprisonment).

[9] See, *e. g.*, Ala. Code § 6–2–38(l) (Supp. 1988) ("[A]ny injury to the person or rights of another not arising from contract and not specifically enumerated"); N. C. Gen. Stat. § 1–52(5) (1988) ("[A]ny other injury to the person or rights of another, not arising on contract and not hereafter enumerated").

[10] See, *e. g.*, D. C. Code § 12–301(8) (1981) (actions not otherwise prescribed); Colo. Rev. Stat. § 13–80–102(i) (1987) ("All other actions of every kind for which no other period of limitation is provided").

causes of action are bound to be imperfect." *Ibid.* (footnotes omitted).

The intentional tort analogy is particularly inapposite in light of the wide spectrum of claims which § 1983 has come to span. In *Wilson*, we noted that claims brought under § 1983 include

> "discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard." *Id.*, at 273 (footnotes omitted).

See also *id.*, at 273, n. 31; Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N. Y. U. L. Rev. 1, 19–20 (1985). Many of these claims bear little if any resemblance to the common-law intentional tort. See *Felder* v. *Casey*, 487 U. S., at 146, n. 3. Even where intent is an element of a constitutional claim or defense, the necessary intent is often different from the intent requirement of a related common-law tort. *E. g.*, *Hustler Magazine* v. *Falwell*, 485 U. S. 46, 53 (1988) (distinguishing constitutional "malice" in the First Amendment context from common-law "malice"). Given that so many claims brought under § 1983 have no precise state-law analog, applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope.[11] We accordingly hold that where

---

[11] The analogy to intentional torts also reflects a profound misunderstanding of § 1983's history. Section 1983 was the product of congressional concern about the Ku Klux Klan-sponsored campaign of violence and deception in the South, which was "denying decent citizens their civil and political rights." *Wilson*, 471 U. S., at 276; see also *Briscoe* v. *LaHue*, 460 U. S. 325, 336–340 (1983). Although these violent acts often resembled the torts of assault, battery, false imprisonment, and misrepresentation,

state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.[12]

---

§ 1983 was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them.

"While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created [§ 1983] was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. 167, 175–176 (1961) (emphasis in original; footnote omitted).

See also *Wilson*, *supra*, at 276; *Parratt* v. *Taylor*, 451 U. S. 527, 534 (1981) ("Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights").

The intentional tort analogy also inadequately reflects the state of tort law at the time the Civil Rights Act was enacted. Almost all States had two types of personal injury claims: trespass and trespass or action on the case. J. K. Angell, Limitations of Actions at Law 13–14, 311–319 (1869); H. F. Buswell, Statute of Limitations and Adverse Possession 307–308 (1889). Trespass claims covered direct injury and action on the case indirect injury. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton, Law of Torts 29–30 (5th ed. 1984). The paradigmatic § 1983 claim in 1871 involved a victim of violence or harassment who sued state officials for failing to prevent the harm; involving indirect injury, it would have been covered by the action on the case doctrine, including the relevant statute of limitations. Because most States have replaced action on the case with the general personal injury or residual provisions, and trespass with specialized intentional tort provisions, history supports the application of the former to § 1983 claims.

[12] Our decision today is fully consistent with *Wilson*'s rejection of a state residual, or "catchall," limitations provision as the appropriate one for § 1983 actions. 471 U. S., at 278. In *Wilson*, we rejected recourse to such provisions in the first instance, a position we continue to embrace. Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal injury actions. See, *e. g.*, *Small* v. *Inhabitants of Belfast*, 796 F. 2d 544 (CA1 1986) (construing Maine's catchall statute as the general personal injury provision); *Alley* v. *Dodge Hotel*, 163 U. S. App. D. C. 320, 501 F. 2d 880 (1974) *(per curiam)* (construing District of Columbia's catchall statute as the general personal injury provision).

III

The Court of Appeals therefore correctly applied New York's 3-year statute of limitations governing general personal injury actions to respondent Okure's claim.[13] Our decision in *Wilson* promised an end to the confusion over what statute of limitations to apply to § 1983 actions; with today's decision, we hope to fulfill *Wilson*'s promise. Accordingly, the judgment of the Court of Appeals is

Affirmed.

---

[13] Because we hold that the Court of Appeals correctly borrowed New York's 3-year general personal injury statute of limitations, we need not address Okure's argument that applying a 1-year limitations period to § 1983 actions would be inconsistent with federal interests. See *Burnett* v. *Grattan*, 468 U. S. 42, 61 (1984) (REHNQUIST, J., dissenting) (before borrowing a state statute of limitations and applying it to § 1983 claims, a court must ensure that it "afford[s] a reasonable time to the federal claimant").

GOLDBERG ET AL. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 87–826. Argued October 12, 1988—Decided January 10, 1989*

In light of recent technological changes creating billions of possible electronic paths that an interstate telephone call can take from one point to another, which paths are often indirect, typically bear no relation to state boundaries, and are virtually impossible to trace and record, Illinois passed its Telecommunications Excise Tax Act (Tax Act), which, *inter alia*, imposes a 5% tax on the gross charges of interstate telecommunications originated or terminated in the State and charged to an Illinois service address, regardless of where a particular call is billed or paid; provides a credit to any taxpayer upon proof that another State has taxed the same call; and requires telecommunications retailers, like appellant GTE Sprint Communications Corporation (Sprint), to collect the tax from consumers. The Illinois trial court held that the tax violates the Commerce Clause of the Federal Constitution in a class action brought by appellant Illinois residents, who were subject to and paid the tax, against appellee Director of the State's Department of Revenue and various long-distance telephone carriers, including Sprint, which cross-claimed against the Director. However, the State Supreme Court reversed, ruling that the tax satisfies the four-pronged test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, and its progeny, for determining compliance with the Commerce Clause. All parties concede in this Court that the tax satisfies the first prong of the *Complete Auto* test; *i. e.*, it is applied to an activity having a substantial nexus with Illinois.

Held: The Illinois tax does not violate the Commerce Clause, since it satisfies the final three prongs of the *Complete Auto* test. Pp. 259–267.

(a) The tax is fairly apportioned. It is internally consistent, since it is so structured that if every State were to impose an identical tax on only those interstate phone calls which are charged to an in-state service address, only one State would tax each such call and, accordingly, no multiple taxation would result. The tax is also externally consistent even though it is assessed on the gross charges of an interstate activity, since

---

*Together with No. 87–1101, *GTE Sprint Communications Corp.* v. *Sweet, Director, Illinois Department of Revenue, et al.*, also on appeal from the same court.

it is reasonably limited to the in-state business activity which triggers the taxable event in light of its practical or economic effects on interstate activity. Because it is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate call, the tax's economic effect is like that of a sales tax, such that it reasonably reflects the way that consumers purchase interstate calls and can permissibly be based on gross charges even though the retail purchase, which triggers simultaneous activity in several States, is not a purely local event. Moreover, the risk of multiple taxation is low, since only two types of States—a State like Illinois which taxes interstate calls billed to an in-state address and a State which taxes calls billed or paid in state—have a substantial enough nexus to tax an interstate call. In any event, actual multiple taxation is precluded by the Tax Act's credit provision. Furthermore, an apportionment formula based on mileage or some other geographic division of interstate calls would produce insurmountable administrative and technical barriers, since such calls involve the intangible movement of electronic impulses through vast computerized networks. Pp. 260–265.

(b) The tax does not discriminate against interstate commerce by allocating a larger share of its burden to interstate calls, since that burden falls on in-state consumers rather than on out-of-state consumers, and since, unlike mileage on state highways, the exact path of thousands of electronic signals can neither be traced nor recorded. *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, distinguished. Pp. 265–266.

(c) The tax is fairly related to services which the State provides to the benefit of taxpayers. Such services are not limited to those provided to telecommunications equipment used during interstate calls, but also include the ability to subscribe to telephone service and to own or rent telephone equipment at an address within the State, as well as police and fire protection and other general services. Pp. 266–267.

117 Ill. 2d 493, 512 N. E. 2d 1262, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, and KENNEDY, JJ., joined, in all but Part II–C of which STEVENS, J., joined, and in Parts I, II–A, II–D, and III of which O'CONNOR, J., joined. STEVENS, J., *post*, p. 268, and O'CONNOR, J., *post*, p. 270, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 271.

Walter A. Smith, Jr., argued the cause for appellants. With him on the briefs for appellants Goldberg et al. were *John G. Roberts, Jr.*, *John G. Jacobs*, and *William G. Clark*,

Jr. Laura DiGiantonio, *Richard N. Wiley*, and *Robert L. Weinberg* filed briefs for appellant GTE Sprint Communications Corp.

Andrew L. Frey argued the cause for appellees. On the brief were *Neil F. Hartigan*, Attorney General of Illinois, *Robert J. Ruiz*, Solicitor General, *Terry F. Moritz*, Special Assistant Attorney General, and *Alan P. Solow*.†

JUSTICE MARSHALL delivered the opinion of the Court.

In this appeal, we must decide whether a tax on interstate telecommunications imposed by the State of Illinois violates the Commerce Clause. We hold that it does not.

I

A

These cases come to us against a backdrop of massive technological and legal changes in the telecommunications industry.[1] Years ago, all interstate telephone calls were relayed through electric wires and transferred by human operators working switchboards. Those days are past. Today, a computerized network of electronic paths transmits thousands of electronic signals per minute through a complex system of microwave radios, fiber optics, satellites, and cables. DOJ

†*William C. Lane* filed a brief for the National Taxpayers Union as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *James F. Flug*, and *Martin Lobel;* and for MCI Telecommunications Corp. by *Frederic S. Lane*, *William T. Barker*, and *Walter Nagel*.

[1] See, *e. g.*, U. S. Dept. of Justice, The Geodesic Network: 1987 Report on Competition in the Telephone Industry (hereinafter DOJ Report) (discussing technological changes); Connecticut General Assembly, Final Report of the Connecticut Telecommunications Task Force, Finance, Revenue and Bonding Committee (1985) (discussing legal and technological changes); Council of State Policy & Planning Agencies, K. Case, State Tax Policy and the Telecommunications Industry, in The Challenge of Telecommunications State Regulatory and Tax Policies for a New Industry 33 (B. Dyer ed. 1986) (discussing changes in state taxation policies).

Report 1.2–1.6, 1.8; Brief for MCI Telecommunications Corporation as *Amicus Curiae* 2. When fully connected, this network offers billions of paths from one point to another. DOJ Report 1.18. When a direct path is full or not working efficiently, the computer system instantly activates another path. Signals may even change paths in the middle of a telephone call without perceptible interruption. Brief for National Conference of State Legislatures et al. as *Amici Curiae* 6. Thus, the path taken by the electronic signals is often indirect and typically bears no relation to state boundaries.[2] The number of possible paths, the nature of the electronic signals, and the system of computerized switching make it virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call.

The explosion in new telecommunications technologies and the breakup of the AT&T monopoly[3] has led a number of States to revise the taxes they impose on the telecommunications industry.[4] In 1985, Illinois passed the Illinois

---

[2] A signal traveling from one microwave tower to another may pass through a State but never touch anything in it. A satellite transmission may leave a caller's building, travel to outer space, and remain there until it is received by a satellite dish at the building housing the receiving party. Brief for National Conference of State Legislatures et al. as *Amici Curiae* 6.

[3] See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (DC 1982), summarily aff'd *sub nom. Maryland* v. *United States*, 460 U. S. 1001 (1983).

[4] See, *e. g.*, Ark. Code Ann. § 26–52–301 (Supp. 1987); Fla. Stat. § 212.05(1)(e) (Supp. 1988); Haw. Rev. Stat. § 237–13(6) (Supp. 1987); Minn. Stat. § 297A.01 Subd. 3(f) (Supp. 1987); N. M. Stat. Ann. § 7–9–56(C) (Supp. 1988); Ohio Rev. Code Ann. § 5739.01 (B)(3)(f) (Supp. 1987); Okla. Stat., Tit. 68, § 1354(1)(D) (Supp. 1987); Tex. Tax Code Ann. § 151.323 (Supp. 1988); Wash. Rev. Code § 82.04.065 (1987); Wis. Stat. § 77.51(14)(m) (1985–1986).

Some municipalities have begun to impose taxes on telephone calls. See, *e. g.*, Greeley, Colorado, Ordinance, Tit. 4, § 4.04.005 *et seq.* (1988);

Telecommunications Excise Tax Act (Tax Act), Ill. Rev. Stat., ch. 120, ¶¶2001–2021 (1987). The Tax Act imposes a 5% tax on the gross charge of interstate telecommunications (1) originated or terminated in Illinois, ¶2004, §4 (hereinafter §4)[5] and (2) charged to an Illinois service address, regardless of where the telephone call is billed or paid. ¶2002, §§2(a) and (b).[6] The Tax Act imposes an identical 5% tax on intrastate telecommunications. ¶2003, §3. In order to prevent "actual multi-state taxation," the Tax Act provides a credit to any taxpayer upon proof that the taxpayer has paid a tax in another State on the same telephone call which triggered the Illinois tax. ¶2004, §4. To facilitate collection, the Tax Act

---

Wheat Ridge, Colorado, Ordinance No. 630 (1985), Los Angeles, California, Ordinance No. 162586 (1987).

[5] Section 4 states in part:

"A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person."

"Gross charge" is defined as the amount paid for the telephone call, ¶2002, §§2(a) and (b), less charges for certain types of special equipment not at issue here. ¶2002, §§2(a)(1)–(5).

The Tax Act defines telecommunications broadly to include

"in addition to the meaning ordinarily and popularly ascribed to it, . . . without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities." ¶2002, §2(b).

For the sake of simplicity, we use the terms "call" and "telephone call" to refer to these multifarious forms of telecommunications.

[6] Although not defined in the Tax Act, we understand the term "service address" to mean the address where the telephone equipment is located and to which the telephone number is assigned. See ¶2002, §§2(b) and (h).

requires telecommunications retailers, like appellant GTE Sprint Communications Corporation (Sprint), to collect the tax from the consumer who charged the call to his service address. ¶2005, § 5.

B

Eight months after the Tax Act was passed, Jerome Goldberg and Robert McTigue, Illinois residents who are subject to and have paid telecommunications taxes through their retailers, filed a class action complaint in the Circuit Court of Cook County, Illinois. They named as defendants J. Thomas Johnson, Director of the Department of Revenue for the State of Illinois, (Director),[7] and various long-distance telephone carriers, including Sprint. The complaint alleged that § 4 of the Tax Act violates the Commerce Clause of the United States Constitution.[8] Sprint cross-claimed against the Director, seeking a declaration that the Tax Act is unconstitutional under the Commerce Clause. The Director then filed a motion for summary judgment against Sprint and the other long-distance carriers. Sprint responded with a motion for summary judgment against the Director; Goldberg and McTigue, in turn, filed their own motion for summary judgment against both the Director and Sprint.

After briefing and a hearing, the trial court declared § 4 unconstitutional. It found that *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and its progeny control this litigation. Under the four-pronged test originated in *Complete Auto*, a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

[7] Roger Sweet has since replaced J. Thomas Johnson as Director of the Department of Revenue.

[8] Goldberg and McTigue also alleged that the Tax Act violates the Due Process and Equal Protection Clauses. They have abandoned these claims in this appeal. Brief for Appellants Goldberg and McTigue 9, n. 7.

Id., at 279.[9] In the view of the trial court, the Tax Act did not satisfy the last three prongs of the *Complete Auto* test because:

> "Illinois is attempting to tax the entire cost of an interstate act which takes place only partially in Illinois. This tax by its own terms is not fairly apportioned. It discriminates against interstate commerce and it is not related to services provided in Illinois. For all of these reasons the Act must fail." *Goldberg* v. *Johnson*, No. 85 CH 8081 (Cook County, Oct. 21, 1986), App. to Juris. Statement in No. 87–826, p. 24a.

The Illinois Supreme Court reversed, *Goldberg* v. *Johnson*, 117 Ill. 2d 493, 512 N. E. 2d 1262 (1987) *(per curiam)* despite its finding that the tax is "not an apportioned tax" because it "applies to the entirety of each and every interstate telecommunication." *Id.*, at 501, 512 N. E. 2d, at 1266. The court reasoned that an unapportioned tax is "constitutionally suspect" because of the risk of multiple taxation, *ibid.*, but decided that the Tax Act adequately avoided this danger. With respect to interstate calls originating in Illinois, the court noted that no other State could levy a tax on such calls. *Id.*, at 502, 512 N. E. 2d, at 1266. As for calls terminating in Illinois and charged to an Illinois service address, the court found that even though the tax created "a real risk of multiple taxation," *id.*, at 502, 512 N. E. 2d, at 1267,[10] that risk was eliminated by § 4's credit provision. *Id.*, at 503, 512 N. E. 2d, at 1267.

As for discrimination, the third prong of the *Complete Auto* test, the court held that the Tax Act is constitutionally valid since a 5% tax is imposed on intrastate as well as in-

[9] All parties conceded before the trial court, as they do here, that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act.

[10] A collect call is one example of a telephone call which originates in another State but terminates in Illinois and is charged to an Illinois service address.

terstate telecommunications. Turning to the fourth prong, the court held that the tax is fairly related to services provided by Illinois. The court explained that Illinois provided services and other benefits with respect to that portion of an interstate call occurring within the State, and that "the benefits afforded by other States in facilitating the same interstate telecommunication are too speculative to override the substantial benefits extended by Illinois." *Id.*, at 504, 512 N. E. 2d, at 1267.

Having found that the Tax Act satisfied the requirements of *Complete Auto*, the Illinois Supreme Court concluded that it did not violate the Commerce Clause. Sprint, Goldberg, and McTigue appealed to this Court. We noted probable jurisdiction, 484 U. S. 1057 (1988), and now affirm.

II

A

This Court has frequently had occasion to consider whether state taxes violate the Commerce Clause. The wavering doctrinal lines of our pre-*Complete Auto* cases reflect the tension between two competing concepts: the view that interstate commerce enjoys a "free trade" immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way. *Complete Auto*, *supra*, at 278–279; see also *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 281, 282, nn. 12, 13 (1987); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 645 (1981) (BLACKMUN, J., dissenting). *Complete Auto* sought to resolve this tension by specifically rejecting the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce. 430 U. S., at 288; see also *Commonwealth Edison Co.*, *supra*, at 645.[11] Since the *Complete Auto* decision we have

[11] In *Complete Auto Transit, Inc.* v. *Brady*, we overruled *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), which had prohibited state taxation on the privilege of doing business within

applied its four-pronged test on numerous occasions.[12] We now apply it to the Illinois tax.

B

As all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act, we begin our inquiry with apportionment, the second prong of the *Complete Auto* test. Appellants argue that the telecommunications tax is not fairly apportioned because Illinois taxes the gross charge of each telephone call. They interpret our prior cases, specifically *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954), *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), and *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), to require Illinois to tax only a fraction of the gross charge of each telephone call based on the miles which the electronic signals traveled within Illinois as a portion of the total miles traveled. The Director, in turn, argues that Illinois apportions its telecommunications tax by carefully limiting the type of interstate telephone calls which it reaches.

In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to

---

a State if the tax reached interstate commerce. In *Complete Auto* we rejected *Spector*'s formalistic approach, stating that "[u]nder the present state of the law, the *Spector* rule, as it has come to be known, has no relationship to economic realities." 430 U. S., at 279. We now seek to "'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 615 (1981) (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 443 (1980)).

[12] See, *e. g.*, *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24 (1988) (use tax); *Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U. S. 1 (1986) (sales tax on fuel used in international commerce); *Commonwealth Edison Co.* v. *Montana*, *supra* (severance tax); *Maryland* v. *Louisiana*, 451 U. S. 725 (1981) (use tax); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980) (corporate income tax); *Washington Dept. of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734 (1978) (business and occupation tax).

ensure that each State taxes only its fair share of an interstate transaction. See, *e. g.*, *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 169 (1983). But "we have long held that the Constitution imposes no single [apportionment] formula on the States," *id.*, at 164, and therefore have declined to undertake the essentially legislative task of establishing a "single constitutionally mandated method of taxation." *Id.*, at 171; see also *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 278–280 (1978). Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. *Scheiner*, *supra*, at 285; *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 644 (1984); *Container Corp.*, *supra*, at 169–170.

To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. 463 U. S., at 169. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. We conclude that the Tax Act is internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call.

Appellant Sprint argues that our decision in *Armco* dictates a different standard. It contends that, under *Armco*, a court evaluating the internal consistency of a challenged tax must also compare the tax to the similar, but not identical, taxes imposed by other States. Sprint misreads *Armco*. If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of state taxes would turn solely on "the shifting complexities of the tax codes of 49 other States." *Armco*, *supra*, at 645; see also *Moorman*, *supra*, at 277, n. 12. In any event, to the extent that other States have passed tax statutes which create a risk of multiple tax-

ation, we reach that issue under the external consistency test, to which we now turn.

The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Container Corp.*, *supra*, at 169–170. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. Appellants first contend that any tax assessed on the gross charge of an interstate activity cannot reasonably reflect in-state business activity and therefore must be unapportioned. The Director argues that, because the Tax Act has the same economic effect as a sales tax, it can be based on the gross charge of the telephone call. See, *e. g.*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 58 (1940) (sales tax); cf. *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31–32 (1988) (use tax); *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, 483 U. S. 232, 251 (1987) (gross receipts).

We believe that the Director has the better of this argument. The tax at issue has many of the characteristics of a sales tax. It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, cf. *McGoldrick*, *supra*, at 58, the Tax Act reasonably reflects the way that consumers purchase interstate telephone calls.

The Director further contends that the Illinois telecommunications tax is fairly apportioned because the Tax Act reaches only those interstate calls which are (1) originated or terminated in Illinois and (2) charged to an Illinois service address. Appellants Goldberg and McTigue, by contrast, raise the specter of many States assessing a tax on the gross charge of an interstate telephone call. Appellants have exaggerated the extent to which the Tax Act creates a risk of

multiple taxation. We doubt that States through which the telephone call's electronic signals merely pass have a sufficient nexus to tax that call. See *United Air Lines, Inc.* v. *Mahin*, 410 U. S. 623, 631 (1973) (State has no nexus to tax an airplane based solely on its flight over the State); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 302–304 (1944) (Jackson, J., concurring) (same). We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. See *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U. S. 753 (1967) (receipt of mail provides insufficient nexus).

We believe that only two States have a nexus substantial enough to tax a consumer's purchase of an interstate telephone call. The first is a State like Illinois which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the origination or termination of an interstate telephone call billed or paid within that State. See, *e. g.*, Ark. Code Ann. §26–52–301(3) (Supp. 1987); Wash. Rev. Code §82.04.065(2) (1987).

We recognize that, if the service address and billing location of a taxpayer are in different States, some interstate telephone calls could be subject to multiple taxation.[13] This

---

[13] Those taxpayers who split their billing and service addresses between two different States face a risk of multiple taxation on a limited number of their interstate telephone calls. For example, if a company's Arkansas headquarters paid the telephone bills of its Illinois subsidiary, two state taxes would be paid on telephone calls made by the Illinois subsidiary to the head office or any other Arkansas location. Such calls would terminate and be billed or paid in Arkansas, and they would also originate and be charged to an Illinois service address. Likewise, a collect call from the Arkansas headquarters to the Illinois subsidiary could be taxed in both States. The collect call would originate and be billed or paid in Arkansas, and it would also terminate and be charged to an Illinois service address. Noncollect calls from the Arkansas headquarters to the Illinois subsidiary would not, however, be captured by the Illinois Tax Act. Likewise, the

limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme. See *Container Corp.*, 463 U. S., at 171; *Moorman*, 437 U. S., at 272–273. To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation. *D. H. Holmes*, *supra*, at 31 ("The . . . taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States"); see also *Tyler Pipe*, *supra*, at 245, n. 13.

It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry. In previous cases we have endorsed apportionment formulas based upon the miles a bus, train, or truck traveled within the taxing State.[14] But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State. See, *e. g.*, *Central Greyhound*, 334 U. S., at 663 ("There is no dispute as to feasibility in apportioning this tax"); see also *Western Live Stock*, 303 U. S., at 257. These cases, by contrast, involve the more intangible movement of electronic impulses through computerized networks. An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technologi-

---

Arkansas statute would not tax interstate calls made by the Illinois subsidiary to States other than Arkansas.

[14] Many of our Commerce Clause decisions concern state taxes on the movement of goods or the instrumentalities of interstate transportation. See, *e. g.*, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987) (trucks); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979) (cargo containers); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977) (motor carriers); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954) (oil pipelines); *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948) (buses); cf. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 257 (1938) (tax on gross receipts of intrastate train travel is valid while a like tax on an interstate train travel is not).

cal barriers. See *Scheiner*, 483 U. S., at 296 (apportionment does not require State to adopt a tax which would "pose genuine administrative burdens").[15] We thus find it significant that Illinois' method of taxation is a realistic legislative solution to the technology of the present-day telecommunications industry.[16]

In sum, we hold that the Tax Act is fairly apportioned. Its economic effect is like that of a sales tax, the risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision. Moreover, we conclude that mileage or some other geographic division of individual telephone calls would be infeasible.

C

We turn next to the third prong of the *Complete Auto* test, which prohibits a State from imposing a discriminatory tax on interstate commerce. Appellants argue that irrespective of the identical 5% tax on the gross charge of intrastate telephone calls, the Tax Act discriminates against interstate commerce by allocating a larger share of the tax burden to interstate telephone calls. They rely on *Scheiner*, where we

---

[15] Sprint alleges that it is "capable, administratively, of billing more than one state's tax on a single interstate communication." Brief for Appellant GTE Sprint Communications Corp. 4. This statement, however, tells us no more than that Sprint's computerized billing system is capable of adding another line to consumers' bills. Sprint does not explain, however, how it would keep track of and record the exact paths and in-state mileage of thousands of electronic impulses per minute.

[16] Years ago, we considered and rejected certain state taxes on interstate telecommunications. See, *e. g.*, *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384 (1935); *Western Union Tel. Co.* v. *Pennsylvania*, 128 U. S. 39 (1888); *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411 (1888); cf. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1 (1878) (because the telegraph industry is interstate commerce, Act of Congress pre-empts state regulation). These cases considered a telecommunications technology only distantly related to modern telecommunications technology and were decided in a pre-*Complete Auto* era when this Court held the view that interstate commerce itself could not be taxed. See n. 11, *supra*.

stated that, "[i]n its guarantee of a free trade area among the States, . . . the Commerce Clause has a deeper meaning that may be implicated even though state provisions . . . do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner, supra,* at 281.

In *Scheiner,* we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways. 483 U. S., at 286. The Illinois tax differs from the flat taxes found discriminatory in *Scheiner* in two important ways. First, whereas Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change, the economic burden of the Illinois telecommunications tax falls on the Illinois telecommunications consumer, the insider who presumably is able to complain about and change the tax through the Illinois political process. It is not a purpose of the Commerce Clause to protect state residents from their own state taxes.

Second, whereas with Pennsylvania's flat taxes it was possible to measure the activities within the State because truck mileage on state highways could be tallied, reported, and apportioned, the exact path of thousands of electronic signals can neither be traced nor recorded. We therefore conclude that the Tax Act does not discriminate in favor of intrastate commerce at the expense of interstate commerce.

D

Finally, we reach the fourth prong of the *Complete Auto* test, namely, whether the Illinois tax is fairly related to the presence and activities of the taxpayer within the State. See *D. H. Holmes,* 486 U. S., at 32–34. The purpose of this test is to ensure that a State's tax burden is not placed upon

persons who do not benefit from services provided by the State. *Commonwealth Edison*, 453 U. S., at 627.

Appellants would severely limit this test by focusing solely on those services which Illinois provides to telecommunications equipment located within the State. We cannot accept this view. The tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. *Id.*, at 627, n. 16. On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.'" *Ibid.* (emphasis in original). The fourth prong of the *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. Indeed, last Term, in *D. H. Holmes*, *supra*, at 32, we noted that a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer.

In light of the foregoing, we have little difficulty concluding that the Tax Act is fairly related to the benefits received by Illinois telephone consumers. The benefits that Illinois provides cannot be limited to those exact services provided to the equipment used during each interstate telephone call. Illinois telephone consumers also subscribe to telephone service in Illinois, own or rent telephone equipment at an Illinois service address, and receive police and fire protection as well as the other general services provided by the State of Illinois.

III

For the reasons stated above, we hold that the telecommunications tax imposed by the Tax Act is consistent with the Commerce Clause. It is fairly apportioned, does not discriminate against interstate commerce, and is fairly re-

lated to services which the State of Illinois provides to the taxpayer. The judgment of the Illinois Supreme Court is hereby

Affirmed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

My reasons for concluding that the Illinois tax does not discriminate against interstate commerce are different from those expressed in Part II–C of the Court's opinion. Unlike the Court, I do not believe Illinois may discriminate among its own residents by placing a heavier tax on those who engage in interstate commerce than on those who merely engage in local commerce. See *ante*, at 266 ("It is not a purpose of the Commerce Clause to protect state residents from their own state taxes"). In fact, such a holding is a clear departure from our precedents. See, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, 483 U. S. 232, 240–248 (1987) (invalidating manufacturing tax that discriminated between in-state manufacturers that sold at wholesale in state and those that sold at wholesale out of state); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984) (invalidating tax exemption for locally produced alcoholic beverages in case brought by local wholesalers); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 333–334 (1977) (invalidating securities transfer tax that discriminated against those state residents who sold out of state rather than in state). Surely a state tax of 3% on the shipment of goods intrastate and of 5% on the shipment of goods interstate would violate the Commerce Clause.[1]

[1] Perhaps it is the sales tax-like attributes of the Tax Act that have persuaded the Court to dismiss the discrimination claim by focusing solely on the sales tax-like impact on local residents. See *ante*, at 262, 265, 266. A State may assess a sales tax on the entire value of the purchased item even though some amount of that value was added in other States. Appellees have contended throughout this litigation that the tax involved here should be viewed as a sales tax on the cost of the phone call. The state court

Appellants' discrimination claim can best be illustrated by example: A call originating and terminating in Illinois that costs $10 is taxed at full value at 5%. A second call, originating in Illinois but terminating in Indiana, costs the same $10 and is taxed at the same full value at the same 5% rate. But while Illinois may properly tax the entire $10 of the first call, it (technically) may tax only that portion of the second call over which it has jurisdiction, namely, the intrastate portion of the call (say, for example, $5). By imposing an identical 50¢ tax on the two calls, Illinois has imposed a disproportionate economic burden on the interstate call. See *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987) (invalidating flat tax that imposed disproportionate economic burden on interstate commerce).

This argument, however, overlooks the true overall incidence of the Illinois tax. Although Illinois taxes the entirety of every call charged to an Illinois number, it does not tax any part of the calls that are received at an Illinois number but charged elsewhere. Thus, although Illinois taxes the entire Illinois-Indiana $10 call, it taxes no part of the reciprocal Indiana-Illinois $10 call. At the 5% rate, Illinois receives 50¢ from the two calls combined, precisely the amount it receives from one $10 purely intrastate call. By taxing half of the relevant universe of interstate calls at full value, Illinois

---

refused to so characterize the tax, instead concluding that the tax was assessed on interstate commerce. *Goldberg* v. *Johnson*, 117 Ill. 2d 493, 498–500, 512 N. E. 2d 1262, 1265–1266 (1987) *(per curiam)*. Although the Court's analysis is properly informed by the sales tax-like attributes of the tax in question, it does not ultimately challenge the state court's characterization of the tax and does not rest its holding on a recharacterization of the tax as a sales tax. Thus, it is insufficient to say, in response to the discrimination argument advanced by appellants, that because the tax burden falls only on the Illinois consumer, the tax—like a sales tax with a similar burden—is nondiscriminatory. Because the premise of our review of the Tax Act is that it applies to interstate activity, we must go further in responding to appellants' contention that the Act imposes a disproportionate burden on interstate commerce.

achieves the same economic result as taxing all of those calls at half value would achieve. As a result, interstate phone calls are taxed at a lower effective rate than intrastate calls,[2] and accordingly bear a proportional tax burden.[3]

With the exception of Part II–C, I join the Court's opinion.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I agree that the Illinois Telecommunications Excise Tax Act does not violate the Commerce Clause, and join Parts I, II–A, II–D, and III of the Court's opinion. I write separately to explain why I do not join Parts II–B and II–C. First, I am still unsure of the need and authority for applying the internal consistency test to state taxes challenged under the Commerce Clause. See *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 303 (1987) (O'CONNOR, J., dissenting). I therefore do not join in the Court's application of that test to the Tax Act. *Ante*, at 261. Second, I agree with JUSTICE STEVENS that a State may not discriminate among its own residents by placing a heavier tax on those who engage in interstate commerce than those who merely engage in local commerce. *Ante*, at 268 (STEVENS, J., concurring in part and concurring in judgment). Accordingly, I cannot join the Court's statement that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Ante*, at 266.

---

[2] That is, half of the interstate calls are taxed at 5%, but the other half are taxed at 0%; the effective rate is 2½%. On the other hand, all intrastate calls are taxed at 5%.

[3] This analysis is not obviated by the Court's statement, with which I agree, that "[w]e . . . doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call." *Ante*, at 263. That one State through which interstate commerce flows may not constitutionally tax such commerce does not mean that another State may make up for the gap, as it were, by taxing its share as well as the first State's share. Thus, even if Indiana could not constitutionally tax the mere termination of an Illinois-Indiana call, Illinois still may tax only the portion of the call over which it has jurisdiction.

JUSTICE SCALIA, concurring in the judgment.

I remain of the view that only state taxes that facially discriminate against interstate commerce violate the negative Commerce Clause, see *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, 483 U. S. 232, 254 (1987) (SCALIA, J., concurring in part and dissenting in part); *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 303 (1987) (SCALIA, J., dissenting). Because the Illinois Telecommunications Excise Tax is assessed upon intrastate and interstate calls at precisely the same rate, it poses no constitutional difficulty.

PERRY *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 87–6325. Argued November 8, 1988—Decided January 10, 1989

At the conclusion of petitioner's direct testimony in his state-court trial for murder and related offenses, the trial judge declared a 15-minute recess and ordered that petitioner not be allowed to talk to anyone, including his lawyer, during the break. In affirming petitioner's conviction, the South Carolina Supreme Court ruled that *Geders* v. *United States*, 425 U. S. 80—in which it was held that a trial court's order directing a defendant not to consult his attorney during an overnight recess, called while the defendant was on the witness stand, violated his Sixth Amendment right to the assistance of counsel—did not require reversal, since this Court had there emphasized the fact that a defendant would "normally confer" with counsel during an overnight recess and had explicitly disclaimed any intent to deal with limitations imposed in other circumstances. The state court declared that, normally, counsel is not permitted to confer with his client between direct and cross-examination. Subsequently, the Federal District Court granted petitioner a writ of habeas corpus, but the Court of Appeals reversed. Although agreeing with the District Court that *Geders* applied and that constitutional error had occurred, the court disagreed with the lower court's ruling that a defendant subjected to a *Geders* violation need not demonstrate prejudice in order to have his conviction set aside. The court concluded that petitioner's conviction should stand because the trial court's error was not prejudicial under *Strickland* v. *Washington*, 466 U. S. 668, in that the evidence against petitioner was overwhelming and there was no basis for believing that his testimony on cross-examination would have been different had he been given an opportunity to confer with his counsel during the recess.

Held:

1. A showing of prejudice is not an essential component of a violation of the *Geders* rule, in light of the fundamental importance of the criminal defendant's constitutional right to be represented by counsel. By citing *Geders* in distinguishing between direct governmental interference with that right and denial of the right by virtue of counsel's ineffective assistance, *Strickland* made clear that the complete denial of the right by the government is not subject to the kind of prejudice analysis that is appro-

priate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. Pp. 278–280.

2. However, the Federal Constitution does not compel a trial judge to allow a criminal defendant to confer with his attorney during a brief break in his testimony. It is an empirical predicate of our system of justice that, quite apart from any question of unethical "coaching," cross-examination of an uncounseled witness, whether the defendant or a nondefendant, following direct examination is more likely to lead to the discovery of truth than is cross-examination of a witness given time to pause and consult with his lawyer. Thus, although it may be appropriate to permit such consultation in individual cases, the trial judge must nevertheless be allowed the discretion to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and his lawyer would relate exclusively to his ongoing testimony. The long interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that the defendant does have a constitutional right to discuss with his lawyer—such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain—and the fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right in that instance. Pp. 280–285.

832 F. 2d 837, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined, and in Parts I and III of which KENNEDY, J., joined. KENNEDY, J., filed an opinion concurring in part, *post*, p. 285. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 285.

W. Gaston Fairey, by appointment of the Court, 485 U. S. 1004, argued the cause and filed a brief for petitioner.

Donald J. Zelenka, Chief Deputy Attorney General of South Carolina, argued the cause for respondents. With him on the brief were *T. Travis Medlock*, Attorney General, and *James C. Anders*.*

JUSTICE STEVENS delivered the opinion of the Court.

In *Geders* v. *United States*, 425 U. S. 80 (1976), we held that a trial court's order directing a defendant not to consult

**Jon May* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

his attorney during an overnight recess, called while the defendant was on the witness stand, violated his Sixth Amendment right to the assistance of counsel. Today we consider whether the *Geders* rule applies to a similar order entered at the beginning of a 15-minute afternoon recess.

I

Petitioner was tried and convicted by a jury of participating in a brutal murder, kidnaping, and sexual assault. His defense was that he had not taken an active part in the abduction or the homicide and that his participation in the sexual assault was the product of duress. Evidence offered on his behalf indicated that he was mildly retarded and that he was a nonviolent person who could be easily influenced by others. He took the stand and began to testify in his own defense after a lunch recess.

At the conclusion of his direct testimony, the trial judge declared a 15-minute recess, and, without advance notice to counsel, ordered that petitioner not be allowed to talk to anyone, including his lawyer, during the break. When the trial resumed, counsel moved for a mistrial. The judge denied the motion, explaining that petitioner "was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination." App. 4–5.

The Supreme Court of South Carolina affirmed petitioner's conviction. *State* v. *Perry*, 278 S. C. 490, 299 S. E. 2d 324 (1983). It concluded that *Geders* was not controlling because our opinion in that case had emphasized the fact that a defendant would normally confer with counsel during an overnight recess and that we had explicitly stated that "we do not deal with . . . limitations imposed in other circumstances." *Geders* v. *United States*, *supra*, at 91. The state court explained:

> "We attach significance to the words 'normally confer.' Normally, counsel is not permitted to confer with his

defendant client between direct examination and cross examination. Should counsel for a defendant, after direct examination, request the judge to declare a recess so that he might talk with his client before cross examination begins, the judge would and should unhesitatingly deny the request." 278 S. C., at 491–494, 299 S. E. 2d, at 325–326.

Justice Ness dissented. He pointed out that a defendant would normally confer with his lawyer during a short routine recess and therefore that *Geders* should apply. Moreover, in his opinion the importance of protecting the defendant's fundamental right to the assistance of counsel far outweighs the negligible value of preventing the lawyer from "coaching" his or her client during a brief recess.[1]

Thereafter, petitioner sought and obtained a federal writ of habeas corpus. Applying settled law in the Fourth Circuit,

[1] "I agree with the Fourth Circuit decision in *[United States]* v. *Allen*, [542 F. 2d 630 (1976), cert. denied, 430 U. S. 908 (1977)], which held the Sixth Amendment right to counsel is so fundamental that it should never be interfered with for any length of time absent some compelling reason. See also *Stubbs* v. *Bordenkircher*, 689 F. 2d 1205 (4th Cir. 1982) [,cert. denied, 461 U. S. 907 (1983)]. To allow defendants to be deprived of counsel during court-ordered recesses is to assume the worst of our system of criminal justice, *i. e.*, that defense lawyers will urge their clients to lie under oath. I am unwilling to make so cynical an assumption, it being my belief that the vast majority of lawyers take seriously their ethical obligations as officers of the court.

"Even if that assumption is to be made, the *Geders* opinion pointed out that opposing counsel and the trial judge are not without weapons to combat the unethical lawyer. The prosecutor is free to cross-examine concerning the extent of any 'coaching,' or the trial judge may direct the examination to continue without interruption until completed. Additionally, as noted in *Allen*, a lawyer and client determined to lie will likely invent and polish the story long before trial; thus, the State benefits little from depriving a defendant of counsel during short recesses.

"I think the Sixth Amendment right to counsel far outweighs the negligible value of restricting that right for a few minutes during trial." *State* v. *Perry*, 278 S. C., at 495–497, 299 S. E. 2d, at 327–328 (dissenting opinion).

the District Court held that although a defendant has no right to be coached on cross-examination, he does have a right to counsel during a brief recess and he need not demonstrate prejudice from the denial of that right in order to have his conviction set aside. App. 17–19; see *United States* v. *Allen*, 542 F. 2d 630, 633–634 (1976), cert. denied, 430 U. S. 908 (1977); *Stubbs* v. *Bordenkircher*, 689 F. 2d 1205, 1206–1207 (1982), cert. denied, 461 U. S. 907 (1983).

The Court of Appeals, sitting en banc, reversed. 832 F. 2d 837 (1987). It agreed with the District Court that *Geders* applied and that constitutional error had occurred, but it concluded that petitioner's conviction should stand because the error was not prejudicial. This conclusion rested on the court's view that our opinions in *United States* v. *Cronic*, 466 U. S. 648 (1984), and *Strickland* v. *Washington*, 466 U. S. 668 (1984), implied that trial errors of this kind do not pose such a fundamental threat to a fair trial that reversal of a conviction should be automatic. After a review of the record, the Court of Appeals found that the evidence against petitioner was "overwhelming," 832 F. 2d, at 843, and that there was no basis for believing that his performance on cross-examination would have been different had he been given an opportunity to confer with his lawyer during the brief recess.

Four judges dissented. They argued that *Geders* had been properly interpreted in earlier Fourth Circuit cases to require automatic reversal and that the majority's reliance on *Strickland* was misplaced because the prejudice inquiry in that case was employed to determine whether a Sixth Amendment violation had occurred—not to determine the consequences of an acknowledged violation. Moreover, they reasoned that the prejudice inquiry was particularly inappropriate in this context because it would almost inevitably require a review of private discussions between client and lawyer.

Because the question presented by this case is not only important, but also one that frequently arises,[2] we granted certiorari, 485 U. S. 976 (1988).

---

[2] Federal and state courts since *Geders* have expressed varying views on the constitutionality of orders barring a criminal defendant's access to his or her attorney during a trial recess. See *Sanders* v. *Lane*, 861 F. 2d 1033 (CA7 1988) (denial of access to counsel during lunchtime recess while defendant still on witness stand violation of the Sixth Amendment without consideration of prejudice, but error held harmless); *Bova* v. *Dugger*, 858 F. 2d 1539, 1540 (CA11 1988) (15-minute recess "sufficiently long to permit meaningful consultation between defendant and his counsel" and therefore bar on attorney-defendant discussion constitutional violation even though defendant on stand during cross-examination); *Crutchfield* v. *Wainwright*, 803 F. 2d 1103 (CA11 1986) (en banc) (6 of 12 judges hold that if defendant or counsel indicates, on the record, a desire to confer during a recess, then any denial of consultation is a *per se* constitutional violation; 5 judges hold that restriction on discussion with counsel regarding testimony during brief recess near end of direct examination when no objection was raised does not constitute constitutional violation; 1 judge holds that a violation may exist if defendant and counsel actually desired to confer, but then prejudice need be shown to gain postconviction relief), cert. denied, 483 U. S. 1008 (1987); *Mudd* v. *United States*, 255 U. S. App. D. C. 78, 79–83, 798 F. 2d 1509, 1510–1514 (1986) (order permitting defense counsel to speak with client about all matters other than client's testimony during weekend recess while client on stand *per se* Sixth Amendment violation); *United States* v. *Romano*, 736 F. 2d 1432, 1435–1439 (CA11 1984) (Sixth Amendment violation when judge barred attorney-defendant discussion only regarding defendant's testimony during 5-day recess), vacated in part on other grounds, 755 F. 2d 1401 (CA11 1985); *United States* v. *Vasquez*, 732 F. 2d 846, 847–848 (CA11 1984) (refusing to adopt rule "that counsel may interrupt court proceedings at any time to confer with his or her client about a matter in the case," thus affirming denial of counsel's request to consult with client during court's sidebar explanation to counsel); *Stubbs* v. *Bordenkircher*, 689 F. 2d 1205, 1206–1207 (CA4 1982) (denial of access to counsel during lunch recess while defendant on stand constitutionally impermissible, but no deprivation of right to counsel here because no showing that defendant desired to consult with attorney and would have done so but for the restriction), cert denied, 461 U. S. 907 (1983); *Bailey* v. *Redman*, 657 F. 2d 21, 22–25 (CA3 1981) (no deprivation of right to counsel from order barring defendant from discussing ongoing testimony with anyone during overnight recess because no objection and no showing that defend-

II

There is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the

---

ant would have conferred with counsel but for order), cert. denied, 454 U. S. 1153 (1982); *United States* v. *DiLapi*, 651 F. 2d 140, 147–149 (CA2 1981) (denial of access to counsel during 5-minute recess while defendant on stand Sixth Amendment violation, but nonprejudicial in this case), cert. denied, 455 U. S. 938 (1982); 651 F. 2d, at 149–151 (Mishler, J., concurring) (no Sixth Amendment right to consult with attorney during cross-examination; instead, Fifth Amendment's due process requirements should govern whether such denial of access to counsel rendered trial unfair); *United States* v. *Conway*, 632 F. 2d 641, 643–645 (CA5 1980) (denial of access to counsel during lunch recess while defendant on stand violation of right to effective assistance of counsel); *United States* v. *Bryant*, 545 F. 2d 1035, 1036 (CA6 1976) (denial of access to counsel during lunch recess while defendant on stand violation of right to counsel); *United States* v. *Allen*, 542 F. 2d 630, 632–634 (CA4 1976) ("[A] restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible," even while defendant is still on stand), cert. denied, 430 U. S. 908 (1977); *Ashurst* v. *State*, 424 So. 2d 691, 691–693 (Ala. Crim. App. 1982) (bar on defendant's access to attorney during defendant's testimony, including all breaks and recesses, violates right to counsel); *State* v. *Mebane*, 204 Conn. 585, 529 A. 2d 680 (1987) (denial of access to counsel during 21-minute recess while defendant on stand *per se* error), cert. denied, 484 U. S. 1046–1047 (1988); *Bailey* v. *State*, 422 A. 2d 956, 957–964 (Del. 1980) (order prohibiting defendant from discussing testimony with anyone during overnight recess, not objected to, not error, and if error, harmless); *McFadden* v. *State*, 424 So. 2d 918, 919–920 (Fla. App. 1982) (error by instructing counsel not to discuss defendant's ongoing testimony with him over holiday recess, but error held harmless because judge gave attorney ample opportunity to meet with defendant before proceeding to trial after recess); *Bova* v. *State*, 410 So. 2d 1343, 1345 (Fla. 1982) (denial of access to counsel during 15-minute break during cross-examination of defendant violation of Sixth Amendment, but harmless error); *People* v. *Stroner*, 104 Ill. App. 3d 1, 5–6, 432 N. E. 2d 348, 351 (1982) (no violation of right to counsel when judge barred defendant from discussing testimony, but permitted other contact with attorney, during 30-minute recess while defendant on stand), aff'd in part and rev'd in part on other grounds, 96 Ill. 2d 204, 449 N. E. 2d 1326 (1983); *Wooten-Bey* v. *State*, 76 Md. App. 603, 607–616, 547 A. 2d 1086, 1088–1092 (1988) (order denying defendant consultation with counsel concerning ongoing testimony during lunch

rule announced in *Geders*. In that case, we simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess. That reversal was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel.[3] See, *e. g.*, *United States* v. *Cronic*, 466 U. S., at 653–654; *Chapman* v. *California*, 386 U. S. 18, 23, n. 8 (1967); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Glasser* v. *United States*, 315 U. S. 60, 76 (1942).

The disposition in *Geders* was also consistent with our later decision in *Strickland* v. *Washington*, 466 U. S. 668 (1984), in which we considered the standard for determining whether counsel's legal assistance to his client was so inadequate that it effectively deprived the client of the protections guaranteed by the Sixth Amendment. In passing on such claims of "'actual ineffectiveness,'" *id.*, at 686, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Ibid.* More specifically, a defendant must show "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.*, at 687. Prior to our consideration of the standard for measuring the quality of the lawyer's work, however, we had expressly noted that direct governmental interference with the right to counsel is a different matter. Thus, we wrote:

---

break error, but error cured by judge's permitting discussion with counsel and opportunity for further redirect after defendant left stand); *People* v. *Hagen*, 86 App. Div. 2d 617, 446 N. Y. S. 2d 91 (1982) (Sixth Amendment violation when judge barred still-testifying defendant from discussing testimony with attorney during overnight recess).

[3] See U. S. Const., Amdt. 6 ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence").

> "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, *e. g.*, *Geders* v. *United States*, 425 U. S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York*, 422 U. S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U. S. 605, 612–613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U. S. 570, 593–596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance,' *Cuyler* v. *Sullivan*, 446 U. S., at 344. *Id.*, at 345–350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective)." *Id.*, at 686.

Our citation of *Geders* in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether," *Strickland* v. *Washington*, *supra*, at 692, is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. See *Penson* v. *Ohio*, *ante*, at 88; *United States* v. *Cronic*, *supra*, at 659, and n. 25. Thus, we cannot accept the rationale of the Court of Appeals' decision.

III

We are persuaded, however, that the underlying question whether petitioner had a constitutional right to confer with his attorney during the 15-minute break in his testimony—a question that we carefully preserved in *Geders*—was correctly resolved by the South Carolina Supreme Court. Admittedly, the line between the facts of *Geders* and the facts of this case is a thin one. It is, however, a line of constitutional dimension. Moreover, contrary to the views expressed by

the dissenting member of the South Carolina Supreme Court, see n. 1, *supra*, it is not one that rests on an assumption that trial counsel will engage in unethical "coaching."

The distinction rests instead on the fact that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.

The reason for the rule is one that applies to all witnesses—not just defendants. It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed.[4] Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will con-

[4] See, *e. g.*, *Jerry Parks Equipment Co.* v. *Southeast Equipment Co.*, 817 F. 2d 340, 342–343 (CA5 1987) (improper discussion of case by defense witness with defense counsel); *United States* v. *Greschner*, 802 F. 2d 373, 375–376 (CA10 1986) (circumvention of sequestration order where "witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify"), cert. denied, 480 U. S. 908 (1987); *United States* v. *Johnston*, 578 F. 2d 1352, 1355 (CA10) (exclusion of witnesses from courtroom a "time-honored practice designed to prevent the shaping of testimony by hearing what other witnesses say"; judge should avoid circumvention of rule by "making it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom"), cert. denied, 439 U. S. 931 (1978); *Milanovich* v. *United States*, 275 F. 2d 716, 720 (CA4 1960) ("[O]rdinarily, when a judge exercises his discretion to exclude witnesses from the courtroom, it would seem proper for him to take the further step of making the exclusion effective to accomplish the desired result of preventing the witnesses from comparing the testimony they are about to give. If witnesses are excluded but not cautioned against communicating during the trial, the benefit of the exclusion may be largely destroyed"), aff'd in part and set aside in part on other grounds, 365 U. S. 551 (1961).

fine themselves to truthful statements based on their own recollections.[5] The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration.[6] Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

In other words, the truth-seeking function of the trial can be impeded in ways other than unethical "coaching." Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.

---

[5] See, *e. g.*, 6 J. Wigmore, Evidence §§ 1837–1838 (J. Chadbourn rev. 1976 and Supp. 1988); Fed. Rule of Evid. 615, "Exclusion of Witnesses."

[6] See U. S. Const., Amdt. 6 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); see also, *e. g.*, *Coy* v. *Iowa*, 487 U. S. 1012, 1016 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact").

"Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *United States* v. *DiLapi*, 651 F. 2d 140, 151 (CA2 1981) (Mishler, J., concurring), cert. denied, 455 U. S. 938 (1982).[7]

Thus, just as a trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony—or at any other point in the examination of a witness—we think the judge must also have the power to maintain the status quo during a brief recess in which there is a virtual certainty

---

[7] See *United States* v. *DiLapi*, 651 F. 2d, at 149–151 (Mishler, J., concurring) (emphasis in original):

"[W]e must also account for the function of cross-examination in the trial process in construing the Sixth Amendment guarantee of counsel.

"'The age-old tool for ferreting out truth in the trial process is the right to cross-examination. "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law."' 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974). The importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct, . . . suggests that the right to assistance of counsel did not include the right to have counsel's advice on cross-examination.

"The Court has consistently acknowledged the vital role of cross-examination in the search for truth. It has recognized that the defendant's decision to take the stand, and to testify on his own behalf, places into question his credibility as a witness and that the prosecution has the *right* to test his credibility on cross-examination. . . . Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination."

Cf. 5 J. Wigmore, Evidence § 1367 (J. Chadbourn rev. 1974) (calling cross-examination "the greatest legal engine ever invented for the discovery of truth"); 4 J. Weinstein, Evidence ¶ 800[01] (1988) (cross-examination, a "'vital feature' of the Anglo-American system," "'sheds light on the witness' perception, memory and narration,'" and "can expose inconsistencies, incompletenesses, and inaccuracies in his testimony").

that any conversation between the witness and the lawyer would relate to the ongoing testimony. As we have said, we do not believe the defendant has a constitutional right to discuss that testimony while it is in process.

The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. See *Geders* v. *United States*, 425 U. S., at 88. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Our conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during such brief recesses. As a matter of discretion in individual cases, or of practice for individual trial judges, or indeed, as a matter of law in some States, it may well be appropriate to permit such consultation.[8] We merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in

---

[8] Alternatively, the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony. See *People* v. *Stroner*, 104 Ill. App. 3d, at 5–6, 432 N. E. 2d, at 351 (no violation of right to counsel when judge barred defendant from discussing testimony, but permitted other contact with attorney, during 30-minute recess while defendant on stand), aff'd in part and rev'd in part on other grounds, 96 Ill. 2d 204, 449 N. E. 2d 1326 (1983).

progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE KENNEDY, concurring in part.

I join Parts I and III of the Court's opinion and the holding that petitioner was not denied his constitutional right to assistance of counsel. In view of our ruling, it is quite unnecessary to discuss whether prejudice must be shown when the right to counsel is denied. I would not address that issue, and so I decline to join Part II of the Court's opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

In *Geders* v. *United States*, 425 U. S. 80 (1976), we held unanimously that a trial judge's order barring a defendant from conferring with his attorney during an overnight recess violated the defendant's Sixth Amendment right to the assistance of counsel. The majority holds today that when a recess is "short," unlike the "long recess" in *Geders*, a defendant has no such constitutional right to confer with his attorney. *Ante*, at 284. Because this distinction has no constitutional or logical grounding, and rests on a recondite understanding of the role of counsel in our adversary system, I dissent.

I

Contrary to the majority's holding, the Sixth Amendment forbids "*any* order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial." *Geders*, *supra*, at 92 (MARSHALL, J., concurring) (emphasis in original). This view is hardly novel; on the contrary, *every* Court of Appeals to consider this issue since *Geders*, including the en banc Fourth Circuit in this case, 832 F. 2d 837, 839 (1987), has concluded that a bar on

attorney-defendant contact, even during a brief recess, is impermissible if objected to by counsel. See *Sanders* v. *Lane*, 861 F. 2d 1033, 1039 (CA7 1988) (collecting cases). With very few exceptions, the state appellate courts that have addressed this issue have agreed. The majority attempts to sidestep this point, stating that the "[f]ederal and state courts since *Geders* have expressed *varying views* on the constitutionality of orders barring a criminal defendant's access to his or her attorney during a trial recess." *Ante*, at 277, n. 2 (emphasis added). To the extent there has been disagreement in the lower courts, however, it has been limited to the separate question whether a Sixth Amendment violation predicated on a bar order should be subject to a prejudice or harmless-error analysis—the sole question on which the Court granted certiorari in this case.

In concluding that bar orders violate the Sixth Amendment, the lower courts have faithfully reflected this Court's long-expressed view that "the Assistance of Counsel" guaranteed under the Constitution perforce includes the defendant's right to confer with counsel about all aspects of his case:

> "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him.'" *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), quoted in *Geders*, *supra*, at 88–89.

See also *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938); *Gideon* v. *Wainwright*, 372 U. S. 335, 343–345 (1963); *United States* v. *Wade*, 388 U. S. 218, 224 (1967); *Argersinger* v. *Hamlin*, 407 U. S. 25, 31–36 (1972); *United States* v. *Cronic*, 466 U. S. 648, 659 (1984). This long line of cases, which stands for the proposition that a defendant has the right to the aid of counsel at each critical stage of the adversary proc-

ess, is conspicuously absent from the majority's opinion. The omission of this constitutional legacy is particularly glaring given that "[i]t is difficult to perceive a more critical stage . . . than the taking of evidence on the defendant's guilt." *Green* v. *Arn*, 809 F. 2d 1257, 1263 (CA6 1987). Instead, after an obligatory nod of the head to the fundamental nature of the right to counsel, the majority strings together several unstated assumptions and unsupported assertions and concludes that attorney-defendant discussions during short trial recesses may be completely barred because they might disserve the trial's truth-seeking function. The majority's conclusory approach ill befits the important rights at stake in this case.

A

The majority begins its analysis by stating that a defendant "has no constitutional right to consult with his lawyer *while he is testifying*." *Ante*, at 281 (emphasis added). This truism is beside the point. Neither Perry nor his counsel sought to have Perry's "testimony interrupted in order to give him the benefit of counsel's advice," *ibid.*; nor has Perry suggested that he had a constitutional right to the interruption. This case instead involves the separate question whether a defendant has a right to talk to his lawyer *after* the trial judge has called a recess for some reason independent of the lawyer's desire to talk to the defendant or the defendant's desire to talk to his lawyer.

The majority further blurs the real issue in this case by describing the practice of not allowing defendants or lawyers to interrupt the defendant's testimony as a corollary of the "broader rule that witnesses may be sequestered." *Ibid.* The majority even provides a lengthy footnote which contains citations to several Court of Appeals cases discussing the purposes of witness sequestration. *Ante*, at 281, n. 4. The flaw in the majority's logic is that sequestration rules are inapplicable to defendants. Defendants, as the majority later acknowledges, enjoy a constitutional right under

the Sixth Amendment to confront the witnesses against them. *Ante*, at 282; see also *Geders*, 425 U. S., at 88.

The majority's false premise—that the issue is whether a defendant has the right to consult with his lawyer "while he is testifying"—naturally conjures up a greater-includes-the-lesser argument: Perry had no right to interrupt his testimony; he therefore had no reasonable expectation that he would be permitted to confer with counsel during any interruption provided by the trial judge. Yet, we rejected this facile argument in *Geders*. There, the trial judge sought to justify his bar order on the ground that it was merely an "accident" that he had called a recess during the defendant's testimony. *Geders*, 425 U. S., at 83, n. 1. In dismissing this notion, we did not frame the inquiry as whether *recesses* normally occur during the course of a defendant's testimony. Instead, we asked whether *consultations* normally occur during recesses called for some independent reason by the trial judge. *Id.*, at 88; see also *Sanders* v. *Lane*, *supra*, at 1036, n. 1; 832 F. 2d, at 849, n. 4 (Winter, C. J., dissenting).

To the extent the majority recognizes that the dispositive fact is not a defendant's right to interrupt, but rather the legitimacy of his expectation that he may speak with his lawyer during such an interruption, it does so by grounding its holding on a general "rul[e]" forbidding attorney-witness contact between a witness' direct and cross-examination. *Ante*, at 282. This "rule," we are told, is based on the view "that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer." *Ibid.* This "rule" is applicable to a defendant, the majority contends, because when a defendant takes the stand, the rules applicable to nonparty witnesses are "generally applicable to him as well." *Ibid.*

The defects in this line of reasoning are manifold. In the first place, the majority cites no authority whatsoever for its

"rule." Even if such authority exists, the presence of contrary authority undercuts any suggestion that settled practice renders unreasonable a defendant's expectation that he will be able to speak with his lawyer during a brief recess.[1] One need look no further than the facts of this case to see that the majority's "rule" is often honored in the breach. The trial judge declared at least three recesses while witnesses for the State were testifying, Tr. 213, 274, 517; two of these recesses came at the end of direct testimony but before cross-examination had begun. *Id.*, at 213, 517. During none of these recesses did the trial judge issue a bar order. The State's witnesses thus were free to consult with anyone, including the prosecutors, during these breaks. Similarly, in nearly every case cited by the majority in its collection of post-*Geders* cases, *ante*, at 277–279, n. 2, there is no indication that witnesses for the State were barred from speaking with the prosecutor or their attorneys during trial recesses.

Even if the majority is correct that trial courts routinely bar attorney-witness contact during recesses between direct and cross-examination, its lumping together of defendants with all other witnesses would still be flawed, for it ignores the pivotal fact that the Sixth Amendment accords defendants constitutional rights above and beyond those accorded witnesses generally.[2] We recognized the defendant's unique

---

[1] See, *e. g.*, 23 C. J. S., Criminal Law § 1025 (1961); *United States ex rel. Lovinger* v. *Circuit Court for the 19th Judicial District*, 652 F. Supp. 1336, 1346 (ND Ill. 1987), aff'd, 845 F. 2d 739 (CA7 1988); *Griffin* v. *State*, 383 So. 2d 873, 878–879 (Ala. Crim. App. 1980); *People* v. *Pendleton*, 75 Ill. App. 3d 580, 594–595, 394 N. E. 2d 496, 506–507 (1979); cf. *United States* v. *Allen*, 542 F. 2d 630, 633, n. 1 (CA4 1976) ("While the sequestering of witnesses is of ancient origin the practice has never been universal, which suggests that the danger of influencing witnesses feared so much by some is not at all feared by others").

[2] Likewise, the majority's equation of a defendant's discussions with his attorney with a defendant's discussions with "third parties," *ante*, at 282, seriously misapprehends the nature of Sixth Amendment rights.

status in *Geders:* "the petitioner was not simply a witness; he was also the defendant. . . . A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial." 425 U. S., at 88; see also *United States* v. *DiLapi*, 651 F. 2d 140, 148 (CA2 1981) ("The fact that other witnesses were cautioned not to speak to anyone during recesses does not justify a prohibition upon defendant-lawyer conversations").[3] The majority, in its haste, today overlooks this axiomatic distinction.[4]

B

The most troubling aspect of the majority's opinion, however, is its assertion that allowing a defendant to speak with his attorney during a "short" recess between direct and cross-examination invariably will retard the truth-seeking function of the trial. Although this notion is described as an "empirical predicate" of our adversary system, *ante*, at 282, the majority provides not a shred of evidence to support it. Furthermore, the majority fails to acknowledge that, in

---

[3] Cf. *Rock* v. *Arkansas*, 483 U. S. 44, 57–58, and n. 15 (1987); *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). The trial judge did at one point recognize that defendant Perry was not like the other witnesses. The significance of this distinction escaped him, however, for he justified the bar order imposed on Perry in part on the ground that "no one is on trial but Mr. Perry . . . . The 6th Amendment rights apply only to one who is on trial." App. 5. This reasoning stands the Sixth Amendment on its head.

[4] The majority errs, furthermore, in assuming, *ante*, at 282, that defendants are subject to the same rules of cross-examination as nonparty witnesses. See generally E. Cleary, McCormick on Evidence §§ 21–26 (3d. ed. 1984) (discussing different views on permissible scope of cross-examination of defendants and nonparty witnesses); §§ 41–44 (discussing different subjects on which defendants and nonparty witnesses may be impeached); §§ 130–140 (discussing different ways in which defendants and nonparty witnesses may invoke their self-incrimination rights while testifying); compare Fed. Rule Evid. 404(a)(1) (character evidence of the accused) with Fed. Rule Evid. 404(a)(3) (character evidence of a witness).

Geders, we never equated the attorney-client contact which we held constitutionally mandated with the evasion of truth.

Central to our Sixth Amendment doctrine is the understanding that legal representation for the defendant at every critical stage of the adversary process *enhances* the discovery of truth because it better enables the defendant to put the State to its proof. As the author of today's majority opinion wrote for the Court earlier this Term:

> "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.' Absent representation, however, it is unlikely that a criminal defendant will be able adequately to test the government's case, for, as Justice Sutherland wrote in *Powell* v. *Alabama*, 287 U. S. 45 (1932), '[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.' *Id.*, at 69." *Penson* v. *Ohio*, *ante*, at 84 (citations omitted).

Nowhere have we suggested that the Sixth Amendment right to counsel turns on what the defendant and his attorney discuss or at what point during a trial their discussion takes place. See generally *Strickland* v. *Washington*, 466 U. S. 668, 684–686 (1984); *United States* v. *Cronic*, 466 U. S., at 653–657; *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981); *Herring* v. *New York*, 422 U. S. 853, 857–858, 862 (1975).

With this understanding of the role of counsel in mind, it cannot persuasively be argued that the discovery of truth will be *impeded* if a defendant "regain[s] . . . a sense of strategy" during a trial recess. *Ante*, at 282. If that were so, a bar order issued during a 17-hour overnight recess should be sustained. Indeed, if the argument were taken to its logical extreme, a bar on *any* attorney-defendant contact, even before trial, would be justifiable. Surely a prosecutor would have

greater success "punch[ing] holes," *ibid.*, in a defendant's testimony under such circumstances. Indeed, the prosecutor would then be assured that the defendant has not had "an opportunity to regroup and regain a poise . . . that the unaided witness [does] not possess." *Ibid.* In other words, the prosecutor would be more likely to face the punch-drunk witness who the majority thinks contributes to the search for truth.[5]

The majority's fears about the deleterious effects of attorney-defendant contact during trial recesses are vastly overstated. Vigorous cross-examination is certainly indispensable in discerning the trustworthiness of testimony, but I would think that a few soothing words from counsel to the agitated or nervous defendant facing the awesome power of the State might *increase* the likelihood that the defendant will state the truth on cross-examination. The value of counsel in calming such a defendant would seem especially apparent in this case given that Perry, who the majority describes as "mildly retarded," *ante*, at 274, was on trial for his life.[6]

---

[5] The majority claims that its decision does not "res[t] on an assumption that trial counsel will engage in unethical coaching." *Ante*, at 281. Nonetheless, I am inclined to believe that the majority's fears that the defendant will "regain . . . a sense of strategy" are motivated, at least in part, by an underlying suspicion that defense attorneys will fail to "respect the difference between assistance and improper influence." *Geders* v. *United States*, 425 U. S. 80, 90, n. 3 (1976). "If our adversary system is to function according to design," however, "we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client." *Id.*, at 93 (MARSHALL, J., concurring); see also *United States* v. *Allen*, 542 F. 2d, at 633 ("[A]ll but very few lawyers take seriously their obligation as officers of the court and their proper role in the administration of justice. We think the probability of improper counseling, *i. e.*, to lie or evade or distort the truth, is negligible in most cases").

[6] At trial, a psychologist and a psychiatrist testified regarding Perry's personality and mental health. They stated that Perry, then 21 years old, had an I. Q. of 86, had encountered learning difficulties in school, had dropped out by the ninth grade, and had a childlike personality. They also testified that Perry often had difficulty distinguishing reality from fantasy

Furthermore, to remind a defendant that certain cross-examination questions might implicate his right against self-incrimination or relate to previously excluded evidence, or to caution a defendant to mind his demeanor at all times, is merely to brace the defendant for the "legal engine" steaming his way. *Ante*, at 283, n. 7, quoting 5 J. Wigmore, Evidence § 1367 (J. Chadbourn rev. 1974). I cannot accept the view that discussions of this sort necessarily threaten the trial's truth-seeking function. To the extent that they might in some circumstances, it is important to remember that truth would not be sacrificed in the name of some obscure principle—a constitutional command hangs in the balance. See *Geders*, 425 U. S., at 91.

Although the majority appears to believe that attorney-defendant recess discussions on any subject are inconsistent with "the discovery of truth," *ante*, at 282, it finds discussions regarding testimony to be particularly pernicious. This distinction finds no support in our Sixth Amendment cases. But even if it did, the majority's logic on this point would remain inscrutable. The majority distinguishes "long" recesses, such as the 17-hour recess at issue in *Geders*, from the "short" 15-minute recess in this case on the ground that it is "appropriate to presume," or, alternatively, that there is "a

---

and that he suffered from "hysterical reaction," an inability to cope with stressful situations. Tr. 1048–1049, 1053–1054, 1087, 1091–1098.

One can only assume that the treatment the trial judge accorded Perry during the 15-minute recess exacerbated his sense of fright or trepidation. After the trial judge *sua sponte* ordered the recess, Perry's counsel attempted to confer with Perry in order to "answer his questions and also to make sure he understood his rights on cross-examination." App. 7. The bar order, however, prevented him from doing so. During the recess, Perry was "taken out of the courtroom and placed in a very small room with no window and no other person, just one chair, enclosed in about a six by six room, with no one to talk to." Tr. of Oral Arg. 8. Apparently, Perry's counsel was not even allowed to explain to Perry why they were not permitted to confer during the recess. Treatment of this sort may well have had an adverse effect on Perry's ability to retain his composure and testify truthfully on cross-examination.

virtual certainty," *ante*, at 283, 284, that any discussion during a 15-minute recess will focus exclusively on the defendant's upcoming testimony. Once again, the majority reasons by assertion; it offers no legal or empirical authority to buttress this proposition. While this assertion might have some validity with respect to nonparty witnesses, who might have little else to discuss with the parties' attorneys, see *Geders*, *supra*, at 88, it defies common sense to argue that attorney-defendant conversations regarding "the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain," *ante*, at 284, cannot, or do not, take place during relatively brief recesses.

For example, while a defendant is on the stand during direct examination, he may remember the name or address of a witness, or the location of physical evidence, which would be helpful to his defense. It would take mere seconds to convey this information to counsel. As a matter of sound trial strategy, defense counsel might believe that this new witness or evidence would have the most impact if presented directly after the defendant concluded his testimony. But under the majority's approach, defense counsel would not even learn about this witness or evidence until the defendant steps down from the stand. Alternatively, the defendant might be so discouraged by his testimony on direct examination as to conclude that he should attempt plea negotiations with the prosecution immediately, or accept an outstanding plea bargain offer. It need only take seconds for him to convey this to his lawyer, particularly if they had previously discussed the advisability of pleading guilty. This opportunity might be forever lost, however, if a bar order issues and the prosecution conducts a successful cross-examination. These are just a few examples of the tactical exchanges which defendants and their attorneys might have midtrial; there is no reason to believe such exchanges predominantly occur during overnight recesses rather than during brief recesses. Indeed, an overnight recess "may entail a deprivation of little more than the

fifteen minutes at stake here because many attorneys will devote the vast majority of such an extended break to preparation for the next day of trial, while sending the client home to sleep, or back to jail." 832 F. 2d, at 849 (Winter, C. J., dissenting).[7]

Yet another perverse aspect of the majority's opinion is its recognition that a defendant has a "constitutional right" to discuss those "matters that go beyond the content of the defendant's own testimony." *Ante*, at 284. Having recognized this right, one would expect the majority to *require* trial judges to permit attorney-defendant contact during all recesses, no matter how brief, so long as trial testimony is not discussed. Instead, the majority merely suggests in a footnote that trial judges "*may* permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony." *Ante*, at 284, n. 8 (emphasis added). If attorney-client discussions regarding matters other than testimony have constitutional stature, they surely deserve more protection than the majority offers today. It may well be that Perry and his counsel would have discussed "matters that [went] beyond the content of [Perry's] own testimony," *ante*, at 284; Perry was, however, denied this constitutional right. In allowing trial judges to ban *all* brief recess consultations, even those including or limited to discussions regarding nontestimonial matters, the majority needlessly fires grapeshot where, even under its own reasoning, a single bullet would have sufficed.[8]

---

[7] Chief Judge Winter further observed:

"Few categories of constitutional error so undermine the adversary system as to warrant reversal without any proof of prejudice in a particular case. Denial of the assistance of counsel during a critical stage of criminal proceedings is one such category of error. Whether the deprivation of counsel spans an entire trial or but a fraction thereof, it renders suspect any result that is obtained." 832 F. 2d, at 845.

[8] The majority assumes that it is possible to distinguish discussions regarding trial strategy from discussions regarding testimony. I am not so sure. Assume, for example, that counsel's direct examination of the

II

Today's decision is regrettable in two further respects. In practical terms, the majority leaves the trial judge "to guess at whether she has committed a constitutional violation" when she issues a recess bar order. *Sanders* v. *Lane*, 861 F. 2d, at 1037. Is it "appropriate to presume" that a 30-minute recess will involve a discussion of nontestimonial matters? How about a lunch break? Does it matter that defense counsel has promised only to discuss nontestimonial matters with his client? Does the majority's rationale encompass recesses during the defendant's direct or redirect testimony, or just those after the direct examination has concluded? These are not abstract inquiries, but the sort that have arisen, and will continue to arise, on a routine basis. See *id.*, at 1036–1037 (collecting cases). By not even providing a practical framework in which to answer these questions, the majority ensures that defendants, even those in adjoining courtrooms, will be subject to inconsistent practices. Such inconsistency is untenable when a critical constitutional right is at stake.

The majority's standardless approach guarantees a new bout of appellate litigation during which lower courts ineluctably will issue conflicting decisions as to the point at which a "short" recess bar order becomes a constitutionally impermissible "long" recess bar order. Given that "clarification is

---

defendant inadvertently elicits damaging information that can be effectively neutralized on redirect only if the defendant has the opportunity to explain his direct testimony to counsel. If a recess were called, the ensuing attorney-defendant discussion would seem to be as much about trial strategy as about upcoming testimony. Without a chance to speak with the defendant, counsel will be hampered in knowing whether redirect is even advisable. The majority's failure to spell out the difference—if there is one—between testimonial and nontestimonial discussions may well "have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating [a court order barring recess discussions of testimonial matters]." *Mudd* v. *United States*, 255 U. S. App. D. C. 78, 81, 798 F. 2d 1509, 1512 (1986).

feasible," *United States* v. *Ross*, 456 U. S. 798, 804 (1982), and indisputably desirable in this area of law, the majority's willingness to tolerate such ambiguity is dismaying. See *United States* v. *Allen*, 542 F. 2d 630, 633 (CA4 1976). The majority purports to draw a "line of constitutional dimension," *ante*, at 280, but it is one which lower courts, faced with a continuum of recess possibilities, will find impossible to discern.

Finally, today's decision marks a lapse in this Court's commitment to fundamental fairness for criminal defendants. The majority wholly ignores the trial judge's uneven imposition of bar orders. No bar order issued when recesses were called during testimony by the State's witnesses, but when a recess was called at the conclusion of Perry's direct testimony, the trial judge suddenly became concerned that witnesses might be "cured or assisted or helped approaching . . . cross examination." App. 4–5. Perry's counsel objected that Perry was being unfairly singled out, but the trial judge responded that he felt compelled to act as he did to ensure, of all things, "fairness to the state." App. 5. This peculiar sense of obligation meant that Perry was removed from the courtroom and held incommunicado for the duration of the recess.[9]

Needless to say, the due process concerns underpinning the Sixth Amendment right to counsel are designed to ensure a fair trial for the defendant, not the State. See generally *Strickland* v. *Washington*, 466 U. S., at 684–685; *United*

[9] In addition to the bar order issued against Perry, the trial judge ordered Perry's wife not to speak with anyone during a recess called after she had completed her direct testimony on behalf of her husband. Defense counsel protested that "this was not done during the state's case. It is only being done on the defendant's case and it is being done without even the request of the state . . . . And I again urge the Court that it appears to show some bias on the part of the Court." Tr. 904. The trial judge rebuffed the objection: "I don't apologize for it. I'm in charge of this trial and I'm going to see that it *remains fair to all parties*." *Ibid.* (emphasis added).

States v. *Cronic*, 466 U. S., at 653–656; *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). By ensuring a defendant's right to have counsel, which includes the concomitant right to communicate with counsel at every critical stage of the proceedings, see *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), the Constitution seeks "to minimize the imbalance in the adversary system." *United States* v. *Ash*, 413 U. S. 300, 309, (1973). The majority twice disserves this noble goal—by isolating the defendant at a time when counsel's assistance is perhaps most needed, and by ignoring the stark unfairness of according prosecution witnesses the very prerogatives denied the defendant. The Constitution does not permit this new restriction on the Sixth Amendment right to counsel. I dissent.

DUQUESNE LIGHT CO. ET AL. *v.* BARASCH ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 87-1160. Argued November 7, 1988—Decided January 11, 1989

In 1967, appellant Pennsylvania electric utilities joined a venture to construct seven nuclear generating units. But in 1980, because of intervening events, including the Arab oil embargo and the accident at Three Mile Island, the participants canceled plans for construction of four of the plants. Thereafter appellant Duquesne Light Co. applied to the Pennsylvania Public Utility Commission (PUC) to obtain a rate increase and to amortize its expenditures on the canceled plants over 10 years. The PUC granted a rate increase that included an amount representing the first payment of the 10-year amortized recovery of Duquesne's costs in the aborted plants. Shortly before the close of the rate proceeding, a state law (Act 335) was enacted that provided that an electric utility's cost of construction of a generating facility shall not be made part of a rate base nor otherwise included in rates charged until such time as the facility "is used and useful in service to the public." The State Office of the Consumer Advocate moved the PUC to reconsider in light of this law, but the PUC on reconsideration affirmed its original rate order, reading the new law as excluding the costs of canceled plants from the rate base, but not as preventing their recovery through amortization. Meanwhile, the PUC similarly granted appellant Pennsylvania Power Co. a rate increase and authorized it to amortize its share of the canceled plants over a 10-year period. The Consumer Advocate appealed both PUC decisions to the Pennsylvania Commonwealth Court, which held that the PUC had correctly construed Act 335. The Pennsylvania Supreme Court reversed, holding that Act 335 prohibited recovery of the costs in question either by inclusion in the rate base or by amortization, and that the statute did not take appellants' property in violation of the Takings Clause of the Fifth Amendment, applicable to the States under the Fourteenth Amendment. The court remanded the case to the PUC for further proceedings to correct its rate orders, giving effect to the exclusion required by Act 335.

Held:

1. This Court has jurisdiction to decide the case under 28 U. S. C. § 1257(2), which authorizes the Court to review by appeal "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . .

and the decision is in favor of its validity." Although the Pennsylvania Supreme Court remanded the case for further proceedings to revise the rate orders, that court's judgment is final for purposes of this Court's appellate jurisdiction. The state court's last word on Act 335's constitutionality has been presented, and all that remains is the straightforward application of its clear directive to otherwise complete rate orders. Pp. 306–307.

2. A state scheme of utility regulation, such as is involved here, does not "take" property simply because it disallows recovery of capital investments that are not "used and useful in service to the public." Pp. 307–316.

(a) Under the "prudent investment" or "historical cost" rule, a utility is compensated for all prudent investments at their actual cost when made (their "historical" cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight. It was ruled in *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, that historical cost was a valid basis on which to calculate utility compensation. Pp. 307–312.

(b) The Constitution does not require that subsidiary aspects of Pennsylvania's ratemaking methodology be examined piecemeal, as appellants argue. State legislatures are competent bodies to set utility rates, and the PUC is essentially an administrative arm of the legislature. Similarly, an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it, as appellants do here by noting Act 335's theoretical inconsistency in suddenly and selectively applying the "used and useful requirement," normally associated with the fair value method of ratesetting, in the context of Pennsylvania's system based on historical costs. Pp. 313–314.

(c) In this case, at all relevant times, Pennsylvania's rate system has been predominantly but not entirely based on historical costs, and it has not been shown that the rate orders in question as modified by Act 335 failed to give a reasonable rate of return on equity given the risk under such a regime. Therefore, Act 335's limited effect on those rate orders does not result in constitutionally impermissible rates. Pp. 314–315.

(d) But adoption of the "prudent investment" rule as the single constitutional standard of valuation would be inconsistent with the view of the Constitution that this Court has taken since *Hope Natural Gas* and would unnecessarily foreclose alternatives that could benefit both consumers and investors. The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public. Pp. 315–316.

516 Pa. 142, 532 A. 2d 325, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, in which WHITE and O'CONNOR, JJ., joined, *post*, p. 317. BLACKMUN, J., filed a dissenting opinion, *post*, p. 317.

Peter Buscemi argued the cause for appellants. With him on the briefs were *Alan L. Reed, William E. Zeiter, John F. Stillmun III, James R. Edgerly, Stephen L. Feld, Christine A. Hansen*, and *Larry R. Crayne*.

Irwin A. Popowsky argued the cause for appellees and filed a brief for appellee David M. Barasch. With him on the brief were *David M. Barasch, pro se*, and *Daniel Clearfield. Daniel P. Delaney, Bohdan R. Pankiw*, and *John A. Levin* filed a brief for appellee Pennsylvania Public Utility Commission.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Pennsylvania law required that rates for electricity be fixed without consideration of a utility's expenditures for electrical generating facilities which were planned but never built, even though the expenditures were prudent and reasonable when made. The Supreme Court of Pennsylvania held that such a law did not take the utilities' property in violation of the Fifth Amendment to the United States Constitution. We agree with that conclusion, and hold that a

*Briefs of *amici curiae* urging reversal were filed for the Edison Electric Institute by *Robert L. Baum* and *Peter B. Kelsey;* and for the Pennsylvania Electric Association by *Rex E. Lee, David W. Carpenter, Vincent Butler*, and *David T. Evrard*.

Briefs of *amici curiae* urging affirmance were filed for the Consumer Federation of America et al. by *Scott Hempling* and *Roger Colton;* for the National Association of Regulatory Utility Commissioners by *William Paul Rodgers, Jr.;* for the National Association of State Utility Consumer Advocates by *Raymon E. Lark, Jr.;* and for the National Governor's Association et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch*, and *Brian J. Moline*.

H. Lee Roussell and *David M. Kleppinger* filed a brief for Industrial Energy Consumers of Pennsylvania et al. as *amici curiae*.

state scheme of utility regulation does not "take" property simply because it disallows recovery of capital investments that are not "used and useful in service to the public." 66 Pa. Cons. Stat. § 1315 (Supp. 1988).

I

In response to predictions of increased demand for electricity, Duquesne Light Company (Duquesne) and Pennsylvania Power Company (Penn Power) joined a venture in 1967 to build more generating capacity. The project, known as the Central Area Power Coordination Group (CAPCO), involved three other electric utilities and had as its objective the construction of seven large nuclear generating units. In 1980 the participants canceled plans for construction of four of the plants. Intervening events, including the Arab oil embargo and the accident at Three Mile Island, had radically changed the outlook both for growth in the demand for electricity and for nuclear energy as a desirable way of meeting that demand. At the time of the cancellation, Duquesne's share of the preliminary construction costs associated with the four halted plants was $34,697,389. Penn Power had invested $9,569,665.

In 1980, and again in 1981, Duquesne sought permission from the Pennsylvania Public Utility Commission (PUC)[1] to recoup its expenditures for the unbuilt plants over a 10-year period. The Commission deferred ruling on the request until it received the report from its investigation of the CAPCO construction. That report was issued in late 1982. The report found that Duquesne and Penn Power could not be faulted for initiating the construction of more nuclear generating capacity at the time they joined the CAPCO project in 1967. The projections at that time indicated a growing de-

[1] The PUC exercises a legislative grant of power to enforce the Pennsylvania public utilities laws. 66 Pa. Cons. Stat. § 501 (1986). "[T]he authority of the Commission must arise either from the express words of the pertinent statutes or by strong and necessary implication therefrom." *Philadelphia* v. *Philadelphia Electric Co.*, 504 Pa. 312, 317, 473 A. 2d 997, 999 (1984) (collecting cases).

mand for electricity and a cost advantage to nuclear capacity. It also found that the intervening events which ultimately confounded the predictions could not have been predicted, and that work on the four nuclear plants was stopped at the proper time. In summing up, the Administrative Law Judge found "that the CAPCO decisions in regard to the [canceled plants] at every stage to their cancellation, were reasonable and prudent." App. to Juris. Statement 19h. He recommended that Duquesne and Penn Power be allowed to amortize their sunk costs in the project over a 10-year period. The PUC adopted the conclusions of the report. App. to Juris. Statement 1i.

In 1982, Duquesne again came before the PUC to obtain a rate increase. Again, it sought to amortize its expenditures on the canceled plants over 10 years. In January 1983, the PUC issued a final order which granted Duquesne the authority to increase its revenues $105.8 million to a total yearly revenue in excess of $800 million. *Pennsylvania PUC* v. *Duquesne Light Co.*, 57 Pa. P. U. C. 1, 51 P. U. R. 4th 198 (1983). The rate increase included $3.5 million in revenue representing the first payment of the 10-year amortization of Duquesne's $35 million loss in the CAPCO plants.

The Pennsylvania Office of the Consumer Advocate (Consumer Advocate) moved the PUC for reconsideration in light of a state law enacted about a month before the close of the 1982 Duquesne rate proceeding. The Act, No. 335, 1982 Pa. Laws 1473, amended the Pennsylvania Utility Code by limiting "the consideration of certain costs in the rate base."[2] It

---

[2] Act 335 amended the Pennsylvania Utility Code by adding 66 Pa. Cons. Stat. § 1315. The relevant parts of Act 335 read as follows:

"AN ACT

"Amending Title 66 (Public Utilities) of the Pennsylvania Consolidated Statutes, providing *a limitation on the consideration of certain costs in the rate base* for electric public utilities.

. . . . . .

"Section 1. Title 66 . . . is amended by adding a section to read:

provided that "the cost of construction or expansion of a facility undertaken by a public utility producing . . . electricity shall not be made a part of the rate base nor otherwise included in the rates charged by the electric utility until such time as the facility is used and useful in service to the public." 66 Pa. Cons. Stat. § 1315 (Supp. 1988). On reconsideration, the PUC affirmed its original rate order. *Pennsylvania PUC* v. *Duquesne Light Co.*, 57 Pa. P. U. C. 177, 52 P. U. R. 4th 644 (1983). It read the new law as excluding the costs of canceled plants (obviously not used and useful) from the rate base, but not as preventing their recovery through amortization.

Meanwhile another CAPCO member, Penn Power, also sought to amortize its share of the canceled CAPCO powerplants over a 10-year period. The PUC granted Penn Power authority to increase its revenues by $15.4 million to a total of $184.2 million. *Pennsylvania PUC* v. *Pennsylvania Power Co.*, 58 Pa. P. U. C. 305, 60 P. U. R. 4th 593 (1984). Part of

---

"§ 1315. Limitation on consideration of certain costs for electric utilities.

"Except for such nonrevenue producing, nonexpense reducing investments as may be reasonably shown to be necessary to improve environmental conditions at existing facilities or improve safety at existing facilities or as may be required to convert facilities to the utilization of coal, *the cost of construction or expansion of a facility* undertaken by a public utility producing, generating, transmitting, distributing or furnishing electricity *shall not be made a part of the rate base nor otherwise included in the rates charged by the electric utility until such time as the facility is used and useful in service to the public.* Except as stated in this section, no electric utility property shall be deemed used and useful *until it is presently providing actual utility service to the customers.*

"Section 2. This act shall be applicable to *all proceedings pending before the Public Utility Commission and the courts at this time.* Nothing contained in this act shall be construed to modify or change existing law with regard to rate making treatment of investment in facilities of fixed utilities other than electric facilities.

"Section 3. *This act shall take effect immediately.*

"APPROVED—The 30th day of December, A. D. 1982." (Emphasis added.)

that revenue increase represented $956,967 for the first year of the 10-year amortized recovery of Penn Power's costs in the aborted nuclear plants.

The Consumer Advocate appealed both of these decisions to the Commonwealth Court, which by a divided vote held that the Commission had correctly construed § 1315. *Cohen* v. *Pennsylvania PUC*, 90 Pa. Commw. 98, 494 A. 2d 58 (1985). The Consumer Advocate then appealed to the Supreme Court of Pennsylvania, and that court reversed. *Barasch* v. *Pennsylvania PUC*, 516 Pa. 142, 532 A. 2d 325 (1987). That court held that the controlling language of the Act prohibited recovery of the costs in question either by inclusion in the rate base or by amortization. The court rejected appellants' constitutional challenge to the statute thus interpreted, observing that "[t]he 'just compensation' safeguarded to a utility by the fourteenth amendment of the federal constitution is a reasonable return on the fair value of its property at the time it is being used for public service." *Id.*, at 163, 532 A. 2d, at 335. Since the instant CAPCO investment was not serving the public and did not constitute an operating expense, no constitutional rights to recovery attached to it. The court remanded to the PUC for further proceedings to correct its rate order, giving effect to the exclusion required by Act 335.[3] Duquesne and Penn Power appealed to this Court arguing that the effect of Act 335 excluding their prudently incurred costs from the rate violated the Takings Clause of the Fifth Amendment, applicable to the States under the Fourteenth Amendment. We noted probable jurisdiction. 485 U. S. 933 (1988).

---

[3] On October 10, 1985, too late to affect this case, the Pennsylvania Legislature enacted Act 1985–62 which added 66 Pa. Cons. Stat. § 520 (Supp. 1988) to the state utility code. Under § 520, the PUC is now authorized to permit amortized recovery of prudently incurred investment in canceled generating units.

II

Although the parties have not discussed it, we must first inquire into our jurisdiction to decide this case. See *Jackson* v. *Ashton*, 8 Pet. 148 (1834); *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884). Our jurisdiction here rests on 28 U. S. C. § 1257(2), which authorizes this Court to review "[f]inal judgments or decrees rendered by the highest Court of a State in which a decision could be had . . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Although this case has been remanded for further proceedings to revise the relevant rate orders, we hold that for purposes of our appellate jurisdiction the judgment of the Pennsylvania Supreme Court is final.

We have acknowledged that the words of § 1257(2) could well be interpreted to preclude review in this Court as long as any proceedings remain in state court. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945). In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975), however, we recognized that in practice the final judgment rule has not been interpreted so strictly. *Cox* outlined four circumstances in which the adjudication of a federal issue in a case by the highest available state court had been reviewed in this Court notwithstanding the prospect of some further state-court proceedings.

This case falls into the first of the four categories. The Pennsylvania Supreme Court has finally adjudicated the constitutionality of Act 335 in the context of otherwise completed rate proceedings and so has left "the outcome of further proceedings preordained." *Cox*, *supra*, at 479. We do not think that the PUC might undo the effects of Act 335 on remand by allowing recovery of the disputed costs in some other way consistent with state law. The Pennsylvania Supreme Court's interpretation of the Act does not leave its

effect in doubt; the CAPCO related costs may not be "otherwise included in the rates charged." 66 Pa. Cons. Stat. § 1315 (1986).[4] We are satisfied that we are presented with the State's last word on the constitutionality of Act 335 and that all that remains is the straightforward application of its clear directive to otherwise complete rate orders. We therefore have jurisdiction. See *Cox*, *supra*, at 479; *Mills* v. *Alabama*, 384 U. S. 214 (1966).

III

As public utilities, both Duquesne and Penn Power are under a state statutory duty to serve the public. A Pennsylvania statute provides that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities" and that "[s]uch service also shall be reasonably continuous and without unreasonable interruptions or delay." 66 Pa. Cons. Stat. § 1501 (1986). Although their assets are employed in the public interest to provide consumers of the State with electric power, they are owned and operated by private investors. This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment.

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practi-

[4] As a result of recent legislation, this Court will not long have appellate jurisdiction over cases of the instant type. Public L. 100–352, 102 Stat. 662, effective September 25, 1988, and applicable to judgments rendered on or after that date, eliminates substantially all of our appellate jurisdiction, including § 1257(2). Persons aggrieved by state-court judgments should now file a petition for certiorari, rather than appeal. See S. Rep. No. 100–300 (1988); H. R. Rep. No. 100–660 (1988); B. Boskey & E. Gressman, The Supreme Court Bids Farewell to Mandatory Appeals, 109 S. Ct. LXXXI (1988).

cally deprive[s] the owner of property without due process of law"); *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 391–392 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. As has been observed, however, "[h]ow such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question." *Smyth* v. *Ames*, 169 U. S. 466, 546 (1898). See also *Permian Basin Area Rate Cases*, 390 U. S. 747, 790 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders").

At one time, it was thought that the Constitution required rates to be set according to the actual present value of the assets employed in the public service. This method, known as the "fair value" rule, is exemplified by the decision in *Smyth* v. *Ames*, *supra*. Under the fair value approach, a "company is entitled to ask . . . a fair return upon the value of that which it employs for the public convenience," while on the other hand, "the public is entitled to demand . . . that no more be exacted from it for the use of [utility property] than the services rendered by it are reasonably worth." 169 U. S., at 547. In theory the *Smyth* v. *Ames* fair value standard mimics the operation of the competitive market. To the extent utilities' investments in plants are good ones (because their benefits exceed their costs) they are rewarded with an opportunity to earn an "above-cost" return, that is, a fair return on the current "market value" of the plant. To the extent utilities' investments turn out to be bad ones (such as plants that are canceled and so never used and useful to

the public), the utilities suffer because the investments have no fair value and so justify no return.

Although the fair value rule gives utilities strong incentive to manage their affairs well and to provide efficient service to the public, it suffered from practical difficulties which ultimately led to its abandonment as a constitutional requirement.[5] In response to these problems, Justice Brandeis had advocated an alternative approach as the constitutional minimum, what has become known as the "prudent investment" or "historical cost" rule. He accepted the *Smyth* v. *Ames* eminent domain analogy, but concluded that what was "taken" by public utility regulation is not specific physical assets that are to be individually valued, but the capital prudently devoted to the public utility enterprise by the utilities' owners. *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Comm'n*, 262 U. S. 276, 291 (1923) (dissenting opinion). Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their "historical" cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight. The utilities incur fewer risks, but are limited to a standard rate of return on the actual amount of money reasonably invested.[6]

---

[5] Perhaps the most serious problem associated with the fair value rule was the "laborious and baffling task of finding the present value of the utility." *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Comm'n*, 262 U. S. 276, 292–294 (1923) (Brandeis, J. dissenting). The exchange value of a utility's assets, such as powerplants, could not be set by a market price because such assets were rarely bought and sold. Nor could the capital assets be valued by the stream of income they produced because setting that stream of income was the very object of the rate proceeding. According to Brandeis, the *Smyth* v. *Ames* test usually degenerated to proofs about how much it would cost to reconstruct the asset in question, a hopelessly hypothetical, complex, and inexact process. 262 U. S., at 292–294.

[6] The system avoids the difficult valuation problems encountered under the *Smyth* v. *Ames* test because it relies on the actual historical cost of investments as the basis for setting the rate. The amount of a utility's

Forty-five years ago in the landmark case of *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), this Court abandoned the rule of *Smyth* v. *Ames*, and held that the "fair value" rule is not the only constitutionally acceptable method of fixing utility rates. In *Hope* we ruled that historical cost was a valid basis on which to calculate utility compensation. 320 U. S., at 605 ("Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base"). We also acknowledged in that case that all of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree. Today we reaffirm these teachings of *Hope Natural Gas:* "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Id*, at 602. This language, of course, does not dispense with all of the constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory: whether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional overtones.

Pennsylvania determines rates under a slightly modified form of the historical cost/prudent investment system.[7] Nei-

---

actual outlays for assets in the public service is more easily ascertained by a ratemaking body because less judgment is required than in valuing an asset.

[7] Pennsylvania values property in the rate base according to its historical cost. As provided by 66 Pa. Cons. Stat. § 1311(b) (1986), "[t]he value

ther Duquesne nor Penn Power alleges that the total effect of the rate order arrived at within this system is unjust or unreasonable. In fact the overall effect is well within the

---

of the property of the public utility included in the rate base shall be the original cost of the property when first devoted to the public service less the applicable accrued depreciation." Accordingly, the PUC declared in Duquesne's rate proceeding that "we shall adopt as the fair value of the respondent's rate base, the original cost measure of value." *Pennsylvania PUC* v. *Duquesne Light Co.*, 57 Pa. P. U. C. 1, 5, 51 P. U. R. 4th 198, 202 (1983). It held likewise in Penn Power's case. See *Pennsylvania PUC* v. *Pennsylvania Power Co.*, 58 Pa. P. U. C. 305, 310, 60 P. U. R. 4th 593, 597 (1984) (same).

Having adjusted the historical cost in various ways to account for such things as depreciation and working capital, the PUC proceeds to set a rate of return based largely on the cost of capital to the enterprise. The cost of each component of the utility's capital is considered, *i. e.*, "the cost of debt, the cost of preferred stock, and the cost of common stock[,] [t]he latter being determined by the return required to sell such stock upon reasonable terms in the market." *Pennsylvania PUC* v. *Duquesne Light Co.*, *supra*, at 42, 51 P. U. R. 4th, at 235; *Bluefield Water Works & Improvement Co.* v. *Public Service Comm'n of West Virginia*, 262 U. S. 679, 692–693 (1923). It then exercises "informed judgment" to set the total rate of return based on these component costs of capital. *Ibid.* See also *Pennsylvania PUC* v. *Pennsylvania Power*, *supra*, at 325–326, 60 P. U. R. 4th, at 611–621.

The bulk of the rate based on capital, then, represents a return (set by costs of capital) on a rate base (determined by historical cost). These are features of the historical cost/prudent investment system. Pennsylvania has modified the system in several instances, however, when prudent investments will never be used and useful. For such occurrences, it has allowed amortization *of* the capital lost, but does not allow the utility to earn a return *on* that investment. See, *e. g.*, *Pennsylvania PUC* v. *Metropolitan Edison Co.*, 55 Pa. P. U. C. 478, 486 (1982) (amortization of company's investment in contaminated Three Mile Island Unit 2); *Philadelphia Electric Co.* v. *Pennsylvania PUC*, 61 Pa. Commw. 325, 433 A. 2d 620 (1981) (excluding from the rate base a portion of a utility's generating plant that was excess capacity, but allowing recovery of the operating expenses, including depreciation charges on the entire plants); *UGI Corp.* v. *Pennsylvania PUC*, 49 Pa. Commw. 69, 410 A. 2d 923 (1980) (permitting amortization of terminated feasibility studies); *Pennsylvania PUC* v. *Philadelphia Electric Co.*, 46 Pa. P. U. C. 746, 750 (1973) (10-year amortization of unusual expenses caused by tropical storm). The loss to utilities from prudent but ultimately unsuccessful investments under such a system is

bounds of *Hope*, even with total exclusion of the CAPCO costs. Duquesne was authorized to earn a 16.14% return on common equity and an 11.64% overall return on a rate base of nearly $1.8 billion. See *Pennsylvania PUC* v. *Duquesne Light Co.*, 57 Pa. P. U. C., at 51, 51 P. U. R. 4th, at 243. Its $35 million investment in the canceled plants comprises roughly 1.9% of its total base. The denial of plant amortization will reduce its annual allowance by 0.4%. Similarly, Penn Power was allowed a charge of 15.72% return on common equity and a 12.02% overall return. Its investment in the CAPCO plants comprises only 2.4% of its $401.8 million rate base. See *Pennsylvania PUC* v. *Pennsylvania Power Co.*, 58 Pa. P. U. C., at 331–332, 60 P. U. R. 4th, at 618. The denial of amortized recovery of its $9.6 million investment in CAPCO will reduce its annual revenue allowance by only 0.5%.

Given these numbers, it appears that the PUC would have acted within the constitutional range of reasonableness if it had allowed amortization of the CAPCO costs but set a lower rate of return on equity with the result that Duquesne and Penn Power received the same revenue they will under the instant orders on remand. The overall impact of the rate orders, then, is not constitutionally objectionable. No argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital. Nor has it been demonstrated that these rates are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme.[8]

---

greater than under a pure prudent investment rule, but less than under a fair value approach. Pennsylvania's modification slightly increases the overall risk of investments in utilities over the pure prudent investment rule. Presumably the PUC adjusts the risk premium element of the rate of return on equity accordingly.

[8] Duquesne's embedded cost of debt was 9.42%. *Pennsylvania PUC* v. *Duquesne Light Co.*, 57 Pa. P. U. C., at 44, 51 P. U. R. 4th, at 237. Penn

Instead, appellants argue that the Constitution requires that subsidiary aspects of Pennsylvania's ratemaking methodology be examined piecemeal. One aspect which they find objectionable is the constraint Act 335 places on the PUC's decisions. They urge that such legislative direction to the PUC impermissibly interferes with the PUC's duty to balance consumer and investor interest under *Permian Basin*, 390 U. S., at 792. Appellants also note the theoretical inconsistency of Act 335, suddenly and selectively applying the used and useful requirement, normally associated with the fair value approach, in the context of Pennsylvania's system based on historical cost. Neither of the errors appellants perceive in this case is of constitutional magnitude.

It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates. And the Pennsylvania PUC is essentially an administrative arm of the legislature. See, *e. g.*, *Barasch* v. *Pennsylvania PUC*, 516 Pa., at 171, 532 A. 2d, at 339 ("The Commission is but an instrumentality of the state legislature for the performance of [ratemaking]"); *Minnesota Rate Cases*, 230 U. S. 352, 433 (1913) ("The rate-making power is a legislative power and necessarily implies a range of legislative discretion").[9] We stated in *Permian Basin* that the commission "must be free, within the limitations imposed by pertinent constitutional

---

Power's debt service was at 10.25%. *Pennsylvania PUC* v. *Pennsylvania Power Co.*, 58 Pa. P. U. C., at 332, 60 P. U. R. 4th, at 618.

[9] Indeed, the issue of constitutional concern has usually been just the reverse of appellants' objection. Challenges to state and federal laws have been raised on the ground that the legislatures have delegated too much authority and discretion. See *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928) (federal delegation of authority to set import tariff rates); *York R. Co.* v. *Driscoll*, 331 Pa. 193, 200 A. 864 (1938) (PUC's authorization to exempt utility securities from reporting and registration requirements an unconstitutional delegation of legislative power under Pennsylvania Constitution because it allowed the utility to nullify the statutory reporting requirements).

and *statutory commands*, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." 390 U. S., at 767 (emphasis added). This is not to say that any system of ratemaking applied by a utilities commission, including the specific instructions it has received from its legislature, will necessarily be constitutional. But if the system fails to pass muster, it will not be because the legislature has performed part of the work.

Similarly, an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. "It is not theory, but the impact of the rate order which counts." *Hope*, 320 U. S., at 602. The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.

Admittedly, the impact of certain rates can only be evaluated in the context of the system under which they are imposed. One of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise. *Id.*, at 603 ("[R]eturn to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks"); *Bluefield Water Works & Improvement Co.* v. *Public Service Comm'n of West Virginia*, 262 U. S. 679, 692–693 (1923) ("A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by

corresponding risks and uncertainties"). The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. But the instant case does not present this question. At all relevant times, Pennsylvania's rate system has been predominantly but not entirely based on historical cost and it has not been shown that the rate orders as modified by Act 335 fail to give a reasonable rate of return on equity given the risks under such a regime. We therefore hold that Act 335's limited effect on the rate order at issue does not result in a constitutionally impermissible rate.

Finally we address the suggestion of the Pennsylvania Electric Association as *amicus* that the prudent investment rule should be adopted as the constitutional standard. We think that the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling. *Hope* clearly held that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates." 320 U. S. at 602. More recently, we upheld the Federal Power Commission's departure from the individual producer cost-of-service (prudent investment) system. In *Wisconsin* v. *FPC*, 373 U. S. 294 (1963), the FPC had concluded after extensive hearings that "the individual company cost-of-service method, based on theories of original cost and prudent investment, was not a workable or desirable method for determining the rates of independent producers and that the 'ultimate solution' lay in what has become to be known as the area rate approach: 'the determination of fair prices . . . based on reasonable financial requirements of the industry.'"

Id., at 298–299. In upholding the FPC's area rate methodology against the argument that the individual company prudent investment rule was constitutionally required, the Court observed:

> "[T]o declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly articulated approach to the question of the Commission's power to regulate rates. It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates." *Id.*, at 309 (collecting cases).

See also *FPC* v. *Texaco Inc.*, 417 U. S. at 387–390.

The adoption of a single theory of valuation as a constitutional requirement would be inconsistent with the view of the Constitution this Court has taken since *Hope Natural Gas*, *supra*. As demonstrated in *Wisconsin* v. *FPC*, circumstances may favor the use of one ratemaking procedure over another. The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors.[10] The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.

Affirmed.

---

[10] For example, rigid requirement of the prudent investment rule would foreclose hybrid systems such as the one Pennsylvania used before the effective date of Act 335 and now uses again. See n. 4, *supra*. It would also foreclose a return to some form of the fair value rule just as its practical problems may be diminishing. The emergent market for wholesale electric energy could provide a readily available objective basis for determining the value of utility assets.

JUSTICE SCALIA, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, concurring.

I join the Court in reaffirming our established rule that no single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs. See, *e. g.*, *FPC* v. *Texaco Inc.*, 417 U. S. 380, 387–390 (1974); *Wisconsin* v. *FPC*, 373 U. S. 294, 309 (1963); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944). I think it important to observe, however, that while "prudent investment" (by which I mean capital reasonably expended to meet the utility's legal obligation to assure adequate service) need not be taken into account as such in ratemaking formulas, it may need to be taken into account in assessing the constitutionality of the particular consequences produced by those formulas. We cannot determine whether the payments a utility has been allowed to collect constitute a fair return on investment, and thus whether the government's action is confiscatory, unless we agree upon what the relevant "investment" is. For that purpose, all prudently incurred investment may well have to be counted. As the Court's opinion describes, that question is not presented in the present suit, which challenges techniques rather than consequences.

JUSTICE BLACKMUN, dissenting.

The Court, I fear, because of what it regards as the investment of time in having this case argued and briefed, is strong-arming the finality concept and finding a *Cox* exception that does not exist. We have jurisdiction, under 28 U. S. C. § 1257, only if there is a "final judgment" by the "highest court of a State" in which a decision could be had. To be sure, we have interpreted § 1257 somewhat flexibly to the effect that the finality requirement is satisfied in four discrete situations despite the need of further proceedings in the state courts: *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975).

The Court here concludes that this case falls within the first of the four *Cox* exceptions ("the outcome of further proceedings preordained," *id.*, at 479). With all respect, I disagree, for this case concerns rates, and there is no rate order whatsoever before this Court. The Supreme Court of Pennsylvania invalidated the rate orders set by the Pennsylvania Commission, and remanded the cases for further ratemaking. The Court deludes itself when it speaks of preordination of the Commission's further action. New rates will be set, based upon factors we do not as yet know, and only then will a final judgment possibly emerge in due course.

I therefore would dismiss the appeal for want of the final judgment that § 1257 requires.

Syllabus

REED *v.* UNITED TRANSPORTATION UNION ET AL.

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

No. 87–1031. Argued November 2, 1988—Decided January 11, 1989

Two years after the last of the complained-of events occurred, petitioner, an officer of a local chapter of respondent union, filed suit against the union and various of its officers, alleging that they had violated his right to free speech as to union matters under § 101(a)(2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). There is no statute of limitations expressly applicable to § 101 actions. The District Court denied respondents' summary judgment motion, rejecting their argument that petitioner had filed his suit out of time and holding that the action was governed by North Carolina's 3-year statute of limitations for personal injury actions. The Court of Appeals reversed, construing *DelCostello* v. *Teamsters*, 462 U. S. 151, to require that petitioner's § 101(a)(2) claim be governed by the 6-month statute of limitations set forth in § 10(b) of the National Labor Relations Act (NLRA) for filing unfair labor practice charges with the National Labor Relations Board.

Held: Section 101(a)(2) claims are governed by state general or residual personal injury statutes of limitations. Pp. 323–334.

(a) The well-established general rule requires that the most closely analogous state statute of limitations be borrowed for a federal cause of action not supplied by Congress with its own limitations period. However, a narrow exception to that rule requires the application of a statute of limitations from elsewhere in federal law when the analogous state statute will frustrate or significantly interfere with federal policies, the federal law clearly provides a closer analogy, and the federal policies at stake and the practicalities of litigation render the federal rule significantly more appropriate. Pp. 323–325.

(b) The general borrowing rule requires that state general or residual personal injury statutes of limitations be applied to § 101(a)(2) suits. As a preliminary matter, it must be concluded that all such suits should be characterized in the same way, since the diversion of resources to collateral statute-of-limitations litigation would interfere with § 101(a)(2)'s core purpose of enhancing union democracy by protecting union members' rights to free speech and assembly from incursion by union leadership. Because § 101(a)(2) is modeled on the First Amendment, it is

readily analogized to state personal injury actions under the reasoning of *Owens* v. *Okure*, *ante*, p. 235, where it was held that suits under 42 U. S. C. § 1983, which also protects the exercise of First Amendment rights, are governed by state general or residual personal injury statutes of limitations. Moreover, since such state limitations periods are of sufficient length to accommodate the practical difficulties faced by § 101 (a)(2) plaintiffs—which include identifying the injury, deciding in the first place to sue and thereby to antagonize union leadership, and finding an attorney—the practicalities of litigation do not require a search for a more analogous statute of limitations. Pp. 325–327.

(c) The narrow exception to the general borrowing rule does not require the adoption of the § 10(b) limitations period for § 101(a)(2) claims. Respondents' argument to the contrary fails to take seriously the requirement that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies. The 6-month § 10(b) statute of limitations was crafted to accommodate federal interests in stable bargaining relationships between employers and unions and in private dispute resolution under collective-bargaining agreements. Insofar as those interests are implicated by § 101(a)(2) claims, however, the relationship will generally be tangential or remote—as in the present case, which involves an internal union dispute that can have only an indirect impact on economic relations between union and employer and on labor peace. More importantly, the core federal interest furthered by § 101(a)(2)—the interest in union democracy promoted by union members' free speech and assembly rights—simply had no part in the design of the § 10(b) statute of limitations for unfair labor practice charges. Indeed, Title I of the LMRDA was a response to a perception that the NLRA, including its unfair labor practices provisions, had failed to provide the necessary protections for free speech and other union members' rights. Hence, it is not the case here that the federal policies at stake in § 101(a)(2) actions make § 10(b) significantly more appropriate than the analogous state statutes of limitations that the established borrowing rule favors. *DelCostello*, *supra*, distinguished. Pp. 327–334.

828 F. 2d 1066, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 334. WHITE, J., filed a dissenting opinion, *post*, p. 334.

John W. Gresham argued the cause for petitioner. With him on the brief was *Jonathan Wallas.*

Clinton J. Miller III argued the cause and filed a brief for respondents.*

JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon in this case to decide what statute of limitations governs a claim by a union member under § 101 (a)(2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), Pub. L. 86–257, 73 Stat. 522, 29 U. S. C. § 411(a)(2), alleging that the union violated its member's right to free speech as to union matters.[1] Congress enacted no statute of limitations expressly applicable to § 101 actions.

Petitioner Reed, the Secretary and Treasurer of Local 1715 (Local) of respondent United Transportation Union (Union), received reimbursement from the Local for "time

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Deputy Solicitor General Ayer, Glen D. Nager, George R. Salem, Allen H. Feldman, Mary-Helen Mautner,* and *Ellen L. Beard;* and for the Association for Union Democracy et al. by *Paul Alan Levy, Arthur L. Fox II,* and *Alan B. Morrison.*

David Silberman and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] Section 101(a)(2) of the LMRDA provides:

"FREEDOM OF SPEECH AND ASSEMBLY.

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522.

This section is enforceable by private right of action. 29 U. S. C. § 412.

lost" carrying out his union duties. After an audit the Union's president, respondent Hardin, disallowed these payments. Hardin ruled that petitioner was not entitled to the payments because he had failed to obtain approval for them prior to doing the tasks that caused him to lose time, and because his salary as an officer of the Local was intended to cover all his official duties. When petitioner subsequently attempted to enforce a policy that reimbursements required prior approval—denying unapproved claims by the president and other officers of the Local—Hardin overruled these decisions. Petitioner thereupon unsuccessfully sought reinstatement of his disallowed payment. In a series of letters to Hardin, the last dated August 2, 1983, petitioner alleged that more stringent standards had been applied to his reimbursement claims because he had been critical of the Local's president. Threatening suit, he asserted that the disallowance amounted to harassment for expressing his views on union matters and violated LMRDA § 101. Petitioner did not file this action in the Western District of North Carolina against the Union and various of its officers, however, until August 2, 1985.

Respondents moved for summary judgment, arguing that petitioner had filed his suit out of time. Respondents maintained that on the reasoning of *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), petitioner's § 101 claim should be governed by the statute of limitations that applies to the filing of charges with the National Labor Relations Board alleging unfair labor practices defined in § 8 of the National Labor Relations Act (NLRA), 29 U. S. C. § 158. Section 10(b) of the NLRA, 29 U. S. C. § 160(b), provides that such charges must be filed within six months.[2] The District Court denied summary judgment, holding that petitioner's action was more akin to a civil rights claim than an unfair labor practice

[2] Section 10(b) states in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

charge, and hence was governed by North Carolina's 3-year statute of limitations for personal injury actions in accordance with the rule this Court established in *Wilson* v. *Garcia*, 471 U. S. 261 (1985). 633 F. Supp. 1516 (1986).

The Court of Appeals for the Fourth Circuit reversed, construing *DelCostello* to require that petitioner's § 101(a)(2) claim be governed by NLRA § 10(b). 828 F. 2d 1066 (1987). We granted certiorari, 485 U. S. 933 (1988), to settle a conflict among Courts of Appeals as to the statute of limitations applicable to § 101(a)(2) actions.[3] We now reverse the Fourth Circuit's decision, and hold that § 101(a)(2) claims are governed by state general or residual personal injury statutes, which are to be identified in conformity with our decision this Term in *Owens* v. *Okure*, *ante*, p. 235.

I

Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, "[w]e have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law." *DelCostello*, *supra*, at 158. See, *e. g.*, *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 147 (1987) (noting that the Rules of Decision Act usually requires that a state statute be borrowed, and also that "[g]iven our longstanding practice of borrowing state law, and the congressional aware-

[3] The Court of Appeals for the Fourth Circuit's holding conflicts with *Rodonich* v. *House Wreckers Union Local 95*, 817 F. 2d 967 (CA2 1987), and *Doty* v. *Sewall*, 784 F. 2d 1 (CA1 1986) (applying state personal injury limitations periods to Title I claims). It is in accord, however, with *Clift* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America*, 818 F. 2d 623 (CA7 1987), cert. pending No. 87–42; *Davis* v. *United Automobile, Aerospace and Agriculture Implement Workers of America*, 765 F. 2d 1510 (CA11 1985), cert. denied, 475 U. S. 1057 (1986); and *Local Union 1397, United Steelworkers of America, AFL–CIO* v. *United Steelworkers of America, AFL–CIO*, 748 F. 2d 180 (CA3 1984) (applying § 10(b) statute of limitations).

ness of this practice, we can generally assume that Congress intends by its silence that we borrow state law"); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 703–705 (1966); *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946).

"State legislatures do not devise their limitations periods with national interests in mind," however, "and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. of California* v. *EEOC*, 432 U. S. 355, 367 (1977). Thus, on the assumption that Congress would not choose "to adopt state [limitations] rules at odds with the purpose or operation of federal substantive law," *DelCostello*, *supra*, at 161, we have recognized a closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law. We decline to borrow a state statute of limitations only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *DelCostello*, *supra*, at 172. See *Agency Holding Corp.*, *supra* (adopting federal statute of limitations for civil RICO claims); *Occidental Life Ins. Co.*, *supra* (federal limitations period applied to EEOC enforcement actions); *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958) (federal limitations period applied to unseaworthiness actions); *Holmberg* v. *Armbrecht*, *supra* (refusing to apply state statute to action to enforce federally created equitable right). This is a narrow exception to the general rule. As we made clear in *DelCostello*, "in labor law or elsewhere," application of a federal statute will be unusual, and "resort to state law remains the norm for borrowing of limitations periods." 462 U. S., at 171. Respondents urge in this case that petitioner's § 101(a)(2) claim that he was penalized for exercising his right as a union member to speak freely as to union matters falls within the narrow exception requiring

application of a federal statute of limitations, rather than within the general rule that we borrow an analogous state statute. We cannot agree.

A

We have upon previous occasions considered the history of Title I of the LMRDA, and have concluded that "Congress modeled Title I after the Bill of Rights, and that the legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal." *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 111 (1982). Indeed, the amendments that eventually were enacted as Title I were introduced under the heading of "Bill of Rights of Members of Labor Organizations." See *Finnegan* v. *Leu*, 456 U. S. 431, 435 (1982). Congress considered the protection afforded by Title I to free speech and assembly in the union context necessary to bring an end to abuses by union leadership that had curtailed union democracy. It "adopted the freedom of speech and assembly provision in order to promote union democracy . . . [and] recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Sadlowski*, *supra*, at 112. See also *Finnegan*, *supra*, at 436 (Title I was "necessary to further the [LMRDA's] primary objective of ensuring that unions would be democratically governed and responsive to the will of their memberships"). Thus the core purpose of § 101(a)(2) is to protect free speech and assembly rights because these are considered "vital to the independence of the membership and the effective and fair operation of the union as the representative." *Hall* v. *Cole*, 412 U. S. 1, 8 (1973).

As a preliminary matter, consideration of this core purpose suggests that "all claims arising out of [§ 101(a)(2)] 'should be characterized in the same way.'" *Agency Holding Corp.*, *supra*, at 147, quoting *Wilson* v. *Garcia*, 471 U. S. 261, 268 (1985). Though § 101(a)(2) creates personal rights, a union

member vindicating those rights also serves public goals, in that he "necessarily render[s] a substantial service to his union as an institution and to all of its members," contributing to the improvement or preservation of democracy within the union. *Hall*, *supra*, at 8. Time-consuming litigation as to the collateral question of the appropriate statute of limitations for a § 101 claim would likely interfere with Congress' aim that actions to enforce free speech and association rights should in fact enhance union democracy. Such litigation creates uncertainty as to the time available for filing, and it would not be surprising if the prospect of perhaps prolonged litigation against the union before ever the merits are reached were to have a deterrent effect on would-be § 101(a)(2) plaintiffs. The diversion of resources to collateral statute-of-limitations litigation would be foreign to the central purposes of § 101(a)(2), and thus we are persuaded that all claims under that provision should be characterized in the same way. Determining exactly how they should be characterized does not appear to us to be a difficult task, given a proper understanding of the narrow scope of the *DelCostello* exception to our standard borrowing rule, and of the nature and purpose of § 101(a)(2).

Because § 101(a)(2) protects rights of free speech and assembly, and was patterned after the First Amendment, it is readily analogized for the purpose of borrowing a statute of limitations to state personal injury actions. We find it unnecessary to detail here the elements of this analogy. We have previously considered possible analogies between federal civil rights actions under 42 U. S. C. § 1983 (which lacks an express statute of limitations) and various state-law claims, and have held that § 1983 actions are governed by state general or residual personal injury statutes of limitations. *Owens* v. *Okure*, *ante*, p. 235; *Wilson* v. *Garcia*, *supra*. See also *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987) (applying state personal injury statute to federal civil rights action against a private party brought under 42

U. S. C. § 1981). Since § 101(a)(2) has evident similarities to § 1983, which prohibits the infringement of First Amendment rights by persons acting under color of state law, it is apparent that § 101(a)(2) actions also are analogous to state personal injury claims, and under our usual borrowing rule would take their statutes of limitations. Moreover, these state personal injury statutes are of sufficient length, see *Owens*, *ante*, at 248, nn. 9 and 10, to accommodate the practical difficulties faced by § 101(a)(2) plaintiffs, which include identifying the injury, deciding in the first place to bring suit against and thereby antagonize union leadership, and finding an attorney. See *Doty* v. *Sewall*, 784 F. 2d 1, 9 (CA1 1986). As a result, no practicalities of litigation compel us to search beyond state law for a more analogous statute of limitations. Cf. *Agency Holding Corp.*, 483 U. S., at 147–148; *DelCostello*, 462 U. S., at 165–166, 167–168 (and see n. 4, *infra*); *Burnett* v. *Grattan*, 468 U. S. 42, 50–51 (1984). In light of the analogy between § 101(a)(2) and personal injury actions, and of the lack of any conflict between the practicalities of § 101(a)(2) litigation and state personal injury limitations periods, we are bound to borrow state personal injury statutes absent some compelling demonstration that "the federal policies at stake" in § 101(a)(2) actions make a federal limitations period "a significantly more appropriate vehicle for interstitial lawmaking." *DelCostello*, *supra*, at 172.

B

Respondents argue that the same federal labor policies that led us in *DelCostello* to borrow the NLRA § 10(b) statute of limitations for hybrid § 301/fair representation claims likewise require that we borrow § 10(b) for LMRDA § 101 (a)(2) actions. This argument lacks merit. It fails to take seriously our admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies. More importantly, it entirely ignores the core federal interest furthered by § 101(a)(2)—the

interest in union democracy promoted by free speech and assembly rights of union members—instead urging that we select a statute of limitations to serve federal policies that might merely be implicated by tangential and contingent effects of some § 101(a)(2) litigation.

We declined in *DelCostello* to apply state statutes of limitations for vacation of an arbitration award or for legal malpractice to an employee's hybrid § 301/fair representation action. Such hybrid suits formally comprise two causes of action. First, the employee alleges that the employer violated § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185, by breaching the collective-bargaining agreement. Second, the employee claims that the union breached its duty of fair representation, which this Court has implied from the scheme of the NLRA, by mishandling the ensuing grievance-and-arbitration proceedings. See *DelCostello*, *supra*, at 164, and n. 14. We held in *DelCostello* that, having regard to "the policies of federal labor law and the practicalities of hybrid § 301/fair representation litigation," 462 U. S., at 165, § 10(b) of the NLRA, with its 6-month limitations period for unfair labor practice charges, provided the closest analogy for hybrid § 301/fair representation actions.[4]

---

[4] The *practical* concerns that we held made state limitations periods unsuitable for hybrid § 301/fair representation claims are not implicated in LMRDA § 101(a)(2) actions. We reasoned in *DelCostello* that the suggestion that § 301/fair representation claims be governed by state limitations periods for actions to vacate an arbitration award suffered from "flaws . . . of practical application." *DelCostello* v. *Teamsters*, 462 U. S., at 165. These limitations periods, typically between 10 and 90 days, *id.*, at 166, n. 15, were too short "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine," because in hybrid actions the employee "is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the [grievance] proceeding, and to frame his suit." *Id.*, at 166. No such "flaws . . . of practical application" arise from the application of

Respondents argue, and the Court of Appeals held, that the § 10(b) 6-month limitations period must be applied to § 101(a)(2) actions in order to further the federal policy that calls for "'rapid resolution of internal union disputes'" in order "'to maintain . . . stable bargaining relationships.'" 828 F. 2d, at 1069, quoting *Local Union 1397, United Steelworkers of America, AFL–CIO* v. *United Steelworkers of America, AFL–CIO*, 748 F. 2d 180, 184 (CA3 1984). It is true that in *DelCostello* we held that use of a long malpractice statute of limitations for hybrid § 301/fair representation actions would conflict with the federal policy favoring "the relatively rapid final resolution of labor disputes." 462 U. S., at 168. The specific focus of our comparison between unfair labor practice charges governed by § 10(b) and hybrid § 301/fair representation claims was their effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures.[5]

---

state general personal injury statutes of limitation to § 101(a)(2) suits, as noted in the text, *supra*, at 327.

An additional factor considered important to our analysis in *DelCostello* but absent here is that a hybrid § 301/fair representation action yokes together interdependent claims that could only very impractically be treated as governed by different statutes of limitations. 462 U. S., at 164–165. Cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958) (applying a federal statute to seaworthiness actions under general admiralty law that are almost invariably brought in tandem with federal Jones Act claims). Departure from the normal practice of borrowing state statutes of limitations is more likely to be necessary where distinct actions are combined, making the possibility of finding a single analogous state statute more remote. See *DelCostello*, *supra*, at 166–167.

[5] Thus, in *DelCostello* we distinguished *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), where we held that a straightforward § 301 suit by a union against management for breach of a collective-bargaining agreement, involving no agreement to submit disputes to arbitration, was governed by Indiana's 6-year limitations period for actions on an unwritten contract. The action at issue in *Hoosier* had not involved either the forma-

We noted that the § 10(b) period was "'attuned to . . . the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system.'" *Id.*, at 171, quoting *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 70 (1981) (Stewart, J., concurring in judgment). Those same interests, we held, are implicated by hybrid § 301/fair representation claims against union and employer, because such claims constitute a direct challenge to private dispute settlement under the collective-bargaining agreement. *DelCostello*, *supra*, at 165.

Insofar as interests in stable bargaining relationships and in private dispute resolution under collective-bargaining agreements are implicated by § 101(a)(2) claims, however, the relationship will generally be tangential and remote—as in the present case, which involves an internal union dispute not directly related in any way to collective bargaining or dispute settlement under a collective-bargaining agreement. To be sure, the Court of Appeals stated:

> "Internal union disputes, if allowed to fester, may erode the confidence of union members in their leaders and possibly cause a disaffection with the union, thus weakening the union and its ability to bargain for its members. Such prolonged disputes may also distract union officials from their sole purpose—representation of union members in their relations with their employer. These probable effects of protracted disputes may be destabilizing to labor-management relations." 828 F. 2d, at 1070.

See also *Local Union 1397*, *supra*, at 184 ("[D]issension within a union naturally affects that union's activities and effective-

---

tion of a collective-bargaining agreement or the private settlement of disputes under a collective-bargaining agreement, and had not called for application of a uniform federal statute of limitations. *DelCostello*, *supra*, at 162–163.

ness in the collective bargaining arena"). These observations have some plausibility. But they are not enough to persuade us that federal policy requires that § 10(b) govern claims under § 101(a)(2) of the LMRDA, for they establish no more than that § 101(a)(2) actions may sometimes have "some impact on economic relations between union and employer and on labor peace." Brief for Respondents 22. This is substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the § 10(b) statute to hybrid § 301/fair representation claims, which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures. As the Court of Appeals for the First Circuit noted in *Doty* v. *Sewall*, 784 F. 2d, at 7, a Title I suit does not directly

> "challeng[e] the 'stable relationship' between the employer and the union. It does not affect any interpretation or effect any reinterpretation of the collective bargaining agreement and so, unlike the hybrid actions, a Title I claim does not attack a compromise between labor and management. . . . There is no erosion of the finality of private settlements, for in the free standing LMRDA cases the union member is not attempting to attack any such settlement."

See also *Davis* v. *United Automobile, Aerospace and Agriculture Implement Workers of America*, 765 F. 2d 1510, 1514 (CA11 1985). Thus the federal interests in collective bargaining and in the resolution of disputes under collective-bargaining agreements, which require application of a 6-month statute of limitations to unfair labor practice charges and hybrid § 301/fair representation claims, simply are not directly involved in § 101(a)(2) actions.[6]

---

[6] One class of Title I actions may have a more direct effect on collective bargaining. Union members may attempt to challenge a collective-

There is another and more important reason why we cannot conclude in this case, as we did in *DelCostello*, that § 10(b) provides "a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here." 462 U. S., at 169. Section 101(a)(2) implements a federal policy—to guarantee free speech and association rights in order to further union democracy—that simply had no part in the design of a statute of limitations for unfair labor practice charges. Indeed, Title I of the LMRDA was a response to a perception that the NLRA, including the § 8(b) provisions defining unfair labor practices by labor organizations, had failed to provide the necessary protection for the free speech and other rights of union members that Congress considered essential to the democratic operation of unions. See, *e. g.*, *Steelworkers* v. *Sadlowski*, 457 U. S., at 102, 108–110. Hence while § 10(b) was "'attuned to . . . the . . . balance between national interests in stable bargaining relationships and finality of private settlements'" on the one hand, and "'an employee's interest in setting aside [a] settlement under the collective-bargaining system'" on the other, *DelCostello*, *supra*, at 171, quoting *Mitchell*, *supra*, at 70, the relevant balance in the case of

---

bargaining agreement by alleging that the union denied them the proper opportunity "to participate in the deliberations and voting" to ratify the agreement, in violation of LMRDA § 101(a)(1). See, *e. g.*, *Adkins* v. *International Union of Electrical, Radio & Machine Workers, AFL–CIO*, 769 F. 2d 330, 335 (CA6 1985); *Linder* v. *Berge*, 739 F. 2d 686, 690 (CA1 1984) (both applying the § 10(b) statute of limitations). We have no occasion in this case, which involves a § 101(a)(2) free speech claim, to decide what statute of limitations applies to other Title I actions. We note, nevertheless, that however direct an effect some Title I claims may have on the collective-bargaining agreement or on private dispute resolution, Title I claims all serve the core function of enhancing union democracy through enforcement of the rights of union members, *not* of protecting the integrity of collective bargaining or of grievance-and-arbitration procedures. See text *infra* this page and 333.

§ 101(a)(2) actions is quite different. The second element in the § 10(b) balance is replaced in § 101(a)(2) cases by

> "a union member's interest in protection against the infringement of his rights of free speech[, which] rises to a national interest, as embodied in section 101(a)(2) of the LMRDA, . . . and thus seems of greater importance than an employee's interest in setting aside an individual settlement under a collective bargaining agreement." *Davis*, *supra*, at 1514.

The 6-month § 10(b) statute of limitations was crafted to accommodate federal interests in stable bargaining relationships and in private dispute resolution that are not squarely implicated in LMRDA § 101(a)(2) actions; and it was not adopted with the distinct federal interest in the free speech of union members in mind. Hence it is not the case that "the federal policies at stake" in § 101(a)(2) actions make the § 10(b) statute of limitations "a significantly more appropriate vehicle for interstitial lawmaking" than the analogous state statute of limitations that our established borrowing rule favors.[7]

[7] Respondents also argue that the § 10(b) statute of limitations should be applied to § 101(a)(2) claims because these bear a "family resemblance" to, and overlap with, unfair labor practices charges and claims that a union has breached its duty of fair representation. Brief for Respondents 24–26. In support of borrowing § 10(b) for hybrid § 301/fair representation claims, we noted in *DelCostello* that "the family resemblance [between breaches of the duty of fair representation and unfair labor practices] is undeniable, and indeed there is a substantial overlap," because the NLRB treats breaches of the duty as unfair labor practices. 462 U. S., at 170. Even were it the case, however, that Title I violations may constitute unfair labor practices and breaches of the duty of fair representation—questions we need not delve into today and upon which we express no opinion—we would still hold this resemblance inconclusive as regards the question whether § 101 actions should be governed by a state statute of limitations or by NLRA § 10(b). In contrast to the situation in *DelCostello*, an overlap between Title I violations and unfair labor practices or breaches of the duty of fair representation would not be attributable to similar federal policies underlying each of these areas of protection, for the policies behind

II

Because § 101(a)(2) of the LMRDA is modeled on the First Amendment to our Constitution, there is an analogy between § 101(a)(2) claims, § 1983 claims, and state personal injury actions. Indeed, we have already held that 42 U. S. C. § 1983, which like § 101(a)(2) protects the exercise of First Amendment rights, is governed by state general or residual personal injury statutes of limitations. *Owens* v. *Okure*, *ante*, p. 235. The well-established rule that statutes of limitations for federal causes of action not supplied with their own limitations periods will be borrowed from state law thus requires that state general or residual personal injury statutes be applied to § 101(a)(2) suits. None of the exceptions to that rule apply, for § 10(b) of the NLRA does not supply a more analogous statute; its 6-month limitations period is not better suited to the practicalities of § 101(a)(2) litigation; and it was not designed to accommodate federal policies similar to those implicated in § 101(a)(2) actions. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I remain of the view that the Court should apply the appropriate state statute of limitations (if any at all) when a federal statute lacks an explicit limitations period. See *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 170 (1987) (SCALIA, J., concurring in judgment). Accordingly, I concur in the judgment.

JUSTICE WHITE, dissenting.

I am persuaded that the 6-month statute of limitations prescribed by § 10(b) of the National Labor Relations Act, 29

Title I, on the one hand, and NLRA § 8(b) and the implied duty of fair representation on the other, are quite different. See *supra*, at 331.

U. S. C. § 160(b), should govern this action brought under § 101 of Title I of the Labor-Manangement Reporting and Disclosure Act of 1959, 29 U. S. C. § 411. Title I was part of a statute the purpose of which was to require that unions and employers adhere to high standards of responsibility and ethical conduct in order to protect employee rights to organize and bargain collectively. Title I was thus necessary to eliminate or prevent improper practices on the part of labor unions and employers that "distort and defeat" the policies of the labor laws. §§ 401(a)–(c). It is not readily apparent to me that Congress was simply moving to enforce the First Amendment rather than to ensure that unions were truly and effectively the representatives of their members for the purpose of collective bargaining. I therefore do not think that the 42 U. S. C. § 1983 rule furnishes a closer analogy than does § 10(b); neither does it serve the policies of the labor laws nor further the interests of consistency and repose that are involved in the early settlement of disputes between unions and their members.

Undeniably, Congress made it an unfair labor practice for a union to restrain or coerce employees in the exercise of their organizational and collective-bargaining rights, 29 U. S. C. § 158(a), thus seeking to protect the same interests furthered by Title I, yet insisting that such charges be aired and decided in prompt fashion. Furthermore, there can be no doubt that a great many alleged violations of Title I could be filed with the Board as unfair labor practices subject to the 6-month limitations period of § 10(b). I find nothing of real substance in the Court's opinion to justify borrowing the much longer state statute that was not designed with the interests of the federal labor laws in mind.

Respectfully, I dissent.

ALLEGHENY PITTSBURGH COAL CO. *v.* COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 87–1303. Argued December 7, 1988—Decided January 18, 1989*

The West Virginia Constitution in relevant part establishes a general principle of uniform taxation so that all property, both real and personal, shall be taxed in proportion to its value. The Webster County tax assessor, from 1975 to 1986, valued petitioners' real property on the basis of its recent purchase price. Other properties not recently transferred were assessed based on their previous assessments with minor modifications. This system resulted in gross disparities in the assessed value of generally comparable property. Each year, respondent county commission affirmed the assessments, and petitioners appealed to the State Circuit Court. Eventually, a number of these appeals were consolidated and decided. The State Circuit Court held that the county's assessment system systematically and intentionally discriminated against petitioners in violation of the State Constitution and the Fourteenth Amendment's Equal Protection Clause. It ordered respondent to reduce petitioners' assessments to the levels recommended by the state tax commissioner in his guidelines for local assessors. The State Supreme Court of Appeals reversed. It held that the record did not support a finding of intentional and systematic discrimination because petitioners' property was not assessed at more than true value, as appropriately measured by the recent arm's-length purchase price of the property. In its view, any comparative undervaluation of other property could only be remedied by an action by petitioners to raise those other assessments.

Held:

1. The assessments on petitioners' property violated the Equal Protection Clause. There is no constitutional defect in a scheme that bases an assessment on the recent arm's-length purchase price of the property, and uses a general adjustment as a transitional substitute for an individual reappraisal of other parcels. But the Clause requires that such general adjustments be accurate enough to obtain, over a short period of time, rough equality in tax treatment of similarly situated property own-

---

*Together with No. 87–1310, *East Kentucky Energy Corp. et al.* v. *County Commission of Webster County, West Virginia*, also on certiorari to the same court.

ers. This action is not one involving permissible transitional inequality, since petitioners' property has been assessed at roughly 8 to 35 times more than comparable neighboring property and these discrepancies have continued for more than 10 years with little change. The county's adjustments to assessments that are carried over are too small to seasonably dissipate the disparity. Pp. 342–344.

2. The Equal Protection Clause permits a State to divide different kinds of property into classes and to assign to each a different tax burden so long as those divisions and burdens are neither arbitrary nor capricious. West Virginia has not drawn such a distinction here as its Constitution and laws provide that all property of the kind held by petitioners shall be taxed uniformly according to its estimated market value. There is no suggestion that the State has in practice adopted a different system that authorizes individual counties to independently fashion their own substantive assessment policies. The Webster County assessor has, apparently on her own initiative, applied state tax law in a manner resulting in significant and persistent disparity in assessed value between petitioners' and similarly situated property. The intentional systematic undervaluation of such other property unfairly deprives petitioners of their rights under the Clause. Pp. 344–346.

3. The State might on its own initiative remove the discrimination against petitioners by raising the assessments of systematically and intentionally undervalued property in the same class. A taxpayer in petitioners' position, however, forced to litigate for redress, may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. P. 346.

—— W. Va. ——, 360 S. E. 2d 560, reversed and remanded.

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

E. Barrett Prettyman, Jr., argued the cause for petitioners in both cases. With him on the briefs were *John G. Roberts, Jr.*, and *William James Murphy.*

C. William Ullrich, Chief Deputy Attorney General of West Virginia, argued the cause for respondent. With him on the brief were *Charles G. Brown*, Attorney General, and *Jack Alsop.*†

---

†Briefs of *amici curiae* urging reversal were filed for the National Association of Realtors by *Laurene K. Janik;* and for the National Taxpayers Union by *Gale A. Norton.*

[Footnote is continued on p. 338]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The West Virginia Constitution guarantees to its citizens that, with certain exceptions, "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value . . . ." Art. X, § 1. The Webster County tax assessor valued petitioners' real property on the basis of its recent purchase price, but made only minor modifications in the assessments of land which had not been recently sold. This practice resulted in gross disparities in the assessed value of generally comparable property, and we hold that it denied petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment.

Between 1975 and 1986, the tax assessor for Webster County, West Virginia, fixed yearly assessments for property within the county at 50% of appraised value. She fixed the appraised value at the declared consideration at which the property last sold. Some adjustments were made in the assessments of properties that had not been recently sold, although they amounted to, at most, 10% increases in 1976, 1981, and 1983 respectively.[1]

Benna Ruth Solomon and *Eugene J. Comey* filed a brief for the National Association of Counties et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun*, *Anthony T. Caso*, and *Jonathan M. Coupal;* and for the International Association of Assessing Officers by *James F. Gossett*.

[1] Petitioners contend that the adjustments to the assessments for property not recently transferred were uneven at best. According to petitioners, a study of the assessed value of all coal tracts in Webster County from 1983 to 1984 was introduced at trial and demonstrated that the assessment of 35% of the tracts was unchanged during that period. The courts below do not appear to have made specific factual findings accepting or rejecting this study or petitioners' conclusions drawn from it. For the purposes of argument, we will accept the county's figures since we find that, even accepting those figures, the adjustments do not dispel the constitutional flaw in the assessment system.

In 1974, for example, Allegheny Pittsburgh Coal Company (Allegheny) purchased fee, surface, and mineral interests in certain properties for a stated price somewhat in excess of $24 million, and during the tax years 1976 through 1983 its property was assessed annually at half of this figure. In 1982 Allegheny sold the property to East Kentucky Energy Corp. (Kentucky Energy) for a figure of nearly $30 million, and the property thereafter was annually assessed at a valuation just below $15 million. Oneida Coal Company and Shamrock Coal Company participated in similar transactions in Webster County, and the property they purchased or sold was assessed in a similar manner.

Each year, petitioners pursued relief before the County Commission of Webster County sitting as a review board. They argued that the assessment policy of the Webster County assessor systematically resulted in appraisals for their property that were excessive compared to the appraised value of similar parcels that had not been recently conveyed. Each year the county commission affirmed the assessments, and each year petitioners appealed to the State Circuit Court. A group of these appeals from Allegheny and its successor in interest, Kentucky Energy, were consolidated by the West Virginia Circuit Court and finally decided in 1985. App. to Pet. for Cert. in No. 87–1303, p. 15a. Another group of appeals from Shamrock and Oneida were consolidated and decided by the West Virginia Circuit Court early the next year. App. to Pet. for Cert. in No. 87–1310, p. 49a.[2]

The judge in both of these cases concluded that the system of real property assessment used by the Webster County assessor systematically and intentionally discriminated against

---

[2] After each of these primary decisions adjudicating the validity of the assessments to the lands in question, petitioners obtained a number of other orders applying the findings in the primary decisions to their specific cases and to other appeals not consolidated in the primary decisions. See App. to Pet. for Cert. in No. 87–1310, pp. 79a, 83a, and 86a.

petitioners in violation of the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. He ordered the county commission to reduce the assessments on petitioners' property to the levels recommended by the state tax commissioner in his valuation guidelines published for use by local assessors. Underlying the judge's conclusions were findings that petitioners' tax assessments over the years were dramatically in excess of those for comparable property in the county. He found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. to Pet. for Cert. in No. 87–1303, p. 29a; App. to Pet. for Cert. in No. 87–1310, p. 59a. "The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon [neighboring] properties." *Ibid.* Nor were they "based upon present use or immediately foreseeable economic development of petitioners' real estate." *Ibid.* Rather, "[t]he sole basis of the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." *Ibid.*[3]

[3] Respondent argues in this Court that petitioners' land was not truly comparable to that of the surrounding properties. It points to the fact that one of the parcels held by Allegheny, and then by Kentucky Energy, comprising 4,287 acres, allegedly contains 32 million tons of low-sulfur coal recoverable by strip mining. This unusually valuable parcel skews the average value of all the properties, as well as serving as a basis for higher valuation of this parcel than those surrounding it.

Petitioners make a number of answers: First, they rely on respondent's stipulations that "[t]he properties surrounding the property owned by . . . Petitioner, . . . are comparable properties in that they are substantially the same geologically as the properties of the Petitioner . . . ." Record 1319–1320, 1085. Next, they point to the factual findings of the West Virginia Circuit Court, never rejected by the West Virginia Supreme Court of Appeals, that "[a]lthough the real estate of each of these petitioners is not identical to that of all other real estate in Webster County, it

This approach systematically produced dramatic differences in valuation between petitioners' recently transferred property and otherwise comparable surrounding land. For the years 1976 through 1982, Allegheny was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties. After purchasing that land, Kentucky Energy was assessed and taxed at approximately 33 times the rate of similar parcels. From 1981 through 1985, the county assessed and taxed the Shamrock-Oneida property at roughly 8 to 20 times that of comparable neighboring coal tracts. These disparities existed notwithstanding the adjustments made to the assessments of land not recently conveyed. In the case of the property held by Allegheny and Kentucky Energy, the county's adjustment policy

---

appears that petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." App. to Pet. for Cert. in No. 87–1303, p. 16a; App. to Pet. for Cert. in No. 87–1310, p. 50a. Finally, they note that the court's findings were founded on the testimony of Kentucky Energy's expert witness, the one who testified to the estimated 32 million tons of coal under Kentucky Energy's land, that the surrounding properties were equally promising. On direct examination he said:

"As far as comparing this area with the surrounding property, geologically, those same seams are present on all the other properties [suggested as comparable]. The same coal seams are present there. . . . [T]he coal is there and I know that the chances of them being mineable are just as good there as they are on the [Kentucky Energy] properties.

". . . There may be some variations, depending on which individual seam is mineable from one property to the other, but in the long run they are very similar properties located within the same area and there is no geological reason that they should not be comparable." Brief in Opposition in No. 87–1303, pp. 10a–11a.

We think that petitioners' submissions justify the conclusion on the record presented to us that their properties were, in aspects relevant to valuation and assessment, comparable to surrounding property valued and assessed at markedly lower amounts.

would have required more than 500 years to equalize the assessments.

On appeal, the Supreme Court of Appeals of West Virginia reversed. It found that the record did not support the trial court's ruling that the actions of the assessor and board of review constituted "intentional and systematic" discrimination. It held that "assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of . . . property." *In re 1975 Tax Assessments against Oneida Coal Co.*, —— W. Va. ——, ——, 360 S. E. 2d 560, 564 (1987). That other properties might be undervalued relative to petitioners' did not require that petitioners' assessments be reduced: "'Instead, they should seek to have the assessments of other taxpayers raised to market value.'" *Id.*, at ——, 360 S. E. 2d, at 565 (quoting *Killen* v. *Logan County Comm'n*, —— W. Va. ——, ——, 295 S. E. 2d 689, 709 (1982)). We granted certiorari to decide whether these Webster County tax assessments denied petitioners the equal protection of the law and, if so, whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others. 485 U. S. 976 (1988).

We agree with the import of the opinion of the Supreme Court of Appeals of West Virginia that petitioners have no constitutional complaint simply because their property is assessed for real property tax purposes at a figure equal to 50% of the price paid for it at a recent arm's-length transaction. But their complaint is a comparative one: while their property is assessed at 50% of what is roughly its current value, neighboring comparable property which has not been recently sold is assessed at only a minor fraction of that figure. We do not understand the West Virginia Supreme Court of Appeals to have disputed this fact. We read its opinion as saying that even if there is a constitutional violation on these facts, the only remedy available to petitioners was an effort to have the assessments on the neighboring properties raised

by an appropriate amount. We hold that the assessments on petitioners' property in this case violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that petitioners may not be remitted to the remedy specified by the Supreme Court of Appeals of West Virginia.

The county argues that its assessment scheme is rationally related to its purpose of assessing properties at true current value: when available, it makes use of exceedingly accurate information about the market value of a property—the price at which it was recently purchased. As those data grow stale, it periodically adjusts the assessment based on some perception of the general change in area property values. We do not intend to cast doubt upon the theoretical basis of such a scheme. That two methods are used to assess property in the same class is, without more, of no constitutional moment. The Equal Protection Clause "applies only to taxation which in fact bears unequally on persons or property of the same class." *Charleston Fed. Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 190 (1945) (collecting cases). The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, see *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353 (1918); *Coulter* v. *Louisville & Nashville R. Co.*, 196 U. S. 599 (1905), it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners. *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 526–527 (1959), and cases there cited; cf. *FPC* v. *Hope Natural Gas*

Co., 320 U. S. 591, 602 (1944) (noting, in the ratemaking context, that "[i]t is not theory, but the impact . . . that counts").

But the present action is not an example of transitional delay in adjustment of assessed value resulting in inequalities in assessments of comparable property. Petitioners' property has been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies have continued for more than 10 years with little change. The county's adjustments to the assessments of property not recently sold are too small to seasonably dissipate the remaining disparity between these assessments and the assessments based on a recent purchase price.

The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. *Allied Stores*, *supra*, at 526–527 ("The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products"). It might, for example, decide to tax property held by corporations, including petitioners, at a different rate than property held by individuals. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973) (Illinois *ad valorem* tax on personalty of corporations). In each case, "[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 573 (1910).[4]

[4] We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy as Article XIIIA of its Constitution, popularly known as "Proposition 13." Proposition 13 generally provides that property will be assessed at its 1975–1976 value, and reassessed only when transferred or constructed upon, or in a limited manner for inflation. Cal. Const., Art. XIIIA, § 2 (limiting

But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value. There is no suggestion in the opinion of the Supreme Court of Appeals of West Virginia, or from any other authoritative source, that the State may have adopted a different system in practice from that specified by statute; we have held that such a system may be valid so long as the implicit policy is applied evenhandedly to all similarly situated property within the State. *Nashville C. & S. L. R. Co.* v. *Browning*, 310 U. S. 362, 368–369 (1940). We are not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute. See *Salsburg* v. *Maryland*, 346 U. S. 545 (1954). The Webster County assessor has, apparently on her own initiative, applied the tax laws of West Virginia in the manner heretofore described, with the resulting disparity in assessed value of similar property. Indeed, her practice seems contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors in the assessment of real property.

"[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Sunday Lake Iron Co.*, *supra*, at 352–353; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445–446 (1923); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U. S. 23, 28–29 (1931). "The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326

---

inflation adjustments to 2% per year). The system is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

U. S. 620, 623 (1946). We have no doubt that petitioners have suffered from such "intentional systematic undervaluation by state officials" of comparable property in Webster County. Viewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies petitioners the equal protection of the law.

A taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Hillsborough*, *supra*, at 623, citing *Sioux City Bridge Co.*, *supra*, 445–447; *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U. S. 239, 247 (1931); *Cumberland Coal Co.*, *supra*, at 28–29. The judgment of the Supreme Court of Appeals of West Virginia is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* LYNN

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

No. 86–1940. Argued November 7, 1988—Decided January 18, 1989

In an attempt to alleviate a financial crisis plaguing petitioner local union (Local), which is an affiliate of petitioner international union (International), the International's president appointed Richard Hawkins as trustee to supervise the Local's affairs, with authority under the International's constitution to suspend the Local's officers and business representatives. Five days after a special meeting at which the Local's membership defeated Hawkins' proposal to increase their dues, Hawkins notified respondent Lynn, an elected business representative of the Local, that he was being removed "indefinitely" from his position because of his outspoken opposition to the proposal at the meeting. After exhausting his intraunion remedies, Lynn brought suit in Federal District Court, claiming that his removal violated the free speech provision of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act). The court granted summary judgment for petitioners under *Finnegan* v. *Leu*, 456 U. S. 431, which held that the discharge of a union's appointed business agents by the union president, following his election over the incumbent for whom the business agents had campaigned, did not violate Title I. However, the Court of Appeals reversed, holding that *Finnegan* did not control where the dismissed union official was elected rather than appointed, and rejecting the contention that Lynn's removal was valid because it was carried out under Hawkins' authority as trustee.

Held: The removal of an elected business agent, in retaliation for statements he made at a union meeting in opposition to a dues increase sought by the union trustee, violates the LMRDA. Pp. 352–359.

(a) Petitioners' argument is unpersuasive that Lynn's status as an elected, rather than an appointed, official is immaterial, and that the loss of his union employment cannot amount to a Title I violation because he remains a member of the Local and was not prevented from attending the special meeting, expressing his views on the dues proposal, or casting his vote. Even though Lynn was not actually prevented from exercising such Title I rights, his removal interfered with those rights by forcing him to chose between them and his job. Moreover, in contrast to the discharge of an appointed union official, the removal of an elected

official denies the members who voted for him the representative of their choice and has a more pronounced chilling effect upon their exercise of their own Title I rights, thereby contravening the LMRDA's basic objective of ensuring that unions are democratically governed and responsive to the will of the membership, which must be free to discuss union policies and criticize the leadership without fear of reprisal. *Finnegan*, *supra*, distinguished. Pp. 353–355.

(b) The cause of action of an elected union official removed for exercising his Title I rights is not affected by the fact that the removal is carried out during a trusteeship lawfully imposed under Title III of the Act. Nothing in the LMRDA's language or legislative history suggests that Title I rights are lost whenever a trusteeship is imposed. Given this congressional silence, a trustee's Title III authority ordinarily should be construed in a manner consistent with Title I's protections. As petitioners concede, the imposition of a trusteeship does not destroy the critical right to vote on dues increases which Title I guarantees to local union members. That right would not be meaningful if a trustee were able to control the members' debate over the issue. In the instant case, Lynn's statements concerning the proposed dues increase were entitled to protection, since nothing in the International's constitution suggests that the imposition of the trusteeship changed the nature of his office so that he was obligated to support Hawkins' positions. Pp. 356–358.

804 F. 2d 1472, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 359. KENNEDY, J., took no part in the consideration or decision of the case.

Donald W. Fisher argued the cause for petitioners. With him on the briefs were *Julius Reich*, *David M. Silberman*, and *Laurence Gold*.

Bruce Stark argued the cause for respondent. With him on the brief were *Paul Alan Levy*, *Arthur L. Fox II*, and *Alan B. Morrison*.

JUSTICE MARSHALL delivered the opinion of the Court.

In *Finnegan* v. *Leu*, 456 U. S. 431 (1982), we held that the discharge of a union's appointed business agents by the union president, following his election over the incumbent for

whom the business agents had campaigned, did not violate the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act), 73 Stat. 519, 29 U. S. C. § 401 *et seq.* The question presented in this case is whether the removal of an elected business agent, in retaliation for statements he made at a union meeting in opposition to a dues increase sought by the union trustee, violated the LMRDA. The Court of Appeals for the Ninth Circuit held that the LMRDA protected the business agent from removal under these circumstances. We granted certiorari to address this important issue concerning the internal governance of labor unions, 485 U. S. 958 (1988), and now affirm.

I

In June 1981, respondent Edward Lynn was elected to a 3-year term as a business representative of petitioner Local 75 of the Sheet Metal Workers' International Association (Local), an affiliate of petitioner Sheet Metal Workers' International Association (International).[1] Lynn was instrumental in organizing fellow members of the Local who were concerned about a financial crisis plaguing the Local. These members, who called themselves the Sheet Metal Club Local 75 (Club), published leaflets that demonstrated, on the basis of Department of Labor statistics, that the Local's officials were spending far more than the officials of two other sheet metal locals in the area. The Club urged the Local's officials to reduce expenditures rather than increase dues in order to alleviate the Local's financial problems. A majority of the Local's members apparently agreed, for they defeated three successive proposals to increase dues.

Following the third vote, in June 1982, the Local's 17 officials, including Lynn, sent a letter to the International's general president, requesting that he "immediately take what-

[1] The Local was dissolved in March 1985. Two other sheet metal locals, not parties below or before this Court, presently have joint responsibility for the Local's legal obligations.

ever action [is] . . . necessary including, but not limited to, trusteeship to put this local on a sound financial basis." App. 14. Invoking his authority under the International's constitution, the general president responded by placing the Local under a trusteeship and by delegating to the trustee, Richard Hawkins, the authority "to supervise and direct" the affairs of the Local, "including, but not limited to, the authority to suspend local union . . . officers, business managers, or business representatives." Art. 3, § 2(c), Constitution and Ritual of the Sheet Metal Workers' International Association, Revised and Amended by Authority of the Thirty-Fifth General Convention, St. Louis, Missouri (1978).

Within a month of his appointment, Hawkins decided that a dues increase was needed to rectify the Local's financial situation. Recognizing that he lacked authority to impose a dues increase unilaterally, Hawkins prepared a proposal to that effect which he submitted to and which was approved by the Local's executive board. A special meeting was then convened to put the dues proposal to a membership vote. Prior to the meeting, Hawkins advised Lynn that he expected Lynn's support. Lynn responded that he first wanted a commitment to reduce expenditures, which Hawkins declined to provide. Lynn thus spoke in opposition to the dues proposal at the special meeting. The proposal was defeated by the members in a secret ballot vote. Five days later, Hawkins notified Lynn that he was being removed "indefinitely" from his position as business representative specifically because of his outspoken opposition to the dues increase. App. 20.

After exhausting his intraunion remedies, Lynn brought suit in District Court under § 102 of the LMRDA, 29 U. S. C. § 412, claiming, *inter alia*, that his removal from office violated § 101(a)(2), the free speech provision of Title I of the LMRDA, 29 U. S. C. § 411(a)(2).[2] The District Court

[2] Section 101(a)(2) of the LMRDA, titled "Freedom of Speech and Assembly," provides:

granted summary judgment for petitioners, reasoning that, under *Finnegan* v. *Leu*, *supra*, "[a] union member's statutory right to oppose union policies affords him no protection against dismissal from employment as an agent of the union because of such opposition." App. to Pet. for Cert. 36a.

The Court of Appeals for the Ninth Circuit reversed. 804 F. 2d 1472 (1986). The court held that *Finnegan* did not control where the dismissed union employee was an elected, rather than an appointed, official because removal of the former "can only impede the democratic governance of the union." 804 F. 2d, at 1479. "Allowing the removal of an elected official for exercising his free speech rights," the court explained, "would in effect nullify a member's right to vote for a candidate whose views he supports," *id.*, at 1479, n. 7, and would impinge on the official's right to "spea[k] . . . for himself as a member" of the union. *Id.*, at 1479. The court also rejected the contention that Lynn's removal was valid because it was carried out under the trusteeship, stating that, "while a trustee may remove an elected local officer for financial misconduct, or incompetence, it may not do so in retaliation for the exercise of a right protected by the

---

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522.

Section 102 provides in relevant part:

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." *Id.*, at 523.

LMRDA, such as free speech." *Id.*, at 1480 (citations omitted).[3]

II

The LMRDA "was the product of congressional concern with widespread abuses of power by union leadership." *Finnegan*, 456 U. S., at 435. The major reform bills originally introduced in the Senate, as well as the bill ultimately reported out of the Committee on Labor and Public Welfare, S. 1555, 86th Cong., 1st Sess. (1959), dealt primarily with disclosure requirements, elections, and trusteeships. The legislation that evolved into Title I of the LMRDA, the "Bill of Rights of Members of Labor Organizations," was adopted as an amendment on the Senate floor by "legislators [who] feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership." *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 109 (1982).[4] "[D]esigned to guarantee every member equal voting rights, rights of free speech and assembly, and a right to sue," *ibid.*, the amendment was "aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution." *Finnegan*, 456 U. S., at 435. In providing such protection, Congress sought to further the basic objective of the LMRDA: "ensuring that unions [are] democratically governed and responsive to the will of their memberships." *Id.*, at 436; see also *Reed* v. *Transportation Union*, *ante*, at 325; *Sadlowski*, *supra*, at 112.

We considered this basic objective in *Finnegan*, where several members of a local union who held staff positions as

---

[3] The dissent argued that "the mere fact that Lynn was an elected officer is not sufficient" to distinguish *Finnegan* from the instant case, 804 F. 2d, at 1486, because "the injury suffered by Lynn is primarily connected with his status as an officer, not a union member." *Id.*, at 1487.

[4] Title I "was quickly accepted without substantive change by the House." *Furniture Moving Drivers* v. *Crowley*, 467 U. S. 526, 538 (1984); see also *Finnegan* v. *Leu*, 456 U. S. 431, 435, n. 4 (1982).

business agents were discharged by the local's newly elected president. The business agents had been appointed by the incumbent president and had openly supported him in his unsuccessful reelection campaign. They subsequently sought relief under § 102 of the LMRDA, claiming that discharge from their appointed positions constituted an "infringement" of their free speech and equal voting rights as guaranteed by Title I.

We held that the business agents could not establish a violation of § 102 because their claims were inconsistent with the LMRDA's "overriding objective" of democratic union governance. 456 U. S., at 441. Permitting a victorious candidate to appoint his own staff did not frustrate that objective; rather, it ensured a union's "responsiveness to the mandate of the union election." *Ibid.* We thus concluded that the LMRDA did not "restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Ibid.* In rejecting the business agents' claim, we did not consider whether the retaliatory removal of an elected official violates the LMRDA and, if so, whether it is significant that the removal is carried out under a validly imposed trusteeship. It is to these questions that we now turn.[5]

A

Petitioners argue that Lynn's Title I rights were not "infringed" for purposes of § 102 because Lynn, like other

[5] The business agents in *Finnegan* also claimed that their discharge violated § 609 of the LMRDA, 29 U. S. C. § 529, which makes it unlawful for a union or its officials "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act." 73 Stat. 541. We rejected this claim, holding that "removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609." 456 U. S., at 439.

Lynn's complaint makes reference to § 609, App. 8, but the Court of Appeals' analysis of his Title I claim is limited to a discussion of § 102. Lynn's § 609 claim is not before the Court, nor are the other claims rejected by the lower courts.

members of the Local, was not prevented from attending the special meeting, expressing his views on Hawkins' dues proposal, or casting his vote, and because he remains a member of the Local. Under this view, Lynn's status as an elected, rather than an appointed, official is essentially immaterial and the loss of union employment cannot amount to a Title I violation.

This argument is unpersuasive. In the first place, we acknowledged in *Finnegan* that the business agents' Title I rights had been interfered with, albeit indirectly, because the agents had been forced to choose between their rights and their jobs. See *id.*, at 440, 442. This was so even though the business agents were not actually prevented from exercising their Title I rights. The same is true here. Lynn was able to attend the special meeting, to express views in opposition to Hawkins' dues proposal, and to cast his vote. In taking these actions, Lynn "was exercising . . . membership right[s] protected by section 101(a)." 804 F. 2d, at 1479. Given that Lynn was removed from his post as a direct result of his decision to express disagreement with Hawkins' dues proposal at the special meeting, and that his removal presumably discouraged him from speaking out in the future, Lynn paid a price for the exercise of his membership rights.

This is not, of course, the end of the analysis. Whether such interference with Title I rights gives rise to a cause of action under § 102 must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan*, 456 U. S., at 441. In *Finnegan*, this goal was furthered when the newly elected union president discharged the appointed staff of the ousted incumbent. Indeed, the basis for the *Finnegan* holding was the recognition that the newly elected president's victory might be rendered meaningless if a disloyal staff were able to thwart the implemen-

tation of his programs. While such patronage-related discharges had some chilling effect on the free speech rights of the business agents, we found this concern outweighed by the need to vindicate the democratic choice made by the union electorate.

The consequences of the removal of an elected official are much different. To begin with, when an elected official like Lynn is removed from his post, the union members are denied the representative of their choice. Indeed, Lynn's removal deprived the membership of his leadership, knowledge, and advice at a critical time for the Local. His removal, therefore, hardly was "an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Ibid.;* see also *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 497 (1968).

Furthermore, the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him. See *Hall* v. *Cole*, 412 U. S. 1, 8 (1973). Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues increase proposal,[6] other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril. This is precisely what Congress sought to prevent when it passed the LMRDA. "It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Sadlowski*, 457 U. S., at 112. We thus hold that Lynn's retaliatory removal stated a cause of action under § 102.[7]

---

[6] There is no suggestion that Lynn's speech in opposition to the dues increase contravened any obligation properly imposed upon him as an elected business agent of the Local.

[7] In reaching this conclusion, we reject petitioners' contention that a union official must establish that his firing was part of a systematic effort

B

Petitioners next contend that, even if the removal of an elected official for the exercise of his Title I rights ordinarily states a cause of action under § 102, a different result obtains here because Lynn was removed during a trusteeship lawfully imposed under Title III of the LMRDA, 73 Stat. 530–532, 29 U. S. C. §§ 461–466.

We disagree. In the first place, we find nothing in the language of the LMRDA or its legislative history to suggest that Congress intended Title I rights to fall by the wayside whenever a trusteeship is imposed. Had Congress contemplated such a result, we would expect to find some discussion of it in the text of the LMRDA or its legislative history.[8] Given

---

to stifle dissent within the union in order to state a claim under § 102. Although in *Finnegan* we noted that a § 102 claim might arise if a union official were dismissed "as 'part of a purposeful and deliberate attempt . . . to suppress dissent within the union,'" 456 U. S., at 441, quoting *Schonfeld* v. *Penza*, 477 F. 2d 899, 904 (CA2 1973), we did not find that this constituted the *only* situation giving rise to a § 102 claim. We merely stated that we did not have such a case before us, and that we expressed no view as to its proper resolution. 456 U. S., at 441. Likewise, we explicitly reserved the question "whether a different result might obtain in a case involving nonpolicymaking and nonconfidential employees." *Id.*, at 441, n. 11.

[8] The LMRDA's trusteeship provisions first appeared as Title II of the Kennedy-Ives bill passed by the Senate in June 1958. S. 3974, 85th Cong., 2d Sess. Title II was a response to the findings of the Senate Select Committee on Improper Activities in the Labor or Management Field, popularly known as the McClellan Committee, which "exposed the details of the sad state of democracy in large sections of the labor movement and provided numerous examples of abuses of the trusteeship power." Note, Landrum-Griffin and the Trusteeship Imbroglio, 71 Yale L. J. 1460, 1473 (1962). The McClellan Committee found, in particular, that trusteeships were too often "baselessly imposed." S. Rep. No. 1417, 85th Cong., 2d Sess., 4 (1958).

Title II reappeared in the Kennedy-Ervin bill reported out of the Committee on Labor and Public Welfare in the next Congress. S. 1555, 86th Cong., 1st Sess. (1959). The Committee Report accompanying this bill, although recognizing that trusteeships were sometimes necessary, stressed that "labor history and the hearings of the McClellan committee

Congress' silence on this point, a trustee's authority under Title III ordinarily should be construed in a manner consistent with the protections provided in Title I. See *McDonald* v. *Oliver*, 525 F. 2d 1217, 1229 (CA5), cert. denied, 429 U. S. 817 (1976); *United Brotherhood of Carpenters & Joiners* v. *Brown*, 343 F. 2d 872, 882–883 (CA10 1965); *United Brotherhood of Carpenters & Joiners* v. *Dale*, 118 LRRM 3160, 3167 (CD Cal. 1985).

Whether there are any circumstances under which a trustee acting pursuant to Title III can override Title I free speech rights is a question we need not confront.[9] Section 101(a)(3) of Title I, 29 U. S. C. § 411(a)(3), guarantees to the members of a local union the right to vote on any dues in-

---

demonstrate that in some instances trusteeships have been used as a means of consolidating the power of corrupt union officers, plundering and dissipating the resources of local unions, *and preventing the growth of competing political elements within the organization.*" S. Rep. No. 187, 86th Cong., 1st Sess., 17 (1959) (emphasis added); see also H. R. Rep. No. 741, 86th Cong., 1st Sess., 13 (1959).

After the addition of Title I on the Senate floor, there was little discussion in either House of the relationship between Title I and the trusteeship provisions now contained in Title III. This is not surprising. From the time the trusteeship provisions were first proposed in the spring of 1958, congressional attention was directed toward the LMRDA's more controversial titles, "while the trusteeship title glided quietly though the labyrinthine process from bill to bill with little change and less discussion." Note, 71 Yale L. J., *supra*, at 1475. One exception is the debate over an amendment proposed by Senator Dodd to require the approval of the Secretary of Labor before a trusteeship could be imposed. 105 Cong. Rec. 6675–6681 (1959). In successfully opposing this amendment, Senator Morse emphasized the importance of "look[ing] at the trustee section of the bill . . . *in the light of the other sections of the bill*, and not[ing] what the committee has done by way of setting up democratic procedures to protect the rank and file of the local unions." *Id.*, at 6678 (emphasis added).

[9] As Lynn notes, "the precise scope of a trustee's power pursuant to Title III, and the nature of the democratic rights of the members that survive a trusteeship, are matters that have engendered little litigation in the lower courts." Brief for Respondent 31. We thus proceed with caution in this relatively uncharted territory.

crease,[10] and, as petitioners conceded at oral argument, this critical Title I right does not vanish with the imposition of a trusteeship. Tr. of Oral. Arg. 5. A trustee seeking to restore the financial stability of a local union through a dues increase thus is required to seek the approval of the union's members. In order to ensure that the union members' democratic right to decide on a dues proposal is meaningful, the right to exchange views on the advantages and disadvantages of such a measure must be protected. A trustee should not be able to control the debate over an issue which, by statute, is beyond his control.

In the instant case, Lynn's statements concerning the proposed dues increase were entitled to protection. Petitioners point to nothing in the International's constitution to suggest that the nature of Lynn's office changed once the trusteeship was imposed, so that Lynn was obligated to support Hawkins' positions. Thus, at the special meeting, Lynn was free to express the view apparently shared by a majority of the Local's members that the best solution to the Local's financial problems was not an increase in dues, but a reduction in expenditures. Under these circumstances, Hawkins violated Lynn's Title I rights when he removed Lynn from his post.[11]

---

[10] Section 101(a)(3) of the LMRDA provides in part:

"[T]he rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—

"(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot . . . ." 73 Stat. 522.

[11] Lynn's posttrusteeship status thus was much the same as it was before the trusteeship. We do not address a situation where an international's constitution provides that, when a trusteeship is imposed, elected officials are required to support the trustee's policies and thus may occupy a status

III

For the reasons stated herein, we conclude that Lynn's removal from his position as business representative constituted a violation of Title I of the LMRDA. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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

JUSTICE WHITE, concurring in the judgment.

Finnegan v. *Leu*, 456 U. S. 431, 436–437 (1982), observed that "[i]t is readily apparent, both from the language of these provisions and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect" (footnote omitted). If that is so and if a case involves speech in the capacity of an officer, it should make no difference that the officer is elected rather than appointed. But in *Finnegan*, it was asserted that the officer was removed because of his campaign activities, as a member, in a union election, which was speech protected by Title I. In response, the Court said that under the union constitution the newly elected president had power to appoint and remove officers and that he was entitled to start out with officers in whom he had confidence. This was sufficient to dispose of the officers' claim under Title I.

In the case before us, the speech for which respondent was removed was also speech in the capacity of a member. The duties of a union business agent are defined in the union constitution. Those duties relate primarily to collective bargaining and administering the collective-bargaining contract. They do not seem to include supporting the union president's proposal to increase union dues; and if they did, I am not so

---

similar to the appointed officials in *Finnegan*. Cf. § 101(b), Title I, 73 Stat. 523, 29 U. S. C. § 411(b).

sure that respondent would have spoken out against the dues increase at all.

In this case, unlike *Finnegan*, respondent was not discharged by an incoming elected president with power to appoint his own staff, but by a trustee whose power to dismiss and appoint officers, for all that is shown here, went no further than the Local's president to discharge for cause, *i. e.*, for incompetence or other behavior disqualifying them for the tasks they were expected to perform as officers. Respondent's speech opposing the dues increase was the speech of a member about a matter the members were to resolve, and there is no countervailing interest rooted in union democracy that suffices to override that protection.

Thus, I doubt that resolution of cases like this turns on whether an officer is elected or appointed. Rather its inquiry is whether an officer speaks as a member or as an officer in discharge of his assigned duties. If the former, he is protected by Title I. If the latter, the issue becomes whether other considerations deprive the officer/member of the protections of that Title.

MISTRETTA *v.* UNITED STATES

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87–7028. Argued October 5, 1988—Decided January 18, 1989*

Because the existing indeterminate sentencing system resulted in serious disparities among the sentences imposed by federal judges upon similarly situated offenders and in uncertainty as to an offender's actual date of release by Executive Branch parole officials, Congress passed the Sentencing Reform Act of 1984 (Act), which, *inter alia*, created the United States Sentencing Commission as an independent body in the Judicial Branch with power to promulgate binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants according to specific and detailed factors. The District Court upheld the constitutionality of the Commission's resulting Guidelines against claims by petitioner Mistretta, who was under indictment on three counts centering in a cocaine sale, that the Commission was constituted in violation of the separation-of-powers principle, and that Congress had delegated excessive authority to the Commission to structure the Guidelines. Mistretta had pleaded guilty to a conspiracy-to-distribute count, was sentenced under the Guidelines to 18 months' imprisonment and other penalties, and filed a notice of appeal. This Court granted his petition and that of the United States for certiorari before judgment in the Court of Appeals in order to consider the Guidelines' constitutionality.

Held: The Sentencing Guidelines are constitutional, since Congress neither (1) delegated excessive legislative power to the Commission nor (2) violated the separation-of-powers principle by placing the Commission in the Judicial Branch, by requiring federal judges to serve on the Commission and to share their authority with nonjudges, or by empowering the President to appoint Commission members and to remove them for cause. The Constitution's structural protections do not prohibit Congress from delegating to an expert body within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here, nor from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Pp. 371–412.

682 F. Supp. 1033, affirmed.

---

*Together with No. 87–1904, *United States* v. *Mistretta*, also on certiorari before judgment to the same court.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in all but n. 11 of which BRENNAN, J., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 413.

Alan B. Morrison argued the cause for petitioner in No. 87–7028 and respondent in No. 87–1904. With him on the briefs were *Patti A. Goldman*, *Raymond C. Conrad, Jr.*, and *Christopher C. Harlan*.

Solicitor General Fried argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Bolton*, *Deputy Solicitor General Bryson*, *Paul J. Larkin, Jr.*, *Douglas Letter*, *Gregory C. Sisk*, and *John F. De Pue*.

Paul M. Bator argued the cause for the United States Sentencing Commission as *amicus curiae* urging affirmance. With him on the brief were *Andrew L. Frey*, *Kenneth S. Geller*, and *John R. Steer*.†

JUSTICE BLACKMUN delivered the opinion of the Court.

In this litigation, we granted certiorari before judgment in the United States Court of Appeals for the Eighth Circuit in order to consider the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission. The Commission is a body created under the Sentencing Reform Act of 1984 (Act), as amended, 18 U. S. C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U. S. C. §§ 991–998 (1982 ed., Supp. IV).[1] The United States District Court for the Western District of Missouri ruled that the Guidelines

---

†*David O. Bickart* filed a brief for Joseph E. DiGenova et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the United States Senate by *Michael Davidson*, *Ken U. Benjamin, Jr.*, and *Morgan J. Frankel;* and for the National Association of Criminal Defense Lawyers by *Benson B. Weintraub*, *Benedict P. Kuehne*, and *Dennis N. Balske*.

[1] Hereinafter, for simplicity in citation, each reference to the Act is directed to Supplement IV to the 1982 edition of the United States Code.

were constitutional. *United States* v. *Johnson*, 682 F. Supp. 1033 (1988).[2]

I

A

Background

For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether restraint, such as probation, should be imposed instead of imprisonment or fine. This indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the "guidance and control" of a parole officer. See *Zerbst* v. *Kidwell*, 304 U. S. 359, 363 (1938).

Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society. It obviously required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation. As a result, the court and the officer were in positions to exercise, and usually did exercise, very broad discretion. See Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 812–813 (1961).

---

[2] The District Court's memorandum, written by Judge Howard F. Sachs, states that his conclusion that "the Guidelines are not subject to valid challenge" by claims based on the Commission's lack of constitutional status or on a theory of unconstitutional delegation of legislative power, 682 F. Supp., at 1033–1034, is shared by District Judges Elmo B. Hunter, D. Brook Bartlett, and Dean Whipple of the Western District. *Id.*, at 1033, n. 1. Chief District Judge Scott O. Wright wrote in dissent. *Id.*, at 1035.

This led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge "sees more and senses more" than the appellate court; thus, the judge enjoyed the "superiority of his nether position," for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal. See Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635, 663 (1971). See *Dorszynski* v. *United States*, 418 U. S. 424, 431 (1974). The decision whether to parole was also "predictive and discretionary." *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972). The correction official possessed almost absolute discretion over the parole decision. See, *e. g.*, *Brest* v. *Ciccone*, 371 F. 2d 981, 982–983 (CA8 1967); *Rifai* v. *United States Parole Comm'n*, 586 F. 2d 695 (CA9 1978).

Historically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, *United States* v. *Wiltberger*, 5 Wheat. 76 (1820), and the scope of judicial discretion with respect to a sentence is subject to congressional control. *Ex parte United States*, 242 U. S. 27 (1916). Congress early abandoned fixed-sentence rigidity, however, and put in place a system of ranges within which the sentencer could choose the precise punishment. See *United States* v. *Grayson*, 438 U. S. 41, 45–46 (1978). Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system. Also, with the advent of parole, Congress moved toward a "three-way sharing" of sentencing responsibility by granting corrections personnel in the Executive Branch the discre-

tion to release a prisoner before the expiration of the sentence imposed by the judge. Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment. See *Williams* v. *New York*, 337 U. S. 241, 248 (1949). See also *Geraghty* v. *United States Parole Comm'n*, 719 F. 2d 1199, 1211 (CA3 1983), cert. denied, 465 U. S. 1103 (1984); *United States* v. *Addonizio*, 442 U. S. 178, 190 (1979); *United States* v. *Brown*, 381 U. S. 437, 443 (1965) ("[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will").

Serious disparities in sentences, however, were common. Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases. See N. Morris, The Future of Imprisonment 24–43 (1974); F. Allen, The Decline of the Rehabilitative Ideal (1981). In 1958, Congress authorized the creation of judicial sentencing institutes and joint councils, see 28 U. S. C. § 334, to formulate standards and criteria for sentencing. In 1973, the United States Parole Board adopted guidelines that established a "customary range" of confinement. See *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 391 (1980). Congress in 1976 endorsed this initiative through the Parole Commission and Reorganization Act, 18 U. S. C. §§ 4201–4218, an attempt to envision for the Parole Commission a role, at least in part, "to moderate the disparities in the sentencing practices of individual judges." *United States* v. *Addonizio*, 442 U. S., at 189. That Act, however, did not disturb the division of sentencing responsibility among the three Branches. The judge continued to exercise discretion and to set the sentence within the statutory range fixed by Congress, while the pris-

oner's actual release date generally was set by the Parole Commission.

This proved to be no more than a way station. Fundamental and widespread dissatisfaction with the uncertainties and the disparities continued to be expressed. Congress had wrestled with the problem for more than a decade when, in 1984, it enacted the sweeping reforms that are at issue here.

Helpful in our consideration and analysis of the statute is the Senate Report on the 1984 legislation, S. Rep. No. 98–225 (1983) (Report).[3] The Report referred to the "outmoded rehabilitation model" for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed. *Id.*, at 38. It observed that the indeterminate-sentencing system had two "unjustifi[ed]" and "shameful" consequences. *Id.*, at 38, 65. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an even-handed and effective operation of the criminal justice system. The Report went on to note that parole was an inadequate device for overcoming these undesirable consequences. This was due to the division of authority between the sentencing judge and the parole officer who often worked at cross purposes; to the fact that the Parole Commission's own guidelines did not take into account factors Congress regarded as important in sentencing, such as the sophistication of the offender and the role the offender played in an offense committed with others, *id.*, at 48; and to the fact that the Parole Commission had only limited power to adjust a sentence imposed by the court. *Id.*, at 47.

---

[3] The corresponding Report in the House of Representatives was filed a year later. See H. R. Rep. No. 98–1017 (1984). The House bill (H. R. 6012, 98th Cong., 2d Sess. (1984)) eventually was set aside in favor of the Senate bill. The House Report, however, reveals that the Senate's rationale underlying sentencing reform was shared in the House.

Before settling on a mandatory-guideline system, Congress considered other competing proposals for sentencing reform. It rejected strict determinate sentencing because it concluded that a guideline system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case. *Id.*, at 78–79, 62. The Judiciary Committee rejected a proposal that would have made the sentencing guidelines only advisory. *Id.*, at 79.

B

The Act

The Act, as adopted, revises the old sentencing process in several ways:

1. It rejects imprisonment as a means of promoting rehabilitation, 28 U. S. C. § 994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U. S. C. § 3553(a)(2).

2. It consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission. 28 U. S. C. §§ 991, 994, and 995(a)(1).

3. It makes all sentences basically determinate. A prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in custody. 18 U. S. C. §§ 3624(a) and (b).

4. It makes the Sentencing Commission's guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines. §§ 3553(a) and (b). The Act also requires the court to state its reasons for the sen-

tence imposed and to give "the specific reason" for imposing a sentence different from that described in the guideline. § 3553(c).

5. It authorizes limited appellate review of the sentence. It permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline. §§ 3742(a) and (b).

Thus, guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors, "among others." 28 U. S. C. §§ 994(b), (c), and (d). The maximum of the range ordinarily may not exceed the minimum by more than the greater of 25% or six months, and each sentence is to be within the limit provided by existing law. §§ 994(a) and (b)(2).

C

The Sentencing Commission

The Commission is established "as an independent commission in the judicial branch of the United States." § 991(a). It has seven voting members (one of whom is the Chairman) appointed by the President "by and with the advice and consent of the Senate." "At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States." *Ibid.* No more than four members of the Commission shall be members of the same political party. The Attorney General, or his designee, is an ex officio nonvoting member. The Chairman and other members of the Commission are subject to removal by the President "only for neglect of duty or malfeasance in office or for other good cause shown." *Ibid.* Except for initial staggering of terms,

a voting member serves for six years and may not serve more than two full terms. §§ 992(a) and (b).[4]

D

The Responsibilities of the Commission

In addition to the duty the Commission has to promulgate determinative-sentence guidelines, it is under an obligation periodically to "review and revise" the guidelines. § 994*(o)*. It is to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress "any amendments of the guidelines." § 994(p). It is to make recommendations to Congress whether the grades or maximum penalties should be modified. § 994(r). It must submit to Congress at least annually an analysis of the operation of the guidelines. § 994(w). It is to issue "general policy statements" regarding their application. § 994(a)(2). And it has the power to "establish general policies . . . as are necessary to carry out the purposes" of the legislation, § 995(a)(1); to "monitor the performance of probation officers" with respect to the guidelines, § 995(a)(9); to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel" and others, § 995(a)(18); and to "perform such other functions as are required to permit Federal courts to meet their responsibilities" as to sentencing, § 995(a)(22).

We note, in passing, that the monitoring function is not without its burden. Every year, with respect to each of more than 40,000 sentences, the federal courts must forward, and the Commission must review, the presentence report,

---

[4] Until the Parole Commission ceases to exist in 1992, as provided by §§ 218(a)(5) and 235(a)(1) of the Act, 98 Stat. 2027 and 2031, the Chairman of that Commission serves as an ex officio nonvoting member of the Sentencing Commission. § 235(b)(5), 98 Stat. 2033.

the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement.

II

This Litigation

On December 10, 1987, John M. Mistretta (petitioner) and another were indicted in the United States District Court for the Western District of Missouri on three counts centering in a cocaine sale. See App. to Pet. for Cert. in No. 87–1904, p. 16a. Mistretta moved to have the promulgated Guidelines ruled unconstitutional on the grounds that the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines. As has been noted, the District Court was not persuaded by these contentions.[5]

The District Court rejected petitioner's delegation argument on the ground that, despite the language of the statute, the Sentencing Commission "should be judicially characterized as having Executive Branch status," 682 F. Supp., at 1035, and that the Guidelines are similar to substantive rules promulgated by other agencies. *Id.*, at 1034–1035. The court also rejected petitioner's claim that the Act is unconstitutional because it requires Article III federal judges to serve on the Commission. *Id.*, at 1035. The court stated, however, that its opinion "does not imply that I have no serious doubts about some parts of the Sentencing Guidelines and the legality of their anticipated operation." *Ibid.*

Petitioner had pleaded guilty to the first count of his indictment (conspiracy and agreement to distribute cocaine, in violation of 21 U. S. C. §§ 846 and 841(b)(1)(B)). The Government thereupon moved to dismiss the remaining counts.

---

[5] Petitioner's claims were identical to those raised by defendants in other cases in the Western District of Missouri. Argument on petitioner's motion was presented to a panel of sentencing judges. The result is described in n. 2, *supra*.

That motion was granted. App. to Pet. for Cert. in No. 87–1904, p. 33a. Petitioner was sentenced under the Guidelines to 18 months' imprisonment, to be followed by a 3-year term of supervised release. *Id.*, at 30a, 35a, 37a. The court also imposed a $1,000 fine and a $50 special assessment. *Id.*, at 31a, 40a.

Petitioner filed a notice of appeal to the Eighth Circuit, but both petitioner and the United States, pursuant to this Court's Rule 18, petitioned for certiorari before judgment. Because of the "imperative public importance" of the issue, as prescribed by the Rule, and because of the disarray among the Federal District Courts,[6] we granted those petitions. 486 U. S. 1054 (1988).

III

Delegation of Power

Petitioner argues that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine. We do not agree.

The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U. S. Const., Art. I, § 1, and we long have insisted that "the integrity and maintenance of

---

[6] The disarray is revealed by the District Court decisions cited in the petition for certiorari in No. 87–1904, pp. 9–10, nn. 10 and 11. Since certiorari was granted, a panel of the United States Court of Appeals for the Ninth Circuit, by a divided vote, has invalidated the Guidelines on separation-of-powers grounds, *Gubiensio-Ortiz* v. *Kanahele*, 857 F. 2d 1245 (1988), cert. pending *sub nom. United States* v. *Chavez-Sanchez*, No. 88–550, and a panel of the Third Circuit (one judge, in dissent, did not reach the constitutional issue) has upheld them, *United States* v. *Frank*, 864 F. 2d 992 (1988).

the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch. *Field* v. *Clark*, 143 U. S. 649, 692 (1892). We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 406 (1928). So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*, at 409.

Applying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. See *Opp Cotton Mills, Inc.* v. *Administrator, Wage and Hour Div. of Dept. of Labor*, 312 U. S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy"); see also *United States* v. *Robel*, 389 U. S. 258, 274 (1967) (opinion concurring in result). "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421 (1935). Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly

delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 105 (1946).

Until 1935, this Court never struck down a challenged statute on delegation grounds. See *Synar* v. *United States*, 626 F. Supp. 1374, 1383 (DC) (three-judge court), aff'd *sub nom. Bowsher* v. *Synar*, 478 U. S. 714 (1986). After invalidating in 1935 two statutes as excessive delegations, see *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, and *Panama Refining Co.* v. *Ryan*, *supra*, we have upheld, again without deviation, Congress' ability to delegate power under broad standards.[7] See, *e. g.*, *Lichter* v. *United States*, 334 U. S. 742, 785–786 (1948) (upholding delegation of authority to determine excessive profits); *American Power & Light Co.* v. *SEC*, 329 U. S., at 105 (upholding delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); *Yakus* v. *United States*, 321 U. S. 414, 426 (1944) (upholding delegation to Price Administrator to fix commodity prices that would be fair and equitable, and would effectuate purposes of Emergency Price Control Act of 1942); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine

---

[7] In *Schechter* and *Panama Refining* the Court concluded that Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power. No delegation of the kind at issue in those cases is present here. The Act does not make crimes of acts never before criminalized, see *Fahey* v. *Mallonee*, 332 U. S. 245, 249 (1947) (analyzing *Panama Refining*), or delegate regulatory power to private individuals, see *Yakus* v. *United States*, 321 U. S. 414, 424 (1944) (analyzing *Schechter*). In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional. See, *e. g.*, *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607, 646 (1980); *National Cable Television Assn.* v. *United States*, 415 U. S. 336, 342 (1974).

just and reasonable rates); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing "as public interest, convenience, or necessity" require).

In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements. Congress charged the Commission with three goals: to "assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U. S. C. § 991(b)(1). Congress further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed . . . correctional treatment." 18 U. S. C. § 3553(a)(2).

In addition, Congress prescribed the specific tool—the guidelines system—for the Commission to use in regulating sentencing. More particularly, Congress directed the Commission to develop a system of "sentencing ranges" applicable "for each category of offense involving each category of defendant." 28 U. S. C. § 994(b).[8] Congress instructed the

[8] Congress mandated that the guidelines include:

"(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maxima. Congress also required that for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." § 994(b)(2). Moreover, Congress directed the Commission to use current average sentences "as a starting point" for its structuring of the sentencing ranges. § 994(m).

To guide the Commission in its formulation of offense categories, Congress directed it to consider seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. §§ 994(c)(1)–(7).[9] Congress set forth 11 factors for the Commission to

---

"(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

"(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

"(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively." 28 U. S. C. § 994(a)(1).

[9] The Senate Report on the legislation elaborated on the purpose to be served by each factor. The Report noted, for example, that the reference to the community view of the gravity of an offense was "not intended to mean that a sentence might be enhanced because of public outcry about a single offense," but "to suggest that changed community norms concerning certain particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense." Report, at 170. The Report, moreover, gave spe-

consider in establishing categories of defendants. These include the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. § 994(d)(1)–(11).[10] Congress also prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders," § 994(d), and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors, § 994(e).

In addition to these overarching constraints, Congress provided even more detailed guidance to the Commission about categories of offenses and offender characteristics. Congress directed that guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. § 994(h). Congress further directed that the Commission assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career

---

cific examples of areas in which prevailing sentences might be too lenient, including the treatment of major white-collar criminals. *Id.*, at 177.

[10] Again, the legislative history provides additional guidance for the Commission's consideration of the statutory factors. For example, the history indicates Congress' intent that the "criminal history . . . factor includes not only the number of prior criminal acts—whether or not they resulted in convictions—the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a 'career criminal' or a manager of a criminal enterprise." *Id.*, at 174. This legislative history, together with Congress' directive that the Commission begin its consideration of the sentencing ranges by ascertaining the average sentence imposed in each category in the past, and Congress' explicit requirement that the Commission consult with authorities in the field of criminal sentencing provide a factual background and statutory context that give content to the mandate of the Commission. See *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946).

felon, for one convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics. § 994(i). Congress also instructed "that the guidelines reflect . . . the general appropriateness of imposing a term of imprisonment" for a crime of violence that resulted in serious bodily injury. On the other hand, Congress directed that guidelines reflect the general inappropriateness of imposing a sentence of imprisonment "in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." § 994(j). Congress also enumerated various aggravating and mitigating circumstances, such as, respectively, multiple offenses or substantial assistance to the Government, to be reflected in the guidelines. §§ 994*(l)* and (n). In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories.

We cannot dispute petitioner's contention that the Commission enjoys significant discretion in formulating guidelines. The Commission does have discretionary authority to determine the relative severity of federal crimes and to assess the relative weight of the offender characteristics that Congress listed for the Commission to consider. See §§ 994(c) and (d) (Commission instructed to consider enumerated factors as it deems them to be relevant). The Commission also has significant discretion to determine which crimes have been punished too leniently, and which too severely. § 994(m). Congress has called upon the Commission to exercise its judgment about which types of crimes and which

types of criminals are to be considered similar for the purposes of sentencing.[11]

But our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy. In *Yakus* v. *United States*, 321 U. S. 414 (1944), the Court upheld a delegation to the Price Administrator to fix commodity prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" to stabilize prices and avert speculation. See *id.*, at 420. In *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), we upheld a delegation to the Federal Communications Commission granting it the authority to promulgate regulations in accordance with its view of the "public interest." In *Yakus*, the Court laid down the applicable principle:

> "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the ex-

---

[11] Petitioner argues that the excessive breadth of Congress' delegation to the Commission is particularly apparent in the Commission's considering whether to "reinstate" the death penalty for some or all of those crimes for which capital punishment is still authorized in the Federal Criminal Code. See Brief for Petitioner 51–52. Whether, in fact, the Act confers upon the Commission the power to develop guidelines and procedures to bring current death penalty provisions into line with decisions of this Court is a matter of intense debate between the Executive Branch and some members of Congress, including the Chairman of the Senate Judiciary Committee. See *Gubiensio-Ortiz* v. *Kanahele*, 857 F. 2d, at 1256. We assume, without deciding, that the Commission was assigned the power to effectuate the death penalty provisions of the Criminal Code. That the Commission may have this authority (but has not exercised it) does not affect our analysis. Congress did not authorize the Commission to enact a federal death penalty for any offense. As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments. JUSTICE BRENNAN does not join this footnote.

> ercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .
>
> . . . . . .
>
> ". . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . ." 321 U. S., at 425–426.

Congress has met that standard here. The Act sets forth more than merely an "intelligible principle" or minimal standards. One court has aptly put it: "The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." *United States* v. *Chambless*, 680 F. Supp. 793, 796 (ED La. 1988).

Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus* v. *United States*, 321 U. S., at 425–426. We have no doubt that in the hands of the Commission "the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose" of the Act. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940).

IV

Separation of Powers

Having determined that Congress has set forth sufficient standards for the exercise of the Commission's delegated authority, we turn to Mistretta's claim that the Act violates the constitutional principle of separation of powers.

This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. See, *e. g.*, *Morrison* v. *Olson*, 487 U. S. 654, 685–696 (1988); *Bowsher* v. *Synar*, 478 U. S., at 725. Madison, in writing about the principle of separated powers, said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324 (J. Cooke ed. 1961).

In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others," *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935), the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct. See, *e. g.*, *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977) (rejecting as archaic complete division of authority among the three Branches); *United States* v. *Nixon*, 418 U. S. 683 (1974) (affirming Madison's flexible approach to separation of powers). Madison, defending the Constitution against charges that it established insufficiently separate Branches, addressed the point directly. Separation of powers, he wrote, "d[oes] not mean that these [three]

departments ought to have no *partial agency* in, or no *controul* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961) (emphasis in original). See *Nixon* v. *Administrator of General Services*, 433 U. S., at 442, n. 5. Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively." *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976). In a passage now commonplace in our cases, Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power to which we are heir:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring opinion).

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch. "[T]he greatest security," wrote Madison, "against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51, p. 349 (J. Cooke ed. 1961). Accordingly, as we have noted

many times, the Framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S., at 122. See also *INS* v. *Chadha*, 462 U. S. 919, 951 (1983).

It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *Ibid.* Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. For example, just as the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power,[12] so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch. *Bowsher* v. *Synar*, 478 U. S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS* v. *Chadha*, *supra* (Congress may not control execution of laws except through Art. I procedures); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982) (Congress may not confer Art. III power on Art. I judge). By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. *Morrison* v. *Olson*, 487 U. S. 654 (1988) (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986) (up-

[12] Madison admonished: "In republican government the legislative authority, necessarily, predominates." The Federalist No. 51, p. 350 (J. Cooke ed. 1961).

holding agency's assumption of jurisdiction over state-law counterclaims).

In *Nixon* v. *Administrator of General Services*, *supra*, upholding, against a separation-of-powers challenge, legislation providing for the General Services Administration to control Presidential papers after resignation, we described our separation-of-powers inquiry as focusing "on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U. S., at 443 (citing *United States* v. *Nixon*, 418 U. S., at 711–712.[13] In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," *Morrison* v. *Olson*, 487 U. S., at 680–681, and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S., at 851.

Mistretta argues that the Act suffers from each of these constitutional infirmities. He argues that Congress, in constituting the Commission as it did, effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary's independence and integrity. Specifically, petitioner claims that in delegating to an independent agency within the Judicial Branch the power to promulgate sentencing guidelines, Congress unconstitutionally has required the Branch, and individual Article III judges, to exercise not only their judicial authority, but legislative authority—the making of sentencing policy—as well. Such rulemaking authority, petitioner contends, may be exercised by Congress, or delegated by Congress to the

---

[13] If the potential for disruption is present, we then determine "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U. S., at 443.

Executive, but may not be delegated to or exercised by the Judiciary. Brief for Petitioner 21.

At the same time, petitioner asserts, Congress unconstitutionally eroded the integrity and independence of the Judiciary by requiring Article III judges to sit on the Commission, by requiring that those judges share their rulemaking authority with nonjudges, and by subjecting the Commission's members to appointment and removal by the President. According to petitioner, Congress, consistent with the separation of powers, may not upset the balance among the Branches by co-opting federal judges into the quintessentially political work of establishing sentencing guidelines, by subjecting those judges to the political whims of the Chief Executive, and by forcing judges to share their power with nonjudges. *Id.*, at 15–35.

"When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Bowsher* v. *Synar*, 478 U. S., at 736 (opinion concurring in judgment). Although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches, we conclude, upon close inspection, that petitioner's fears for the fundamental structural protections of the Constitution prove, at least in this case, to be "more smoke than fire," and do not compel us to invalidate Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing.

A

Location of the Commission

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a

court and does not exercise judicial power. Rather, the Commission is an "independent" body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines. 28 U. S. C. § 991(a). Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation. Setting to one side, for the moment, the question whether the composition of the Sentencing Commission violates the separation of powers, we observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.

According to express provision of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." See *Muskrat* v. *United States*, 219 U. S. 346, 356 (1911). In implementing this limited grant of power, we have refused to issue advisory opinions or to resolve disputes that are not justiciable. See, *e. g.*, *Flast* v. *Cohen*, 392 U. S. 83 (1968); *United States* v. *Ferreira*, 13 How. 40 (1852). These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes "traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S., at 97; see also *United States Parole Comm'n* v. *Geraghty*, 445 U. S., at 396. As a general principle, we stated as recently as last Term that "'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'" *Morrison* v. *Olson*, 487 U. S., at 677, quoting *Buckley* v. *Valeo*, 424 U. S., at 123, citing in turn *United States* v. *Ferreira*, *supra*, and *Hayburn's Case*, 2 Dall. 409 (1792).

Nonetheless, we have recognized significant exceptions to this general rule and have approved the assumption of some nonadjudicatory activities by the Judicial Branch. In keeping with Justice Jackson's *Youngstown* admonition that the separation of powers contemplates the integration of dispersed powers into a workable Government, we have recognized the constitutionality of a "twilight area" in which the activities of the separate Branches merge. In his dissent in *Myers* v. *United States*, 272 U. S. 52 (1926), Justice Brandeis explained that the separation of powers "left to each [Branch] power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Id.*, at 291.

That judicial rulemaking, at least with respect to some subjects, falls within this twilight area is no longer an issue for dispute. None of our cases indicate that rulemaking *per se* is a function that may not be performed by an entity within the Judicial Branch, either because rulemaking is inherently nonjudicial or because it is a function exclusively committed to the Executive Branch.[14] On the contrary, we specifically

---

[14] Our recent cases cast no doubt on the continuing vitality of the view that rulemaking is not a function exclusively committed to the Executive Branch. Although in *INS* v. *Chadha*, 462 U. S. 919 (1983), we characterized rulemaking as "Executive action" not governed by the Presentment Clauses, we did so as part of our effort to distinguish the rulemaking of administrative agencies from "lawmaking" by Congress which is subject to the presentment requirements of Article I. *Id.*, at 953, n. 16. Plainly, this reference to rulemaking as an executive function was not intended to undermine our recognition in previous cases and in over 150 years of practice that rulemaking pursuant to a legislative delegation is not the exclusive prerogative of the Executive. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) (distinguishing between Federal Election Commission's exclusively executive enforcement power and its other powers, including rulemaking); see also *Humphrey's Executor* v. *United States*, 295 U. S. 602, 617 (1935). On the contrary, rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch.

More generally, it hardly can be argued in this case that Congress has impaired the functioning of the Executive Branch. In the field of sentenc-

have held that Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch. In *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941), we upheld a challenge to certain rules promulgated under the Rules Enabling Act of 1934, which conferred upon the Judiciary the power to promulgate federal rules of civil procedure. See 28 U. S. C. § 2072. We observed: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States." 312 U. S., at 9–10 (footnote omitted). This passage in *Sibbach* simply echoed what had been our view since *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825), decided more than a century earlier, where Chief Justice Marshall wrote for the Court that rulemaking power pertaining to the Judicial Branch may be "conferred on the judicial department." Discussing this delegation of rulemaking power, the Court found Congress authorized

> "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

---

ing, the Executive Branch never has exercised the kind of authority that Congress has vested in the Commission. Moreover, since Congress has empowered the President to appoint and remove Commission members, the President's relationship to the Commission is functionally no different from what it would have been had Congress not located the Commission in the Judicial Branch. Indeed, since the Act grants ex officio membership on the Commission to the Attorney General or his designee, 28 U. S. C. § 991(a), the Executive Branch's involvement in the Commission is greater than in other independent agencies, such as the Securities and Exchange Commission, not located in the Judicial Branch.

> "That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer." *Id.*, at 22.

See also *Hanna* v. *Plumer*, 380 U. S. 460 (1965). Pursuant to this power to delegate rulemaking authority to the Judicial Branch, Congress expressly has authorized this Court to establish rules for the conduct of its own business and to prescribe rules of procedure for lower federal courts in bankruptcy cases, in other civil cases, and in criminal cases, and to revise the Federal Rules of Evidence. See generally J. Weinstein, Reform of Court Rule-Making Procedures (1977).

Our approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch has been identical to our approach to judicial rulemaking: consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary. Following this approach, we specifically have upheld not only Congress' power to confer on the Judicial Branch the rulemaking authority contemplated in the various enabling Acts, but also to vest in judicial councils authority to "make 'all necessary orders for the effective and expeditious administration of the business of the courts.'" *Chandler* v. *Judicial Council*, 398 U. S. 74, 86, n. 7 (1970), quoting 28 U. S. C. § 332 (1970 ed.). Though not the subject of constitutional challenge, by established practice we have recognized Congress' power to create the Judicial Conference of the United States, the Rules Advisory Committees that it oversees, and the Administrative Office of the United States Courts whose myriad responsibilities

include the administration of the entire probation service.[15] These entities, some of which are comprised of judges, others of judges and nonjudges, still others of nonjudges only, do not exercise judicial power in the constitutional sense of deciding cases and controversies, but they share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary. Thus, although the judicial power of the United States is limited by express provision of Article III to "Cases" and "Controversies," we have never held, and have clearly disavowed in practice, that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are "necessary and proper . . . for carrying into execution all the judgments which the judicial department has power to pronounce." *Wayman* v. *Southard*, 10 Wheat., at 22.[16] Because of their

[15] The Judicial Conference of the United States is charged with "promot-[ing] uniformity of management procedures and the expeditious conduct of court business," in part by "a continuous study of the operation and effect of the general rules of practice and procedure," and recommending changes "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." 28 U. S. C. § 331 (1982 ed. and Supp. IV). Similarly, the Administrative Office of the United States Courts handles the administrative and personnel matters of the courts, matters essential to the effective and efficient operation of the judicial system. § 604 (1982 ed. and Supp. IV). Congress also has established the Federal Judicial Center which studies improvements in judicial administration. §§ 620–628 (1982 ed. and Supp. IV).

[16] We also have upheld Congress' power under the Appointments Clause to vest appointment power in the Judicial Branch, concluding that the power of appointment, though not judicial, was not "inconsistent as a functional matter with the courts' exercise of their Article III powers." *Morrison* v. *Olson*, 487 U. S. 654, 679, n. 16 (1988). See also *Ex parte Siebold*, 100 U. S. 371 (1880) (appointment power not incongruous to Judiciary). In *Morrison*, we noted that Article III courts perform a variety of functions not necessarily or directly connected to adversarial proceedings

close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch.

In light of this precedent and practice, we can discern no separation-of-powers impediment to the placement of the Sentencing Commission within the Judicial Branch. As we described at the outset, the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch. See, *e. g.*, *United States* v. *Addonizio*, 442 U. S., at 188–189. For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case. Indeed, the legislative history of the Act makes clear that Congress' decision to place the Commission within the Judicial Branch reflected Congress' "strong feeling" that sentencing has been and should remain "primarily a judicial function." Report, at 159. That Congress should vest such rulemaking in the Judicial Branch, far from being "incongruous" or vesting within the Judiciary responsibilities that more appropriately belong to another Branch, simply acknowledges the role that

---

in a trial or appellate court. Federal courts supervise grand juries and compel the testimony of witnesses before those juries, see *Brown* v. *United States*, 359 U. S. 41, 49 (1959), participate in the issuance of search warrants, see Fed. Rule Crim. Proc. 41, and review wiretap applications, see 18 U. S. C. §§ 2516, 2518 (1982 ed. and Supp. IV). In the interest of effectuating their judgments, federal courts also possess inherent authority to initiate a contempt proceeding and to appoint a private attorney to prosecute the contempt. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987). See also *In re Certain Complaints Under Investigation*, 783 F. 2d 1488, 1505 (CA11) (upholding statute authorizing judicial council to investigate improper conduct by federal judge), cert. denied *sub nom. Hastings* v. *Godbold*, 477 U. S. 904 (1986).

the Judiciary always has played, and continues to play, in sentencing.[17]

Given the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling Acts. Such guidelines, like the Federal Rules of Criminal and Civil Procedure, are court rules—rules, to paraphrase Chief Justice Marshall's language in *Wayman*, for carrying into execution judgments that the Judiciary has the power to pronounce. Just as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases. In other words, the Commission's functions, like this Court's function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch.

Petitioner nonetheless objects that the analogy between the Guidelines and the rules of procedure is flawed: Although the Judicial Branch may participate in rulemaking and administrative work that is "procedural" in nature, it may not assume, it is said, the "substantive" authority over sentencing

---

[17] Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch. Ronald L. Gainer, Acting Deputy Assistant Attorney General, Department of Justice, testified before the Senate to this very effect: "If guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function . . . ." Reform of the Federal Criminal Laws, Hearing on S. 1437 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., pt. 13, p. 9005 (1977).

policy that Congress has delegated to the Commission. Such substantive decisionmaking, petitioner contends, entangles the Judicial Branch in essentially political work of the other Branches and unites both judicial and legislative power in the Judicial Branch.

We agree with petitioner that the nature of the Commission's rulemaking power is not strictly analogous to this Court's rulemaking power under the enabling Acts. Although we are loath to enter the logical morass of distinguishing between substantive and procedural rules, see *Sun Oil Co.* v. *Wortman*, 486 U. S. 717 (1988) (distinction between substance and procedure depends on context), and although we have recognized that the Federal Rules of Civil Procedure regulate matters "falling within the uncertain area between substance and procedure, [and] are rationally capable of classification as either," *Hanna* v. *Plumer*, 380 U. S., at 472, we recognize that the task of promulgating rules regulating practice and pleading before federal courts does not involve the degree of political judgment integral to the Commission's formulation of sentencing guidelines.[18] To be sure, all rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action. Also, this Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.[19] Nonetheless, the degree of

---

[18] Under its mandate, the Commission must make judgments about the relative importance of such considerations as the "circumstances under which the offense was committed," the "community view of the gravity of the offense," and the "deterrent effect a particular sentence may have on the commission of the offense by others." 28 U. S. C. §§ 994(c)(2), (4), (6).

[19] Rule 23 of the Federal Rules of Civil Procedure, for example, has inspired a controversy over the philosophical, social, and economic merits and demerits of class actions. See Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664 (1979).

political judgment about crime and criminality exercised by the Commission and the scope of the substantive effects of its work does to some extent set its rulemaking powers apart from prior judicial rulemaking. Cf. *Miller* v. *Florida*, 482 U. S. 423 (1987) (state sentencing guidelines not procedural).

We do not believe, however, that the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch. Our separation-of-powers analysis does not turn on the labeling of an activity as "substantive" as opposed to "procedural," or "political" as opposed to "judicial." See *Bowsher* v. *Synar*, 478 U. S., at 749 ("[G]overnmental power cannot always be readily characterized with only one . . . labe[l]") (opinion concurring in judgment). Rather, our inquiry is focused on the "unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S., at 857. In this case, the "practical consequences" of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts.

First, although the Commission is located in the Judicial Branch, its powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis. Whatever constitutional problems might arise if the powers of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch. The Commission, on which members of the Judiciary may be a minority, is an independent agency in every relevant sense. In contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines

as it sees fit either within the 180-day waiting period, see § 235(a)(1)(B)(ii)(III) of the Act, 98 Stat. 2032, or at any time. In contrast to a court, the Commission's members are subject to the President's limited powers of removal. In contrast to a court, its rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act, 28 U. S. C. § 994(x). While we recognize the continuing vitality of Montesquieu's admonition: "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul,'" The Federalist No. 47, p. 326 (J. Cooke ed. 1961) (Madison), quoting Montesquieu, because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch.[20]

---

[20] We express no opinion about whether, under the principles of separation of powers, Congress may confer on a court rulemaking authority such as that exercised by the Sentencing Commission. Our precedents and customs draw no clear distinction between nonadjudicatory activity that may be undertaken by auxiliary bodies within the Judicial Branch, but not by courts. We note, however, that the constitutional calculus is different for considering nonadjudicatory activities performed by bodies that exercise judicial power and enjoy the constitutionally mandated autonomy of courts from what it is for considering the nonadjudicatory activities of independent nonadjudicatory agencies that Congress merely has located within the Judicial Branch pursuant to its powers under the Necessary and Proper Clause. We make no attempt here to define the nonadjudicatory duties that are appropriate for auxiliary bodies within the Judicial Branch, but not for courts. Nonetheless, it is clear to us that an independent agency located within the Judicial Branch may undertake without constitutional consequences policy judgments pursuant to a legitimate congressional delegation of authority that, if undertaken by a court, might be incongruous to or destructive of the central adjudicatory mission of the Branch. See *United States* v. *Ferreira*, 13 How. 40 (1852). In this sense, the issue we face here is different from the issue we faced in *Morrison* v. *Olson*, 487 U. S. 654 (1988), where we considered the constitutionality of the nonadjudicatory functions assigned to the "Special Division" court created by the Ethics in Government Act of 1978, 28 U. S. C. §§ 49, 591 *et seq.* (1982 ed. and Supp. IV), or the issue we faced in *Hayburn's Case*, 2 Dall. 409

Second, although the Commission wields rulemaking power and not the adjudicatory power exercised by individual judges when passing sentence, the placement of the Sentencing Commission in the Judicial Branch has not increased the Branch's authority. Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations. Accordingly, in placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the authority of that Branch or to have deprived the Executive Branch of a power it once possessed. Indeed, because the Guidelines have the effect of promoting sentencing within a narrower range than was previously applied, the power of the Judicial Branch is, if anything, somewhat diminished by the Act. And, since Congress did not unconstitutionally delegate its own authority, the Act does not unconstitutionally diminish Congress' authority. Thus, although Congress has authorized the Commission to exercise a greater degree of political judgment than has been exercised in the past by any one entity within the Judicial Branch, in the unique context of sentencing, this authorization does nothing to upset the balance of power among the Branches.

What Mistretta's argument comes down to, then, is not that the substantive responsibilities of the Commission aggrandize the Judicial Branch, but that that Branch is inevitably weakened by its participation in policymaking. We do not believe, however, that the placement within the Judicial

---

(1792), and in *Ferreira*, in which Article III courts were asked to render judgments that were reviewable by an executive officer.

Branch of an independent agency charged with the promulgation of sentencing guidelines can possibly be construed as preventing the Judicial Branch "from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S., at 443. Despite the substantive nature of its work, the Commission is not incongruous or inappropriate to the Branch. As already noted, sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment. What we said in *Morrison* when upholding the power of the Special Division to appoint independent counsel applies with even greater force here: "This is not a case in which judges are given power . . . in an area in which they have no special knowledge or expertise." 487 U. S., at 676, n. 13. On the contrary, Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise.

Nor do the Guidelines, though substantive, involve a degree of political authority inappropriate for a nonpolitical Branch. Although the Guidelines are intended to have substantive effects on public behavior (as do the rules of procedure), they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress. Given their limited reach, the special role of the Judicial Branch in the field of sentencing, and the fact that the Guidelines are promulgated by an independent agency and not a court, it follows that as a matter of "practical consequences" the location of the Sentencing Commission within the Judicial Branch simply leaves with the Judiciary what long has belonged to it.

In sum, since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains ap-

propriate to that Branch, Congress' considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch does not violate the principle of separation of powers.

B

Composition of the Commission

We now turn to petitioner's claim that Congress' decision to require at least three federal judges to serve on the Commission and to require those judges to share their authority with nonjudges undermines the integrity of the Judicial Branch.

The Act provides in part: "At least three of [the Commission's] members shall be Federal judges selected [by the President] after considering a list of six judges recommended to the President by the Judicial Conference of the United States." 28 U. S. C. § 991(a). Petitioner urges us to strike down the Act on the ground that its requirement of judicial participation on the Commission unconstitutionally conscripts individual federal judges for political service and thereby undermines the essential impartiality of the Judicial Branch. We find Congress' requirement of judicial service somewhat troublesome, but we do not believe that the Act impermissibly interferes with the functioning of the Judiciary.

The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act. The Constitution does include an Incompatibility Clause applicable to national legislators:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a

Member of either House during his Continuance in Office." U. S. Const., Art. I, § 6, cl. 2.

No comparable restriction applies to judges, and we find it at least inferentially meaningful that at the Constitutional Convention two prohibitions against plural officeholding by members of the Judiciary were proposed, but did not reach the floor of the Convention for a vote.[21]

Our inferential reading that the Constitution does not prohibit Article III judges from undertaking extrajudicial duties finds support in the historical practice of the Founders after ratification. Our early history indicates that the Framers themselves did not read the Constitution as forbidding extrajudicial service by federal judges. The first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England, where he negotiated the treaty that bears his name. Oliver Ellsworth served simultaneously as

[21] One such prohibition appeared in the New Jersey Plan's judiciary provision, see 1 M. Farrand, The Records of the Federal Convention of 1787, p. 244 (1911); the other, proposed by Charles Pinckney, a delegate from South Carolina, was not reported out of the Committee on Detail to which he submitted it, see 2 *id.*, at 341–342. See also Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 S. Ct. Rev. 123. Concededly, it is also true that the delegates at the Convention rejected two proposals that would have institutionalized extrajudicial service. Despite support from Madison, the Framers rejected a proposed "Council of Revision," comprised of, among others, a "convenient number of the National Judiciary," 1 Farrand, *supra*, at 21, that would have exercised veto power over proposed legislation. Similarly, the Framers rejected a proposed "Council of State," of which the Chief Justice was to be a member, that would have acted as adviser to the President in a fashion similar to the modern cabinet. See Lerner, The Supreme Court as Republican Schoolmaster, 1967 S. Ct. Rev. 127, 174–177. At least one commentator has observed that a number of the opponents of the Council of Revision and the Council of State believed that judges individually could assume extrajudicial service. Wheeler, *supra*, at 127–130. We do not pretend to discern a clear intent on the part of the Framers with respect to this issue, but glean from the Constitution and the events at the Convention simply an inference that the Framers did not intend to forbid judges to hold extrajudicial positions. See *United States* v. *Nixon*, 418 U. S. 683, 705–706, n. 16 (1974).

Chief Justice and as Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt.

All these appointments were made by the President with the "Advice and Consent" of the Senate. Thus, at a minimum, both the Executive and Legislative Branches acquiesced in the assumption of extrajudicial duties by judges. In addition, although the records of Congress contain no reference to the confirmation debate, Charles Warren, in his history of this Court, reports that the Senate specifically rejected by a vote of 18 to 8 a resolution proposed during the debate over Jay's nomination to the effect that such extrajudicial service was "contrary to the spirit of the Constitution." 1 C. Warren, The Supreme Court in United States History 119 (rev. ed. 1937). This contemporaneous practice by the Founders themselves is significant evidence that the constitutional principle of separation of powers does not absolutely prohibit extrajudicial service. See *Bowsher* v. *Synar*, 478 U. S., at 723–724 (actions by Members of the First Congress provide contemporaneous and weighty evidence about the meaning of the Constitution).[22]

---

[22] It would be naive history, however, to suggest that the Framers, including the Justices who accepted extrajudicial service, were of one mind on the issue or believed that such service was in all cases appropriate and constitutional. Chief Justice Jay, in draft correspondence to President Washington, explained that he was "far from thinking it illegal or unconstitutional," for the Executive to use individual judges for extrajudicial service so long as the extrajudicial service was "consistent and compatible" with "the judicial function." Draft of a letter by Jay, intended for President Washington, enclosed with a letter dated September 15, 1790, from Jay to Justice Iredell, reproduced in 2 G. McRee, Life and Correspondence of James Iredell 293, 294 (1949). Chief Justice Marshall stepped down from his post as Secretary of State when appointed to the bench, agreeing to stay on only until a replacement could be found. Chief Justice Ellsworth accepted his posting to France with reluctance and his appointment was unsuccessfully opposed on constitutional grounds by Jefferson, Madison, and Pinckney. But that some judges have turned down extrajudicial

Subsequent history, moreover, reveals a frequent and continuing, albeit controversial, practice of extrajudicial service.[23] In 1877, five Justices served on the Election Commission that resolved the hotly contested Presidential election of 1876, where Samuel J. Tilden and Rutherford B. Hayes were the contenders. Justices Nelson, Fuller, Brewer, Hughes, Day, Roberts, and Van Devanter served on various arbitral commissions. Justice Roberts was a member of the commission organized to investigate the attack on Pearl Harbor. Justice Jackson was one of the prosecutors at the Nuremberg trials; and Chief Justice Warren presided over the commission investigating the assassination of President Kennedy.[24] Such service has been no less a practice among lower court federal judges.[25] While these extrajudicial activities spawned spir-

---

service or have expressed reservations about the practice, see Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193 (1953), does not detract from the fact that judges have continued to assume extrajudicial duties, and efforts to curb the practice as contrary to the letter or spirit of the Constitution have not succeeded. But see Note, The Constitutional Infirmities of the United States Sentencing Commission, 96 Yale L. J. 1363, 1381–1385 (1987).

[23] Compendia of extrajudicial activities may be found in several sources. See Mason, *supra;* McKay, The Judiciary and Nonjudicial Activities, 35 Law & Contemp. Prob. 9 (1970); Slonim, Extrajudicial Activities and the Principle of the Separation of Powers, 49 Conn. B. J. 391 (1975). See also *In re President's Comm'n on Organized Crime*, 783 F. 2d 370 (CA3 1986).

[24] Article III judges, and the Chief Justice in particular, also have served and continue to serve on numerous cultural commissions. The Chief Justice by statute is a member of the Board of Regents of the Smithsonian Institution, Rev. Stat. § 5580, as amended, 20 U. S. C. § 42, and a trustee of the National Gallery of Art, 50 Stat. 52, 20 U. S. C. § 72(a). Four Justices, pursuant to 44 U. S. C. § 2501, have served successively as the judiciary member of the National Historical Publications and Records Commission. And Chief Justice Burger began his service as Chairman of the Commission on the Bicentennial of the United States Constitution before he assumed retirement status. See Pub. L. 98–101, 97 Stat. 719.

[25] For example, Judges A. Leon Higginbotham, Jr., James B. Parsons, Luther W. Youngdahl, George C. Edwards, Jr., James M. Carter, and

ited discussion and frequent criticism, and although some of the judges who undertook these duties sometimes did so with reservation and may have looked back on their service with regret, "traditional ways of conducting government . . . give meaning" to the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S., at 610 (concurring opinion). Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.[26]

Thomas J. MacBride, and others, have served on various Presidential and national commissions. See Brief for United States 48, n. 40.

[26] Extrajudicial activity has been the subject of extensive testimony in Congress from federal judges, academics, legislators, and members of the legal community. See Nonjudicial Activities of Supreme Court Justices and other Federal Judges, Hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969). Although many participants were critical of extrajudicial service, the testimony shed little light on what types of service were not merely unwise, but unconstitutional.

Perhaps the most interesting lament on the subject comes from Chief Justice Warren reflecting on his initial refusal to participate in the commission looking into President Kennedy's death:

"First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court serve on a presidential commission; second, it would distract a Justice from the work of the Court, which had a heavy docket; and, third, it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases. I then told them that, historically, the acceptance of diplomatic posts by Chief Justices Jay and Ellsworth had not contributed to the welfare of the Court, that the service of five Justices on the Hayes-Tilden Commission had demeaned it, that the appointment of Justice Roberts as chairman to investigate the Pearl Harbor disaster had served no good purpose, and that the action of Justice Robert Jackson in leaving Court for a year to become chief prosecutor at Nürnberg after World War II had resulted in divisiveness and internal bitterness on the Court." E. Warren, The Memoirs of Earl Warren 356 (1977).

Despite his initial reservations, the Chief Justice served as Chairman of the commission and endured criticism for so doing.

Furthermore, although we have not specifically addressed the constitutionality of extrajudicial service, two of our precedents reflect at least an early understanding by this Court that the Constitution does not preclude judges from assuming extrajudicial duties in their individual capacities. In *Hayburn's Case*, 2 Dall. 409 (1792), the Court considered a request for a writ of mandamus ordering a Circuit Court to execute a statute empowering federal and state courts to set pensions for disabled Revolutionary War veterans. The statute authorized the courts to determine monthly disability payments, but it made those determinations reviewable by the Secretary of War. Because Congress by an amendment of the statute rendered the case moot, the Court did not pass on the constitutional issue. Mr. Dallas, in reporting the case, included in the margin three Circuit Court rulings on the statute. All three concluded that the powers conferred could not be performed by an Article III court. The "judicial Power" of the United States did not extend to duties more properly performed by the Executive. See *Morrison* v. *Olson*, 487 U. S., at 677–678, n. 15 (characterizing *Hayburn's Case*). As this Court later observed in *United States* v. *Ferreira*, 13 How. 40 (1852), however, the New York Circuit, in 1791, with a bench consisting of Chief Justice Jay, Justice Cushing, and District Judge Duane, believed that individual judges acting not in their judicial capacities but as individual commissioners could exercise the duties conferred upon them by the statute. Neither of the other two courts expressed a definitive view whether judges acting as commissioners could make disability determinations reviewable by the Secretary of War. In *Ferreira*, however, this Court concluded that although the Circuit Courts were not fully in agreement as to whether the statute could be construed as conferring the duties on the judges as commissioners, if the statute was subject to that construction "there seems to have been no doubt,

at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions." *Id.*, at 50.

Ferreira itself concerned a statute authorizing a Federal District Court in Florida to adjudicate claims for losses for which the United States was responsible under the 1819 treaty by which Spain ceded Florida to the United States. As in *Hayburn's Case*, the court's determination was to be reported to an executive officer, the Secretary of the Treasury, who would exercise final judgment as to whether the claims should be paid. 13 How., at 45–47. This Court recognized that the powers conferred on the District Court were "judicial in their nature," in the sense that they called for "judgment and discretion." *Id.*, at 48. Nonetheless, we concluded that those powers were not "judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States." *Ibid.* Because the District Court's decision was not an exercise of judicial power, this Court found itself without jurisdiction to hear the appeal. *Id.*, at 51–52.

We did not conclude in *Ferreira*, however, that Congress could not confer on a federal judge the function of resolving administrative claims. On the contrary, we expressed general agreement with the view of some of the judges in *Hayburn's Case* that while such administrative duties could not be assigned to a court, or to judges acting as part of a court, such duties could be assigned to judges acting individually as commissioners. Although we did not decide the question, we expressed reservation about whether the District Judge in Florida could act legitimately as a commissioner since he was not appointed as such by the President pursuant to his Article II power to appoint officers of the United States. 13 How., at 51. In sum, *Ferreira*, like *Hayburn's Case*, suggests that Congress may authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers.

Accord, *United States* v. *Yale Todd* (1794) (unreported decision discussed in the margin of the opinion in *Ferreira*, 13 How., at 52–53).

In light of the foregoing history and precedent, we conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions such as that created by the Act. The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation. Just as the nonjudicial members of the Commission act as administrators, bringing their experience and wisdom to bear on the problems of sentencing disparity, so too the judges, uniquely qualified on the subject of sentencing, assume a wholly administrative role upon entering into the deliberations of the Commission. In other words, the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.

This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.[27]

---

[27] The effect of extrajudicial service on the functioning of the Judicial Branch is not solely a constitutional concern. The Code of Conduct for United States Judges, approved by the Judicial Conference of the United

With respect to the Sentencing Commission, we understand petitioner to argue that the service required of at least three judges presents two distinct threats to the integrity of the Judicial Branch. Regardless of constitutionality, this mandatory service, it is said, diminishes the independence of the Judiciary. See Brief for Petitioner 28. It is further claimed that the participation of judges on the Commission improperly lends judicial prestige and an aura of judicial impartiality to the Commission's political work. The involvement of Article III judges in the process of policymaking, petitioner asserts, "'[w]eakens confidence in the disinterestedness of the judicatory functions.'" *Ibid.*, quoting F. Frankfurter, Advisory Opinions, in 1 Encyclopedia of the Social Sciences 475, 478 (1930).

In our view, petitioner significantly overstates the mandatory nature of Congress' directive that at least three members of the Commission shall be federal judges, as well as the effect of this service on the practical operation of the Judicial Branch. Service on the Commission by any particular judge is voluntary. The Act does not conscript judges for the Commission. No Commission member to date has been appointed without his consent and we have no reason to believe that the Act confers upon the President any authority to

---

States, is intended to ensure that a judge does not accept extrajudicial service incompatible with the performance of judicial duties or that might compromise the integrity of the Branch as a whole. Canon 5(G) provides:

"A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary . . . ." Administrative Office of U. S. Courts, Code of Judicial Conduct for United States Judges (1987).

force a judge to serve on the Commission against his will.[28] Accordingly, we simply do not face the question whether Congress may require a particular judge to undertake the extrajudicial duty of serving on the Commission. In *Chandler* v. *Judicial Council*, 398 U. S. 74 (1970), we found "no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies," authority to administer "'the business of the courts within [each] circuit.'" *Id.*, at 86, n. 7, quoting 28 U. S. C. § 332 (1970 ed.).[29] Indeed, Congress has created numerous nonadjudicatory bodies, such as the Judicial Conference, that are composed entirely, or in part, of federal judges. See 28 U. S. C. §§ 331, 332; see generally Meador, The Federal Judiciary and Its Future Administration, 65 Va. L. Rev. 1031 (1979). Accordingly, absent a more specific threat to judicial independence, the fact that Congress has included federal judges on the Commission does not itself threaten the integrity of the Judicial Branch.

Moreover, we cannot see how the service of federal judges on the Commission will have a constitutionally significant practical effect on the operation of the Judicial Branch. We see no reason why service on the Commission should result in widespread judicial recusals. That federal judges partici-

---

[28] Certainly nothing in the Act creates any coercive power over members of the Judicial Branch and we construe the statute as affording none. "[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities, see, *e. g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986)." *Morrison* v. *Olson*, 487 U. S., at 682.

[29] Notably, the statutory provision creating the Judicial Councils of the Circuits that we found constitutionally unobjectionable in *Chandler* requires the Chief Judge of each Court of Appeals to preside over his Circuit's Judicial Council. 28 U. S. C. § 332. The statutory provision creating the Judicial Conference of the United States also requires the service of the Chief Judge of each Court of Appeals. 28 U. S. C. § 331 (1982 ed. and Supp. IV). Thus, we have given at least tacit approval to this degree of congressionally mandated judicial service on nonadjudicatory bodies.

pate in the promulgation of guidelines does not affect their or other judges' ability impartially to adjudicate sentencing issues. Cf. *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1946) (that this Court promulgated the Federal Rules of Civil Procedure did not foreclose its consideration of challenges to their validity). While in the abstract a proliferation of commissions with congressionally mandated judiciary participation might threaten judicial independence by exhausting the resources of the Judicial Branch, that danger is far too remote for consideration here.

We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Although it is a judgment that is not without difficulty, we conclude that the participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch. We are drawn to this conclusion by one paramount consideration: that the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch. In our view, this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law.

Rather, judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission.

Justice Jackson underscored in *Youngstown* that the Constitution anticipates "reciprocity" among the Branches. 343 U. S., at 635. As part of that reciprocity and as part of the integration of dispersed powers into a workable government, Congress may enlist the assistance of judges in the creation of rules to govern the Judicial Branch. Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest. While we have some reservation that Congress required such a dialogue in this case, the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of the judicial function and where purposes of the Commission are not inherently partisan, such enlistment is not coercion or co-optation, but merely assurance of judicial participation.

Finally, we reject petitioner's argument that the mixed nature of the Commission violates the Constitution by requiring Article III judges to share judicial power with nonjudges. As noted earlier, the Commission is not a court and exercises no judicial power. Thus, the Act does not vest Article III power in nonjudges or require Article III judges to share their power with nonjudges.

C

Presidential Control

The Act empowers the President to appoint all seven members of the Commission with the advice and consent of the Senate. The Act further provides that the President shall make his choice of judicial appointees to the Commission after considering a list of six judges recommended by the Ju-

dicial Conference of the United States. The Act also grants the President authority to remove members of the Commission, although "only for neglect of duty or malfeasance in office or for other good cause shown." 28 U. S. C. § 991(a).

Mistretta argues that this power of Presidential appointment and removal prevents the Judicial Branch from performing its constitutionally assigned functions.[30] See *Nixon* v. *Administrator of General Services*, 433 U. S., at 443. Although we agree with petitioner that the independence of the Judicial Branch must be "jealously guarded" against outside interference, see *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U. S., at 60, and that, as Madison admonished at the founding, "neither of [the Branches] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers," The Federalist No. 48, p. 332 (J. Cooke ed. 1961), we do not believe that the President's appointment and removal powers over the Commission afford him influence over the functions of the Judicial Branch or undue sway over its members.

The notion that the President's power to appoint federal judges to the Commission somehow gives him influence over the Judicial Branch or prevents, even potentially, the Judicial Branch from performing its constitutionally assigned functions is fanciful. We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions. The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. Were the impartiality of the Judi-

---

[30] Petitioner does not raise the issue central to our most recent opinions discussing removal power, namely, whether Congress unconstitutionally has limited the President's authority to remove officials engaged in executive functions or has reserved for itself excessive removal power over such officials. See *Morrison* v. *Olson*, 487 U. S. 654 (1988); *Bowsher* v. *Synar*, 478 U. S. 714 (1986).

cial Branch so easily subverted, our constitutional system of tripartite Government would have failed long ago. We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission.[31]

The President's removal power over Commission members poses a similarly negligible threat to judicial independence. The Act does not, and could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges, as judges. Even if removed from the Commission, a federal judge appointed to the Commission would continue, absent impeachment, to enjoy tenure "during good Behaviour" and a full judicial salary. U. S. Const., Art. III, § 1.[32] Also, the President's removal power under the Act is limited. In order to safeguard the independence of the Commission from executive control, Congress specified in the Act that the President may remove the Commission members only for good cause.[33] Such con-

[31] Moreover, as has been noted, the Act limits the President's power to use his appointments to the Commission for political purposes by explicitly requiring that he consider a list of six judges submitted by the Judicial Conference before making his selections. Senator Hart explained that this provision provided "greater assurance that a broad range of interests will be represented." 124 Cong. Rec. 378 (1978).

[32] The textual requirements of Article III that judges shall enjoy tenure and be paid an irreducible compensation "were incorporated into the Constitution to ensure the independence of the Judiciary from control of the Executive and Legislative Branches of government." *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 59 (1982). These inviolable guarantees are untrammeled by the Act. Concededly, since Commission members receive a salary equal to that of a court of appeals judge, 28 U. S. C. § 992(c), district court judges appointed to the Commission receive an increase in salary. We do not address the hypothetical constitutional question whether, under the Compensation Clause of Article III, a district judge removed from the Commission must continue to be paid the higher salary.

[33] This removal provision is precisely the kind that was at issue in *Humphrey's Executor* v. *United States* where we wrote: "The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require

gressional limitation on the President's removal power, like the removal provisions upheld in *Morrison* v. *Olson*, 487 U. S. 654 (1988), and *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), is specifically crafted to prevent the President from exercising "coercive influence" over independent agencies. See *Morrison*, 487 U. S., at 688; *Humphrey's Executor*, 295 U. S., at 630.

In other words, since the President has no power to affect the tenure or compensation of Article III judges, even if the Act authorized him to remove judges from the Commission at will, he would have no power to coerce the judges in the exercise of their judicial duties.[34] In any case, Congress did not grant the President unfettered authority to remove Commission members. Instead, precisely to ensure that they would not be subject to coercion even in the exercise of their nonjudicial duties, Congress insulated the members from Presidential removal except for good cause. Under these circumstances, we see no risk that the President's limited removal power will compromise the impartiality of Article III judges serving on the Commission and, consequently, no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies.[35]

---

them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which [commissioners] shall continue in office, and to forbid their removal except for cause in the meantime." 295 U. S., at 629.

[34] Although removal from the Sentencing Commission conceivably could involve some embarrassment or even damage to reputation, each judge made potentially subject to these injuries will have undertaken the risk voluntarily by accepting the President's appointment to serve.

[35] *Bowsher* v. *Synar*, 478 U. S. 714 (1986), is not to the contrary. In *Bowsher*, we held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.*, at 726. To permit Congress to remove an officer performing executive functions whenever Congress might find the performance of his duties unsatisfactory would, in essence, give Congress

V

We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.

The judgment of United States District Court for the Western District of Missouri is affirmed.

It is so ordered.

---

veto power over executive action. In light of the special danger recognized by the Founders of congressional usurpation of Executive Branch functions, "[t]his kind of congressional control over the execution of the laws . . . is constitutionally impermissible." *Id.*, at 726–727.

Nothing in *Bowsher*, however, suggests that one Branch may never exercise removal power, however limited, over members of another Branch. Indeed, we already have recognized that the President may remove a judge who serves on an Article I court. *McAllister* v. *United States*, 141 U. S. 174, 185 (1891). In any event, we hold here no more than that Congress may vest in the President the power to remove for good cause an Article III judge from a nonadjudicatory independent agency placed within the Judicial Branch. Because an Article III judge serving on a nonadjudicatory commission is not exercising judicial power, and because such limited removal power gives the President no control over judicatory functions, interbranch removal authority under these limited circumstances poses no threat to the balance of power among the Branches. Our paramount concern in *Bowsher* that Congress was accreting to itself the power to control the functions of another Branch is not implicated by a removal provision, like the one at issue here, which provides no control in one Branch over the constitutionally assigned mission of another Branch.

JUSTICE SCALIA, dissenting.

While the products of the Sentencing Commission's labors have been given the modest name "Guidelines," see 28 U. S. C. § 994(a)(1) (1982 ed., Supp. IV); United States Sentencing Commission Guidelines Manual (June 15, 1988), they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed, 18 U. S. C. § 3742 (1982 ed., Supp. IV). I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.

I

There is no doubt that the Sentencing Commission has established significant, legally binding prescriptions governing application of governmental power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment.[1] Statutorily permissible sentences for particular crimes cover as broad a range as zero years to life, see, *e. g.*, 18 U. S. C. § 1201 (1982 ed. and Supp. IV) (kidnaping), and within those ranges the Commission was given broad discretion to prescribe the "correct" sentence, 28 U. S. C. § 994(b)(2) (1982 ed., Supp. IV). Average prior sentences were to be a starting point for the Commission's inquiry, § 994(m), but it could and regularly did deviate from those averages as it thought appropriate. It chose, for example, to prescribe substantial increases over average prior sentences for white-collar crimes such as public corruption, antitrust violations, and tax evasion. Guidelines,

[1] It is even arguable that the Commission has authority to establish guidelines and procedures for imposing the death penalty, thus reinstituting that sanction under federal statutes for which (by reason of our recent decisions) it has been thought unusable because of constitutionally inadequate procedures. The Justice Department believes such authority exists, and has encouraged the Commission to exercise it. See *Gubiensio-Ortiz* v. *Kanahele*, 857 F. 2d 1245, 1256 (CA9 1988).

at 2.31, 2.133, 2.140. For antitrust violations, before the Guidelines, only 39% of those convicted served any imprisonment, and the average imprisonment was only 45 days, *id.*, at 2.133, whereas the Guidelines prescribe base sentences (for defendants with no prior criminal conviction) ranging from 2-to-8 months to 10-to-16 months, depending upon the volume of commerce involved. See *id.*, at 2.131, 5.2.

The Commission also determined when probation was permissible, imposing a strict system of controls because of its judgment that probation had been used for an "inappropriately high percentage of offenders guilty of certain economic crimes." *Id.*, at 1.8. Moreover, the Commission had free rein in determining whether statutorily authorized fines should be imposed in addition to imprisonment, and if so, in what amounts. It ultimately decided that every nonindigent offender should pay a fine according to a schedule devised by the Commission. *Id.*, at 5.18. Congress also gave the Commission discretion to determine whether 7 specified characteristics of offenses, and 11 specified characteristics of offenders, "have any relevance," and should be included among the factors varying the sentence. 28 U. S. C. §§ 994(c), (d) (1982 ed., Supp. IV). Of the latter, it included only three among the factors required to be considered, and declared the remainder not ordinarily relevant. Guidelines, at 5.29–5.31.

It should be apparent from the above that the decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments. This fact is sharply reflected in the Commission's product, as described by the dissenting Commissioner:

> "Under the guidelines, the judge could give the same sentence for abusive sexual contact that puts the child in fear as for unlawfully entering or remaining in the United States. Similarly, the guidelines permit equivalent sentences for the following pairs of offenses: drug

trafficking and a violation of the Wild Free-Roaming Horses and Burros Act; arson with a destructive device and failure to surrender a cancelled naturalization certificate; operation of a common carrier under the influence of drugs that causes injury and alteration of one motor vehicle identification number; illegal trafficking in explosives and trespass; interference with a flight attendant and unlawful conduct relating to contraband cigarettes; aggravated assault and smuggling $11,000 worth of fish." Dissenting View of Commissioner Paul H. Robinson on the Promulgation of the Sentencing Guidelines by the United States Sentencing Commission 6–7 (May 1, 1987) (citations omitted).

Petitioner's most fundamental and far-reaching challenge to the Commission is that Congress' commitment of such broad policy responsibility to any institution is an unconstitutional delegation of legislative power. It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. As Chief Justice Taft expressed the point for the Court in the landmark case of *J. W. Hampton, Jr., & Co.* v. *United*

States, 276 U. S. 394, 406 (1928), the limits of delegation "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political—including, for example, whether the Nation is at war, see *Yakus* v. *United States*, 321 U. S. 414 (1944), or whether for other reasons "emergency is instinct in the situation," *Amalgamated Meat Cutters and Butcher Workmen of North America* v. *Connally*, 337 F. Supp. 737, 752 (DC 1971) (three-judge court)—it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard? See, *e. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–217 (1943); *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25 (1932).

In short, I fully agree with the Court's rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission.

II

Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in

preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a "restraint of trade," see *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 (1911), or to adopt rules of procedure, see *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 22 (1941), or to prescribe by rule the manner in which their officers shall execute their judgments, *Wayman* v. *Southard*, 10 Wheat. 1, 45 (1825), because that "lawmaking" was ancillary to their exercise of judicial powers. And the Executive could be given the power to adopt policies and rules specifying in detail what radio and television licenses will be in the "public interest, convenience or necessity," because that was ancillary to the exercise of its executive powers in granting and policing licenses and making a "fair and equitable allocation" of the electromagnetic spectrum. See *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933).[2] Or to take examples closer to the case before us: Trial judges could be given the power to determine

[2] An executive agency can, of course, be created with no power other than the making of rules, as long as that agency is subject to the control of the President and the President has executive authority related to the rulemaking. In such circumstances, the rulemaking is ultimately ancillary to the President's executive powers.

what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. And the President, through the Parole Commission subject to his appointment and removal, could be given the power to issue Guidelines specifying when parole would be available, because that was ancillary to the President's exercise of the executive power to hold and release federal prisoners. See 18 U. S. C. §§ 4203(a)(1) and (b); 28 CFR § 2.20 (1988).

As Justice Harlan wrote for the Court in *Field* v. *Clark*, 143 U. S. 649 (1892):

> "'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'" *Id.*, at 693–694 (emphasis added), quoting *Cincinnati, W. & Z. R. Co.* v. *Commissioners of Clinton County*, 1 Ohio St. 77, 88–89 (1852).
>
> "'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining *whether the proper occasion exists for executing them.* But it cannot be said that the exercise of such discretion is the making of the law.'" *Id.*, at 694 (emphasis added), quoting *Moers* v. *Reading*, 21 Pa. 188, 202 (1853).

In *United States* v. *Grimaud*, 220 U. S. 506, 517 (1911), which upheld a statutory grant of authority to the Secretary of Agriculture to make rules and regulations governing use of the public forests he was charged with managing, the Court said:

> "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, *but for administering the laws which did govern.* None of these statutes could confer legislative power." (Emphasis added.)

Or, finally, as Chief Justice Taft described it in *Hampton & Co.*, 276 U. S., at 406:

> "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute *and directing the details of its execution*, even to the extent of providing for penalizing a breach of such regulations." (Emphasis added.)

The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount to* a delegation of legislative powers. I say "so-called excessive delegation" because although that convenient terminology is often used, what is really at issue is whether there has been *any* delegation of legislative power, which occurs (rarely) when Congress authorizes the exercise of executive or judicial power without adequate standards. Strictly speaking, there is *no* acceptable delegation of legislative power. As John Locke put it almost 300 years ago, "[t]he power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *leg-*

islative can have no power to transfer their authority of making laws, and place it in other hands." J. Locke, Second Treatise of Government 87 (R. Cox ed. 1982) (emphasis added). Or as we have less epigrammatically said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, *supra*, at 692. In the present case, however, a pure delegation of legislative power is precisely what we have before us. It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation.

The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law. It is divorced from responsibility for execution of the law not only because the Commission is not said to be "located in the Executive Branch" (as I shall discuss presently, I doubt whether Congress can "locate" an entity within one Branch or another for constitutional purposes by merely saying so); but, more importantly, because the Commission neither exercises any executive power on its own, nor is subject to the control of the President who does. The only functions it performs, apart from prescribing the law, 28 U. S. C. §§ 994(a)(1), (3) (1982 ed., Supp. IV), conducting the investigations useful and necessary for prescribing the law, *e. g.*, §§ 995(a)(13), (15), (16), (21), and clarifying the intended application of the law that it prescribes, *e. g.*, §§ 994(a)(2), 995(a)(10), are data collection and intragovernmental advice giving and education, *e. g.*, §§ 995(a)(8), (9), (12), (17), (18), (20). These latter activities—similar to functions performed by congressional agencies and even congressional staff—neither determine nor affect private rights, and do not constitute an exercise of governmental power. See *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628 (1935). And the Commis-

sion's lawmaking is completely divorced from the exercise of judicial powers since, not being a court, it has no judicial powers itself, nor is it subject to the control of any other body with judicial powers. The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if Congress gave the same power of writing sentencing laws to a congressional agency such as the General Accounting Office, or to members of its staff.

The delegation of lawmaking authority to the Commission is, in short, unsupported by any legitimating theory to explain why it is not a delegation of legislative power. To disregard structural legitimacy is wrong in itself—but since structure has purpose, the disregard also has adverse practical consequences. In this case, as suggested earlier, the consequence is to facilitate and encourage judicially uncontrollable delegation. Until our decision last Term in *Morrison* v. *Olson*, 487 U. S. 654 (1988), it could have been said that Congress could delegate lawmaking authority only at the expense of increasing the power of either the President or the courts. Most often, as a practical matter, it would be the President, since the judicial process is unable to conduct the investigations and make the political assessments essential for most policymaking. Thus, the need for delegation would have to be important enough to induce Congress to aggrandize its primary competitor for political power, and the recipient of the policymaking authority, while not Congress itself, would at least be politically accountable. But even after it has been accepted, pursuant to *Morrison*, that those exercising executive power need not be subject to the control of the President, Congress would still be more reluctant to augment the power of even an independent executive agency than to create an otherwise powerless repository for its delegation. Moreover, assembling the full-time senior personnel for an agency exercising executive powers is more difficult than borrowing other officials (or employing new officers on a

short-term basis) to head an organization such as the Sentencing Commission.

By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.

III

The strange character of the body that the Court today approves, and its incompatibility with our constitutional institutions, is apparent from that portion of the Court's opinion entitled "Location of the Commission." This accepts at the outset that the Commission is a "body within the Judicial Branch," *ante*, at 385, and rests some of its analysis upon that asserted reality. Separation-of-powers problems are dismissed, however, on the ground that "[the Commission's] powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis," since the Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch," *ante*, at 393. In light of the latter concession, I am at a loss to understand why the Commission is "within the Judicial Branch" in any sense that has relevance to today's discussion. I am sure that Congress can

divide up the Government any way it wishes, and employ whatever terminology it desires, for *non*constitutional purposes—for example, perhaps the statutory designation that the Commission is "within the Judicial Branch" places it outside the coverage of certain laws which say they are inapplicable to that Branch, such as the Freedom of Information Act, see 5 U. S. C. § 552(f) (1982 ed., Supp. IV). For such statutory purposes, Congress can define the term as it pleases. But since our subject here is the Constitution, to admit that that congressional designation "has [no] meaning for separation-of-powers analysis" is to admit that the Court must therefore decide for itself where the Commission *is* located for purposes of separation-of-powers analysis.

It would seem logical to decide the question of which Branch an agency belongs to on the basis of who controls its actions: If Congress, the Legislative Branch; if the President, the Executive Branch; if the courts (or perhaps the judges), the Judicial Branch. See, *e. g.*, *Bowsher* v. *Synar*, 478 U. S. 714, 727–732 (1986). In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1986), we approved the concept of an agency that was controlled by (and thus within) none of the Branches. We seem to have assumed, however, that that agency (the old Federal Trade Commission, before it acquired many of its current functions) exercised no governmental power whatever, but merely assisted Congress and the courts in the performance of their functions. See *id.*, at 628. Where no governmental power is at issue, there is no strict constitutional impediment to a "branchless" agency, since it is only "[a]ll legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, which the Constitution divides into three departments. (As an example of a "branchless" agency exercising no governmental powers, one can conceive of an Advisory Commission charged with reporting to all three Branches, whose members are removable only for cause and are thus subject to the control of none of the Branches.) Over the years, however,

Humphrey's Executor has come in general contemplation to stand for something quite different—not an "independent agency" in the sense of an agency independent of all three Branches, but an "independent agency" in the sense of an agency *within* the Executive Branch (and thus authorized to exercise executive powers) independent of the control of the President.

We approved that concept last Term in *Morrison*. See 487 U. S., at 688–691. I dissented in that case, essentially because I thought that concept illogical and destructive of the structure of the Constitution. I must admit, however, that today's next step—recognition of an independent agency in the *Judicial* Branch—makes *Morrison* seem, by comparison, rigorously logical. "The Commission," we are told, "is an independent agency in every relevant sense." *Ante*, at 393. There are several problems with this. First, once it is acknowledged that an "independent agency" may be within *any* of the three Branches, and not merely within the Executive, then there really *is* no basis for determining what Branch such an agency belongs to, and thus what governmental powers it may constitutionally be given, except (what the Court today uses) Congress' say-so. More importantly, however, the concept of an "independent agency" simply does not translate into the legislative or judicial spheres. Although the Constitution says that "[t]he executive Power shall be vested in a President of the United States of America," Art. II, § 1, it was never thought that the President would have to exercise that power *personally*. He may generally authorize others to exercise executive powers, with full effect of law, in his place. See, *e. g.*, *Wolsey* v. *Chapman*, 101 U. S. 755 (1880); *Williams* v. *United States*, 1 How. 290 (1843). It is already a leap from the proposition that a person who is not the President may exercise executive powers to the proposition we accepted in *Morrison* that a person who is *neither* the President *nor* subject to the President's control may exercise executive powers. But with

respect to the exercise of judicial powers (the business of the Judicial Branch) the platform for such a leap does not even exist. For unlike executive power, judicial and legislative powers have never been thought delegable. A judge may not leave the decision to his law clerk, or to a master. See *United States* v. *Raddatz*, 447 U. S. 667, 683 (1980); cf. *Runkle* v. *United States*, 122 U. S. 543 (1887). Senators and Members of the House may not send delegates to consider and vote upon bills in their place. See Rules of the House of Representatives, Rule VIII(3); Standing Rules of the United States Senate, Rule XII. Thus, however well established may be the "independent agencies" of the Executive Branch, here we have an anomaly beyond equal: an independent agency exercising governmental power on behalf of a Branch where all governmental power is supposed to be exercised personally by the judges of courts.[3]

Today's decision may aptly be described as the *Humphrey's Executor* of the Judicial Branch, and I think we will live to regret it. Henceforth there may be agencies "within the Judicial Branch" (whatever that means), exercising governmental powers, that are neither courts nor controlled by courts, nor even controlled by judges. If an "independent agency" such as this can be given the power to fix sentences previously exercised by district courts, I must assume that a similar agency can be given the powers to adopt rules of pro-

---

[3] There are of course agencies within the Judicial Branch (because they operate under the control of courts or judges) which are not themselves courts, see, *e. g.*, 28 U. S. C. § 601 *et seq.* (Administrative Office of the United States Courts), just as there are agencies within the Legislative Branch (because they operate under the control of Congress) which are not themselves Senators or Representatives, see, *e. g.*, 31 U. S. C. § 701 *et seq.* (General Accounting Office). But these agencies, unlike the Sentencing Commission, exercise no governmental powers, that is, they establish and determine neither private rights nor the prerogatives of the other Branches. They merely assist the courts and the Congress in *their* exercise of judicial and legislative powers.

cedure and rules of evidence previously exercised by this Court. The bases for distinction would be thin indeed.

* * *

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence, see *Morrison*, *supra; Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987), to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. That is the meaning of the statements concerning acceptable commingling made by Madison in defense of the proposed Constitution, and now routinely used as an excuse for disregarding it. When he said, as the Court correctly quotes, that separation of powers "'d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other,'" *ante*, at 380–381, quoting The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961), his point was that the commingling specifically provided for in the structure that he and his colleagues had designed—the Presidential veto over legislation, the Senate's confirmation of executive and judicial officers, the Senate's ratification of treaties, the Congress' power to impeach and remove executive and judicial officers—did not violate a proper understanding of separation of powers. He would be aghast, I think, to hear those words used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, "too much commingling" does not occur. Consideration of the degree of commingling that a particular disposition produces may be appropriate at

the margins, where the outline of the framework itself is not clear; but it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws.

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.

I respectfully dissent from the Court's decision, and would reverse the judgment of the District Court.

ARGENTINE REPUBLIC *v.* AMERADA HESS SHIPPING CORP. ET AL.

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

No. 87–1372. Argued December 6, 1988—Decided January 23, 1989

A crude oil tanker owned by respondent United Carriers, Inc., a Liberian corporation, and chartered to respondent Amerada Hess Corp., also a Liberian corporation, was severely damaged when it was attacked in international waters by Argentine military aircraft during the war between Great Britain and petitioner Argentine Republic over the Falkland Islands (Malvinas) off the Argentine coast. Respondents brought separate actions against petitioner in Federal District Court for the damage they sustained in the attack. They invoked the District Court's jurisdiction under the Alien Tort Statute (ATS), which confers original jurisdiction on district courts over civil actions by an alien for a tort committed in violation of the law of nations or a treaty of the United States. Amerada Hess also brought suit under the general admiralty and maritime jurisdiction of federal courts, 28 U. S. C. § 1333, and "the principle of universal jurisdiction, recognized in customary international law." The District Court dismissed respondents' complaints for lack of subject-matter jurisdiction, ruling that their actions were barred by the Foreign Sovereign Immunities Act of 1976 (FSIA). The FSIA provides in 28 U. S. C. § 1604 that "[s]ubject to existing international agreements to which the United States [was] a party at the time of the enactment of this Act[,] a foreign state shall be immune from the jurisdiction" of United States courts except as provided in 28 U. S. C. §§ 1605–1607, and further provides in 28 U. S. C. § 1330(a) that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under §§ 1605–1607 or any applicable international agreement. The Court of Appeals reversed, holding that the District Court had jurisdiction over respondents' consolidated action under the ATS.

Held: The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in United States courts, and the District Court correctly dismissed the action because the FSIA did not authorize jurisdiction over petitioner under the facts of this case. Pp. 433–443.

(a) The FSIA's text and structure demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign

state in United States courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars United States courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by both United States citizens and aliens when a foreign state is *not* entitled to immunity. Pp. 433–435.

(b) From Congress' decision in the FSIA to deny immunity to foreign states in cases involving property taken in violation of international law in § 1605(a)(3), the plain implication is that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions. Pp. 435–436.

(c) Congress' failure in the FSIA to enact a *pro tanto* repealer of the ATS when it passed the FSIA in 1976 may be explained at least in part by the lack of certainty as to whether the ATS conferred jurisdiction in suits against foreign states. In light of the comprehensiveness of the FSIA's scheme, it is doubtful that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the ATS and presumably other grants of subject-matter jurisdiction in Title 28. Pp. 436–438.

(d) The rule of statutory construction under which repeals by implication are disfavored does not apply here. This case does not involve two statutes that supplement one another, nor is it a case where a more general statute is claimed to have repealed by implication an earlier statute dealing with a narrower subject. Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision in § 1604 that "a foreign state shall be immune from the jurisdiction" of United States courts except as provided in §§ 1605–1607, preclude a construction of the ATS that permits the instant action. P. 438.

(e) Congress dealt with the admiralty jurisdiction of the federal courts when it enacted the FSIA. Section 1605(b) expressly permits an *in personam* suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state. Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize this suit against petitioner. Pp. 438–439.

(f) The District Court correctly determined that none of the exceptions enumerated in the FSIA applies to the facts of this case. The exception for noncommercial torts in § 1605(a)(5) is limited by its terms to cases in which the damage to or loss of property occurs *in the United States*. The FSIA's definition of "United States" in § 1603(c) as including all "territory and waters, continental and insular, subject to the jurisdiction of the United States" cannot be construed to include petitioner's attack on the high seas. Pp. 439–441.

(g) The Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention entered into by petitioner and the United States do not create an exception to the FSIA. A foreign state cannot waive its immunity under § 1605(a)(1) by signing an international agreement that does not mention a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States. Nor does the Treaty of Friendship, Commerce and Navigation between the United States and Liberia carve out an exception to the FSIA. That Treaty provides that United States and Liberian nationals shall have access to the courts of each country "on conforming to the local laws," and the FSIA is clearly one of the "local laws" to which respondents must conform before bringing suit in United States courts. Pp. 441–443.

830 F. 2d 421, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part, in which MARSHALL, J., joined, *post*, p. 443.

Bruno A. Ristau argued the cause for petitioner. With him on the briefs was *Joel E. Leising.*

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Boulton, Deputy Solicitor General Cohen, Edwin S. Kneedler, Abraham D. Sofaer,* and *Eugene Pinkelmann.*

Douglas R. Burnett argued the cause for respondents. With him on the brief were *Raymond J. Burke, Jr., Frances C. Peters,* and *Richard H. Webber.**

---

*Briefs of *amici curiae* urging affirmance were filed for the Republic of Liberia by *Frank L. Wiswall, Jr.;* and for the International Association of Independent Tanker Owners by *Christopher B. Kende.*

Briefs of *amici curiae* were filed for the American Institute of Marine Underwriters by *Marilyn L. Lytle* and *Douglas A. Jacobsen;* for the American Institute of Merchant Shipping et al. by *Michael Joseph;* for the International Human Rights Law Group by *Harry A. Inman;* and for the Maritime Law Association of the United States by *R. Glenn Bauer, Richard W. Palmer,* and *Lizabeth L. Burrell.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Two Liberian corporations sued the Argentine Republic in a United States District Court to recover damages for a tort allegedly committed by its armed forces on the high seas in violation of international law. We hold that the District Court correctly dismissed the action, because the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1330 *et seq.*, does not authorize jurisdiction over a foreign state in this situation.

Respondents alleged the following facts in their complaints. Respondent United Carriers, Inc., a Liberian corporation, chartered one of its oil tankers, the Hercules, to respondent Amerada Hess Shipping Corporation, also a Liberian corporation. The contract was executed in New York City. Amerada Hess used the Hercules to transport crude oil from the southern terminus of the Trans-Alaska Pipeline in Valdez, Alaska, around Cape Horn in South America, to the Hess refinery in the United States Virgin Islands. On May 25, 1982, the Hercules began a return voyage, without cargo but fully fueled, from the Virgin Islands to Alaska. At that time, Great Britain and petitioner Argentine Republic were at war over an archipelago of some 200 islands—the Falkland Islands to the British, and the Islas Malvinas to the Argentineans—in the South Atlantic off the Argentine coast. On June 3, United States officials informed the two belligerents of the location of United States vessels and Liberian tankers owned by United States interests then traversing the South Atlantic, including the Hercules, to avoid any attacks on neutral shipping.

By June 8, 1982, after a stop in Brazil, the Hercules was in international waters about 600 nautical miles from Argentina and 500 miles from the Falklands; she was outside the "war zones" designated by Britain and Argentina. At 12:15 Greenwich mean time, the ship's master made a routine report by radio to Argentine officials, providing the ship's

name, international call sign, registry, position, course, speed, and voyage description. About 45 minutes later, an Argentine military aircraft began to circle the Hercules. The ship's master repeated his earlier message by radio to Argentine officials, who acknowledged receiving it. Six minutes later, without provocation, another Argentine military plane began to bomb the Hercules; the master immediately hoisted a white flag. A second bombing soon followed, and a third attack came about two hours later, when an Argentine jet struck the ship with an air-to-surface rocket. Disabled but not destroyed, the Hercules reversed course and sailed to Rio de Janeiro, the nearest safe port. At Rio de Janeiro, respondent United Carriers determined that the ship had suffered extensive deck and hull damage, and that an undetonated bomb remained lodged in her No. 2 tank. After an investigation by the Brazilian Navy, United Carriers decided that it would be too hazardous to remove the undetonated bomb, and on July 20, 1982, the Hercules was scuttled 250 miles off the Brazilian coast.

Following unsuccessful attempts to obtain relief in Argentina, respondents commenced this action in the United States District Court for the Southern District of New York for the damage that they sustained from the attack. United Carriers sought $10 million in damages for the loss of the ship; Amerada Hess sought $1.9 million in damages for the fuel that went down with the ship. Respondents alleged that petitioner's attack on the neutral Hercules violated international law. They invoked the District Court's jurisdiction under the Alien Tort Statute, 28 U. S. C. § 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Amerada Hess also brought suit under the general admiralty and maritime jurisdiction, 28 U. S. C. § 1333, and "the principle of universal jurisdiction, recognized in customary international law." Complaint of Amerada Hess ¶ 5,

App. 20. The District Court dismissed both complaints for lack of subject-matter jurisdiction, 638 F. Supp. 73 (1986), ruling that respondents' suits were barred by the FSIA.

A divided panel of the United States Court of Appeals for the Second Circuit reversed. 830 F. 2d 421 (1987). The Court of Appeals held that the District Court had jurisdiction under the Alien Tort Statute, because respondents' consolidated action was brought by Liberian corporations, it sounded in tort ("the bombing of a ship without justification"), and it asserted a violation of international law ("attacking a neutral ship in international waters, without proper cause for suspicion or investigation"). *Id.*, at 424–425. Viewing the Alien Tort Statute as "no more than a jurisdictional grant based on international law," the Court of Appeals said that "who is within" the scope of that grant is governed by "evolving standards of international law." *Id.*, at 425, citing *Filartiga* v. *Pena-Irala*, 630 F. 2d 876, 880 (CA2 1980). The Court of Appeals reasoned that Congress' enactment of the FSIA was not meant to eliminate "existing remedies in United States courts for violations of international law" by foreign states under the Alien Tort Statute. 830 F. 2d, at 426. The dissenting judge took the view that the FSIA precluded respondents' action. *Id.*, at 431. We granted certiorari, 485 U. S. 1005 (1988), and now reverse.

We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress "in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis*, 3 How. 236, 245 (1845); see *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 701 (1982) (jurisdiction of lower federal courts is "limited to those subjects encompassed within the statutory grant of jurisdiction"). In the FSIA, Congress added a new chapter 97 to Title 28 of the United States Code, 28 U. S. C. § 1602–1611, which is entitled "Jurisdictional Immunities of Foreign

States."[1] Section 1604 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of the enactment of this Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." The FSIA also added § 1330(a) to Title 28; it provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605–1607 of this title or under any applicable international agreement." § 1330(a).[2]

We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity. As we said in *Verlinden*, the FSIA "must be applied by the district courts in every action against a foreign

[1] From the Nation's founding until 1952, foreign states were "generally granted . . . complete immunity from suit" in United States courts, and the Judicial Branch deferred to the decisions of the Executive Branch on such questions. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983). In 1952, the State Department adopted the view that foreign states could be sued in United States courts for their commercial acts, but not for their public acts. *Id.*, at 487. "For the most part," the FSIA "codifies" this so-called "restrictive" theory of foreign sovereign immunity. *Id.*, at 488.

[2] Respondents did not invoke the District Court's jurisdiction under 28 U. S. C. § 1330(a). They did, however, serve their complaints upon petitioner's Ministry of Foreign Affairs in conformity with the service of process provisions of the FSIA, 28 U. S. C. § 1608(a), and the regulations promulgated thereunder by the Department of State, 22 CFR pt. 93 (1988). See App. to Pet. for Cert. 38a, 41a.

sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 493 (1983).[3]

The Court of Appeals acknowledged that the FSIA's language and legislative history support the "general rule" that the Act governs the immunity of foreign states in federal court. 830 F. 2d, at 426. The Court of Appeals, however, thought that the FSIA's "focus on commercial concerns" and Congress' failure to "repeal" the Alien Tort Statute indicated Congress' intention that federal courts continue to exercise jurisdiction over foreign states in suits alleging violations of international law outside the confines of the FSIA. *Id.*, at 427. The Court of Appeals also believed that to construe the FSIA to bar the instant suit would "fly in the face" of Congress' intention that the FSIA be interpreted pursuant to "'standards recognized under international law.'" *Ibid.*, quoting H. R. Rep., at 14.

Taking the last of these points first, Congress had violations of international law by foreign states in mind when it enacted the FSIA. For example, the FSIA specifically denies foreign states immunity in suits "in which rights in prop-

---

[3] Subsection (b) of 28 U. S. C. § 1330 provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject-matter] jurisdiction under subsection (a) where service has been made under [28 U. S. C. § 1608]." Thus, personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§ 1605–1607 applies. *Verlinden*, *supra*, at 485, 489, and n. 14. Congress' intention to enact a comprehensive statutory scheme is also supported by the inclusion in the FSIA of provisions for venue, 28 U. S. C. § 1391(f), removal, § 1441(d), and attachment and execution, §§ 1609–1611. Our conclusion here is supported by the FSIA's legislative history. See, *e. g.*, H. R. Rep. No. 94–1487, p. 12 (1976) (H. R. Rep.); S. Rep. No. 94–1310, pp. 11–12 (1976) (S. Rep.) (FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by sovereign states before Federal and State courts in the United States," and "prescribes . . . the jurisdiction of U. S. district courts in cases involving foreign states").

erty taken in violation of international law are in issue." 28 U. S. C. § 1605(a)(3). Congress also rested the FSIA in part on its power under Art. I, § 8, cl. 10, of the Constitution "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." See H. R. Rep., at 12; S. Rep., at 12. From Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.

As to the other point made by the Court of Appeals, Congress' failure to enact a *pro tanto* repealer of the Alien Tort Statute when it passed the FSIA in 1976 may be explained at least in part by the lack of certainty as to whether the Alien Tort Statute conferred jurisdiction in suits against foreign states. Enacted by the First Congress in 1789, the Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. The Court of Appeals did not cite any decision in which a United States court exercised jurisdiction over a foreign state under the Alien Tort Statute, and only one such case has come to our attention—one which was decided after the enactment of the FSIA.[4]

In this Court, respondents argue that cases were brought under the Alien Tort Statute against foreign states for the unlawful taking of a prize during wartime. Brief for Respondents 18–25. The Alien Tort Statute makes no mention

---

[4] See *Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246 (DC 1985) (alternative holding). The Court of Appeals did cite its earlier decision in *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (1980), which involved a suit under the Alien Tort Statute by a Paraguayan national against a Paraguayan police official for torture; the Paraguayan Government was not joined as a defendant.

of prize jurisdiction, and § 1333(2) now grants federal district courts exclusive jurisdiction over "all proceedings for the condemnation of property taken as a prize." In *The Santissima Trinidad*, 7 Wheat. 283, 353–354 (1822), we held that foreign states were not immune from the jurisdiction of United States courts in prize proceedings. That case, however, was not brought under the Alien Tort Statute but rather as a libel in admiralty. Thus there is a distinctly hypothetical cast to the Court of Appeals' reliance on Congress' failure to repeal the Alien Tort Statute, and respondents' arguments in this Court based on the principle of statutory construction that repeals by implication are disfavored.

We think that Congress' failure in the FSIA to enact an express *pro tanto* repealer of the Alien Tort Statute speaks only faintly, if at all, to the issue involved in this case. In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject-matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyrights, and trademarks).[5] Congress provided in the FSIA that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter," and very likely it

[5] The FSIA amended the diversity statute to delete references to suits in which a "foreign stat[e]" is a party either as plaintiff or defendant, see 28 U. S. C. §§ 1332(a)(2) and (3) (1970 ed.), and added a new paragraph (4) that preserves diversity jurisdiction over suits in which foreign states are plaintiffs. As the legislative history explained, "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H. R. Rep., at 14; S. Rep., at 13. Unlike the diversity statute, however, the Alien Tort Statute and the other statutes conferring jurisdiction in general terms on district courts cited in the text did not in 1976 (or today) expressly provide for suits against foreign states.

thought that should be sufficient. § 1602 (emphasis added); see also H. R. Rep., at 12; S. Rep., at 11 (FSIA "intended to preempt any other State and Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns").

For similar reasons we are not persuaded by respondents' arguments based upon the rule of statutory construction under which repeals by implication are disfavored. This case does not involve two statutes that readily could be seen as supplementing one another, see *Wood* v. *United States*, 16 Pet. 342, 363 (1842), nor is it a case where a more general statute is claimed to have repealed by implication an earlier statute dealing with a narrower subject. See *Morton* v. *Mancari*, 417 U. S. 535, 549–551 (1974). We think that Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision in § 1604 that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607," preclude a construction of the Alien Tort Statute that permits the instant suit. See *Red Rock* v. *Henry*, 106 U. S. 596, 601–602 (1883); *United States* v. *Tynen*, 11 Wall. 88, 92 (1871). The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

Respondents also argue that the general admiralty and maritime jurisdiction, § 1333(1), provides a basis for obtaining jurisdiction over petitioner for violations of international law, notwithstanding the FSIA. Brief for Respondents 42–49. But Congress dealt with the admiralty jurisdiction of the federal courts when it enacted the FSIA. Section 1605(b) expressly permits an *in personam* suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state. Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general

admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner.

Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here. These exceptions include cases involving the waiver of immunity, § 1605(a)(1), commercial activities occurring in the United States or causing a direct effect in this country, § 1605(a)(2), property expropriated in violation of international law, § 1605(a)(3), inherited, gift, or immovable property located in the United States, § 1605(a)(4), noncommercial torts occurring in the United States, § 1605(a)(5), and maritime liens, § 1605(b). We agree with the District Court that none of the FSIA's exceptions applies on these facts. See 638 F. Supp., at 75–77.[6]

Respondents assert that the FSIA exception for noncommercial torts, § 1605(a)(5), is most in point. Brief for Respondents 50–52. This provision denies immunity in a case

> "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U. S. C. § 1605(a)(5).

Section 1605(a)(5) is limited by its terms, however, to those cases in which the damage to or loss of property occurs *in the United States*. Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United

[6] The Court of Appeals majority did not pass on whether any of the exceptions to the FSIA applies here. It did note, however, that respondents' arguments regarding § 1605(a)(5) were consistent with its disposition of the case. 830 F. 2d, at 429, n. 3. The dissent found none of the FSIA's exceptions applicable on these facts. *Id.*, at 430 (Kearse, J. dissenting).

States, for which liability is imposed under domestic tort law. See H. R. Rep., at 14, 20–21; S. Rep., at 14, 20–21.

In this case, the injury to respondents' ship occurred on the high seas some 5,000 miles off the nearest shores of the United States. Despite these telling facts, respondents nonetheless claim that the tortious attack on the Hercules occurred "in the United States." They point out that the FSIA defines "United States" as including all "territory and waters, continental and insular, subject to the jurisdiction of the United States," § 1603(c), and that their injury occurred on the high seas, which is within the admiralty jurisdiction of the United States, see *The Plymouth*, 3 Wall. 20, 36 (1866). They reason, therefore, that "by statutory definition" petitioner's attack occurred in the United States. Brief for Respondents 50–51.

We find this logic unpersuasive. We construe the modifying phrase "continental and insular" to restrict the definition of United States to the continental United States and those islands that are part of the United States or its possessions; any other reading would render this phrase nugatory. Likewise, the term "waters" in § 1603(c) cannot reasonably be read to cover all waters over which United States courts might exercise jurisdiction. When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.[7] We thus apply "[t]he canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Broth-*

[7] See, *e. g.*, 14 U. S. C. § 89(a) (empowering Coast Guard to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction" for "prevention, detection, and suppression of violations of laws of the United States"); 18 U. S. C. § 7 ("special maritime and territorial jurisdiction of the United States" in Federal Criminal Code extends to United States vessels on "[t]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State"); 19 U. S. C. § 1701 (permitting President to declare portions of "high seas" as customs-enforcement areas).

ers v. *Filardo*, 336 U. S. 281, 285 (1949); see also *Weinberger* v. *Rossi*, 456 U. S. 25, 32 (1982). Because respondents' injury unquestionably occurred well outside the 3-mile limit then in effect for the territorial waters of the United States, the exception for noncommercial torts cannot apply.[8]

The result in this case is not altered by the fact that petitioner's alleged tort may have had effects in the United States. Respondents state, for example, that the Hercules was transporting oil intended for use in this country and that the loss of the ship disrupted contractual payments due in New York. Brief for Respondents 51. Under the commercial activity exception to the FSIA, § 1605(a)(2), a foreign state may be liable for its commercial activities "outside the territory of the United States" having a "direct effect" inside the United States.[9] But the noncommercial tort exception, § 1605(a)(5), upon which respondents rely, makes no mention of "territory outside the United States" or of "direct effects" in the United States. Congress' decision to use explicit language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States. Respondents do not claim that § 1605(a)(2) covers these facts.

We also disagree with respondents' claim that certain international agreements entered into by petitioner and by

---

[8] The United States has historically adhered to a territorial sea of 3 nautical miles, see *United States* v. *California*, 332 U. S. 19, 32–34 (1947), although international conventions permit a territorial sea of up to 12 miles. See 2 Restatement (Third) of Foreign Relations Law of United States § 511 (1987). On December 28, 1988, the President announced that the United States would henceforth recognize a territorial sea of 12 nautical miles. See Presidential Proclamation No. 5928, 3 CFR 547 (1988).

[9] Section 1605(a)(2) provides, in pertinent part, that foreign states shall not be immune from the jurisdiction of United States courts in cases "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

the United States create an exception to the FSIA here. Brief for Respondents 17. As noted, the FSIA was adopted "[s]ubject to international agreements to which the United States [was] a party at the time of [its] enactment." § 1604. This exception applies when international agreements "expressly conflic[t]" with the immunity provisions of the FSIA, H. R. Rep., at 17; S. Rep., at 17, hardly the circumstances in this case. Respondents point to the Geneva Convention on the High Seas, Apr. 29, 1958, [1962] 13 U. S. T. 2312, T. I. A. S. No. 5200, and the Pan American Maritime Neutrality Convention, Feb. 20, 1928, 47 Stat. 1989, 1990–1991, T. S. No. 845. Brief for Respondents 31–34. These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs.[10] They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts. Cf. *Head Money Cases*, 112 U. S. 580, 598–599 (1884); *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829). Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of

[10] Article 22(1), (3), of the Geneva Convention on the High Seas, 13 U. S. T., at 2318–2319, for example, states that a warship may only board a merchant ship if it has a "reasonable ground for suspecting" the merchant ship is involved in piracy, the slave trade, or traveling under false colors. If an inspection fails to support the suspicion, the merchant ship "shall be compensated for any loss or damage that may have been sustained." Article 23 contains comparable provisions for the stopping of merchant ships by aircraft. Similarly, Article 1 of the Pan American Maritime Neutrality Convention, 47 Stat., at 1990, 1994, permits a warship to stop a merchant ship on the high seas to determine its cargo, and whether it has committed "any violation of blockade," but the warship may only use force if the merchant ship "fails to observe the instructions given it." Article 27 provides: "A belligerent shall indemnify the damage caused by its violation of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces."

action in the United States. We find similarly unpersuasive the argument of respondents and *Amicus Curiae* Republic of Liberia that the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1739, T. S. No. 956, carves out an exception to the FSIA. Brief for Respondents 52–53; Brief for the Republic of Liberia as *Amicus Curiae* 11. Article I of this Treaty provides, in pertinent part, that the nationals of the United States and Liberia "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." The FSIA is clearly one of the "local laws" to which respondents must "conform" before bringing suit in United States courts.

We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country, and that none of the enumerated exceptions to the Act apply to the facts of this case. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, concurring in part.

I join the Court's opinion insofar as it holds that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court. *Ante*, at 431–439.

I, however, do not join the latter part of the Court's opinion to the effect that none of the FSIA's exceptions to foreign sovereign immunity apply in this case. As the majority notes, the Court of Appeals did not decide this question, *ante*, at 439, n. 6, and, indeed, specifically reserved it. 830 F. 2d 421, 429, n. 3 (CA2 1987). Moreover, the question was not among those presented to this Court in the petition for certiorari, did not receive full briefing, and is not necessary to the disposition of the case. Accordingly, I believe it inappropriate to decide here, in the first instance, whether any exceptions to the FSIA apply in this case. See this Court's Rule 21.1(a) (Court will consider only questions presented in

petition); *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) (Court ordinarily will not decide questions not passed on below). I would remand the case to the Court of Appeals on this issue.

Syllabus

FLORIDA *v.* RILEY

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 87–764. Argued October 3, 1988—Decided January 23, 1989

A Florida county sheriff's office received an anonymous tip that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not observe from ground level the contents of a greenhouse on the property—which was enclosed on two sides and obscured from view on the other, open sides by trees, shrubs, and respondent's nearby home—he circled twice over the property in a helicopter at the height of 400 feet and made naked-eye observations through openings in the greenhouse roof and its open sides of what he concluded were marijuana plants. After a search pursuant to a warrant obtained on the basis of these observations revealed marijuana growing in the greenhouse, respondent was charged with possession of that substance under Florida law. The trial court granted his motion to suppress the evidence. Although reversing, the State Court of Appeals certified the case to the State Supreme Court on the question whether the helicopter surveillance from 400 feet constituted a "search" for which a warrant was required under the Fourth Amendment. Answering that question in the affirmative, the court quashed the Court of Appeals' decision and reinstated the trial court's suppression order.

Held: The judgment is reversed.

511 So. 2d 282, reversed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded that the Fourth Amendment does not require the police traveling in the public airways at an altitude of 400 feet to obtain a warrant in order to observe what is visible to the naked eye. *California* v. *Ciraolo*, 476 U. S. 207—which held that a naked-eye police inspection of the backyard of a house from a fixed-wing aircraft at 1,000 feet was not a "search"—is controlling. Thus, respondent could not reasonably have expected that the contents of his greenhouse were protected from public or official inspection from the air, since he left the greenhouse's sides and roof partially open. The fact that the inspection was made from a helicopter is irrelevant, since, as in the case of fixed-wing planes, private and commercial flight by helicopter is routine. Nor, on the facts of this case, does it make a difference for Fourth Amendment purposes that the helicopter was flying below 500 feet, the Federal Aviation Administration's lower limit upon the navigable airspace for fixed-wing craft. Since the FAA permits helicopters to fly

below that limit, the helicopter here was not violating the law, and any member of the public or the police could legally have observed respondent's greenhouse from that altitude. Although an aerial inspection of a house's curtilage may not always pass muster under the Fourth Amendment simply because the aircraft is within the navigable airspace specified by law, there is nothing in the record here to suggest that helicopters flying at 400 feet are sufficiently rare that respondent could have reasonably anticipated that his greenhouse would not be observed from that altitude. Moreover, there is no evidence that the helicopter interfered with respondent's normal use of his greenhouse or other parts of the curtilage, that intimate details connected with the use of the home or curtilage were observed, or that there was undue noise, wind, dust, or threat of injury. Pp. 449–452.

JUSTICE O'CONNOR concluded that the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations, which are intended to promote air safety and not to protect the right to be secure against unreasonable searches and seizures. Whether respondent had a reasonable expectation of privacy from aerial observation of his curtilage does not depend on whether the helicopter was where it had a right to be, but, rather, on whether it was in the public airways at an altitude at which members of the public travel with sufficient regularity that respondent's expectation was not one that society is prepared to recognize as "reasonable." Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because respondent introduced no evidence to the contrary before the state courts, it must be concluded that his expectation of privacy here was not reasonable. However, public use of altitudes lower than 400 feet—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA regulations. Pp. 452–455.

WHITE, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 452. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 456. BLACKMUN, J., filed a dissenting opinion, *post*, p. 467.

Parker D. Thomson, Special Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs were *Robert A. Butterworth*, Attorney General,

Candace M. Sunderland and *Peggy A. Quince*, Assistant Attorneys General, and *Cloyce L. Mangas, Jr.*, Special Assistant Attorney General.

Marc H. Salton argued the cause and filed a brief for respondent.*

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

On certification to it by a lower state court, the Florida Supreme Court addressed the following question: "Whether surveillance of the interior of a partially covered greenhouse

---

*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, and *Lisa M. Paunicka*, Deputy Attorney General, *Don Siegelman*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly*, Attorney General of Delaware, *Warren Price III*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Robert M. Spire*, Attorney General of Nebraska, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *Don Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming; and for the Airborne Law Enforcement Association, Inc., by *Ellen M. Condon* and *Paul J. Marino*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Kent L. Richland*, *Pamela Victorine*, *John A. Powell*, *Steve R. Shapiro*, *Paul Hoffman*, *Joan W. Howarth*, and *James K. Green;* for Community Outreach to Vietnam Era Returnees, Inc., by *Deborah C. Wyatt;* and for the National Association of Criminal Defense Lawyers by *Milton Hirsch*.

Ronald M. Sinoway filed a brief for the California Attorneys for Criminal Justice et al. as *amici curiae*.

in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse constitutes a 'search' for which a warrant is required under the Fourth Amendment and Article I, § 12 of the Florida Constitution." 511 So. 2d 282 (1987). The court answered the question in the affirmative, and we granted the State's petition for certiorari challenging that conclusion. 484 U. S. 1058 (1988).[1]

Respondent Riley lived in a mobile home located on five acres of rural property. A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.

This case originated with an anonymous tip to the Pasco County Sheriff's office that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not see the contents of the greenhouse from the road, he circled twice over respondent's property in a helicopter at the height of 400 feet. With his naked eye, he was able to see through the openings in the roof and one or more of the open sides of the greenhouse and to identify what he thought was marijuana growing in the structure. A war-

---

[1] The Florida Supreme Court mentioned the State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution. The bulk of the discussion, however, focused exclusively on federal cases dealing with the Fourth Amendment, and there being no indication that the decision "clearly and expressly . . . is alternatively based on bona fide separate, adequate, and independent grounds," we have jurisdiction. *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983).

rant was obtained based on these observations, and the ensuing search revealed marijuana growing in the greenhouse. Respondent was charged with possession of marijuana under Florida law. The trial court granted his motion to suppress; the Florida Court of Appeals reversed but certified the case to the Florida Supreme Court, which quashed the decision of the Court of Appeals and reinstated the trial court's suppression order.

We agree with the State's submission that our decision in *California* v. *Ciraolo*, 476 U. S. 207 (1986), controls this case. There, acting on a tip, the police inspected the backyard of a particular house while flying in a fixed-wing aircraft at 1,000 feet. With the naked eye the officers saw what they concluded was marijuana growing in the yard. A search warrant was obtained on the strength of this airborne inspection, and marijuana plants were found. The trial court refused to suppress this evidence, but a state appellate court held that the inspection violated the Fourth and Fourteenth Amendments to the United States Constitution, and that the warrant was therefore invalid. We in turn reversed, holding that the inspection was not a search subject to the Fourth Amendment. We recognized that the yard was within the curtilage of the house, that a fence shielded the yard from observation from the street, and that the occupant had a subjective expectation of privacy. We held, however, that such an expectation was not reasonable and not one "that society is prepared to honor." *Id.*, at 214. Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion. "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *Id.*, at 213, quoting *Katz* v. *United States*, 389 U. S. 347, 351 (1967). As a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be," 476 U. S., at 213. Thus the police, like the public, would have been free to inspect the backyard garden from

the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was. "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.*, at 215.

We arrive at the same conclusion in the present case. In this case, as in *Ciraolo*, the property surveyed was within the curtilage of respondent's home. Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft. 511 So. 2d, at 288. Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, "private and commercial flight [by helicopter] in the public airways is routine" in this country, *Ciraolo*, *supra*, at 215, and there is no indication that such flights are unheard of in Pasco County, Florida.[2] Riley could not rea-

[2] The first use of the helicopter by police was in New York in 1947, and today every State in the country uses helicopters in police work. As of 1980, there were 1,500 such aircraft used in police work. E. Brown, The Helicopter in Civil Operations 79 (1981). More than 10,000 helicopters, both public and private, are registered in the United States. Federal Avi-

sonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.

Nor on the facts before us, does it make a difference for Fourth Amendment purposes that the helicopter was flying at 400 feet when the officer saw what was growing in the greenhouse through the partially open roof and sides of the structure. We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft.[3] Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to

---

ation Administration, Census of U. S. Civil Aircraft, Calendar Year 1987, p. 12. See also 1988 Helicopter Annual 9. And there are an estimated 31,697 helicopter pilots. Federal Aviation Administration, Statistical Handbook of Aviation, Calendar Year 1986, p. 147.

[3] While Federal Aviation Administration regulations permit fixed-wing aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas, helicopters may be operated at less than the minimums for fixed-wing aircraft "if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the [FAA] Administrator." 14 CFR § 91.79 (1988).

observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

The judgment of the Florida Supreme Court is accordingly reversed.

So ordered.

JUSTICE O'CONNOR, concurring in the judgment.

I concur in the judgment reversing the Supreme Court of Florida because I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy "that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). I write separately, however, to clarify the standard I believe follows from *California* v. *Ciraolo*, 476 U. S. 207 (1986). In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U. S. Const., Amdt. 4.

Ciraolo involved observation of curtilage by officers flying in an airplane at an altitude of 1,000 feet. In evaluating whether this observation constituted a search for which a warrant was required, we acknowledged the importance of curtilage in Fourth Amendment doctrine: "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U. S., at 212–213. Although the curtilage is an area to which the private activi-

ties of the home extend, all police observation of the curtilage is not necessarily barred by the Fourth Amendment. As we observed: "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.*, at 213. In *Ciraolo*, we likened observation from a plane traveling in "public navigable airspace" at 1,000 feet to observation by police "passing by a home on public thoroughfares." We held that "[i]n an age where private and commercial flight in the public airways is routine," it is unreasonable to expect the curtilage to be constitutionally protected from aerial observation with the naked eye from an altitude of 1,000 feet. *Id.*, at 215.

Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude. Although "helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft," *ante*, at 451, there is no reason to assume that compliance with FAA regulations alone determines "'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" *Ciraolo*, *supra*, at 212 (quoting *Oliver* v. *United States*, 466 U. S. 170, 182–183 (1984)). Because the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy "society is prepared to recognize as 'reasonable'" simply mirror the FAA's safety concerns.

Observations of curtilage from helicopters at very low altitudes are not perfectly analogous to ground-level observations from public roads or sidewalks. While in both cases the police may have a legal right to occupy the physical space from which their observations are made, the two situations

are not necessarily comparable in terms of whether expectations of privacy from such vantage points should be considered reasonable. Public roads, even those less traveled by, are clearly demarked public thoroughfares. Individuals who seek privacy can take precautions, tailored to the location of the road, to avoid disclosing private activities to those who pass by. They can build a tall fence, for example, and thus ensure private enjoyment of the curtilage without risking public observation from the road or sidewalk. If they do not take such precautions, they cannot reasonably expect privacy from public observation. In contrast, even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. To require individuals to completely cover and enclose their curtilage is to demand more than the "precautions customarily taken by those seeking privacy." *Rakas* v. *Illinois*, 439 U. S. 128, 152 (1978) (Powell, J., concurring). The fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation.

In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not "one that society is prepared to recognize as 'reasonable.'" *Katz*, *supra*, at 361. Thus, in determining "'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment,'" *Ciraolo*, *supra*, at 212 (quoting *Oliver*, *supra*, at 182–183), it is not conclusive to observe,

as the plurality does, that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante*, at 451. Nor is it conclusive that police helicopters may often fly at 400 feet. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

In my view, the defendant must bear the burden of proving that his expectation of privacy was a reasonable one, and thus that a "search" within the meaning of the Fourth Amendment even took place. Cf. *Jones* v. *United States*, 362 U. S. 257, 261 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy"); *Nardone* v. *United States*, 308 U. S. 338, 341 (1939).

Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary before the Florida courts, I conclude that Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one. However, public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

The Court holds today that police officers need not obtain a warrant based on probable cause before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls of the curtilage. I cannot agree that the Fourth Amendment to the Constitution, which safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," tolerates such an intrusion on privacy and personal security.

I

The opinion for a plurality of the Court reads almost as if *Katz* v. *United States*, 389 U. S. 347 (1967), had never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be. *Katz* teaches, however, that the relevant inquiry is whether the police surveillance "violated the privacy upon which [the defendant] justifiably relied," *id.*, at 353—or, as Justice Harlan put it, whether the police violated an "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" *Id.*, at 361 (concurring opinion). The result of that inquiry in any given case depends ultimately on the judgment "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 403 (1974); see also 1 W. LaFave, Search and Seizure § 2.1(d), pp. 310–314 (2d ed. 1987).

The plurality undertakes no inquiry into whether low-level helicopter surveillance by the police of activities in an en-

closed backyard is consistent with the "aims of a free and open society." Instead, it summarily concludes that Riley's expectation of privacy was unreasonable because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante*, at 451. This observation is, in turn, based solely on the fact that the police helicopter was within the airspace within which such craft are allowed by federal safety regulations to fly.

I agree, of course, that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, *supra*, at 351. But I cannot agree that one "knowingly exposes [an area] to the public" solely because a helicopter may legally fly above it. Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view the plurality ignores the very essence of *Katz*. The reason why there is no reasonable expectation of privacy in an area that is exposed to the public is that little diminution in "the amount of privacy and freedom remaining to citizens" will result from police surveillance of something that any passerby readily sees. To pretend, as the plurality opinion does, that the same is true when the police use a helicopter to peer over high fences is, at best, disingenuous. Notwithstanding the plurality's statistics about the number of helicopters registered in this country, can it seriously be questioned that Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance? Is the theoretical possibility that any member of the public (with sufficient means) could also have hired a helicopter and looked over Riley's fence of any relevance at all in determin-

ing whether Riley suffered a serious loss of privacy and personal security through the police action?

In *California* v. *Ciraolo*, 476 U. S. 207 (1986), we held that whatever might be observed from the window of an airplane flying at 1,000 feet could be deemed unprotected by any reasonable expectation of privacy. That decision was based on the belief that airplane traffic at that altitude was sufficiently common that no expectation of privacy could inure in anything on the ground observable with the naked eye from so high. Indeed, we compared those airways to "public thoroughfares," and made the obvious point that police officers passing by a home on such thoroughfares were not required by the Fourth Amendment to "shield their eyes." *Id.*, at 213. Seizing on a reference in *Ciraolo* to the fact that the police officer was in a position "where he ha[d] a right to be," *ibid.*, today's plurality professes to find this case indistinguishable because FAA regulations do not impose a minimum altitude requirement on helicopter traffic; thus, the officer in this case too made his observations from a vantage point where he had a right to be.[1]

It is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety.[2] It is more curious still

[1] What the plurality now states as a firm rule of Fourth Amendment jurisprudence appeared in *Ciraolo*, 476 U. S., at 213, as a passing comment: "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E. g.*, *United States* v. *Knotts*, 460 U. S. 276, 282 (1983)." This rule for determining the constitutionality of aerial surveillance thus derives ultimately from *Knotts*, a case in which the police officers' feet were firmly planted on the ground. What is remarkable is not that one case builds on another, of course, but rather that a principle based on terrestrial observation was applied to airborne surveillance without any consideration whether that made a difference.

[2] The plurality's use of the FAA regulations as a means for determining whether Riley enjoyed a reasonable expectation of privacy produces an incredible result. Fixed-wing aircraft may not be operated below 500 feet

that the plurality relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment.[3] But the plurality's willingness to end its inquiry when it finds that the officer was in a position he had a right to be in is misguided for an even more fundamental reason. Finding determinative the fact that the officer was where he had a right to be is, at bottom, an attempt to analogize surveillance from a helicopter to surveillance by a police officer standing on a public road and viewing evidence of crime through an open window or a gap in a fence. In such a situation, the occupant of the home may be said to lack any

---

(1,000 feet over congested areas), while helicopters may be operated below those levels. See *ante*, at 451, n. 3. Therefore, whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.

[3] In *Oliver* v. *United States*, 466 U. S. 170 (1984), for example, we held that police officers who trespassed upon posted and fenced private land did not violate the Fourth Amendment, despite the fact that their action was subject to criminal sanctions. We noted that the interests vindicated by the Fourth Amendment were not identical with those served by the common law of trespass. See *id.*, at 183–184, and n. 15; see also *Hester* v. *United States*, 265 U. S. 57 (1924) (trespass in "open fields" does not violate the Fourth Amendment). In *Olmstead* v. *United States*, 277 U. S. 438, 466–469 (1928), the illegality under state law of a wiretap that yielded the disputed evidence was deemed irrelevant to its admissibility. And of course *Katz* v. *United States*, 389 U. S. 347 (1967), which overruled *Olmstead*, made plain that the question whether or not the disputed evidence had been procured by means of a trespass was irrelevant. Recently, in *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 239, n. 6 (1986), we declined to consider trade-secret laws indicative of a reasonable expectation of privacy. Our precedent thus points not toward the position adopted by the plurality opinion, but rather toward the view on this matter expressed some years ago by the Oregon Court of Appeals: "We . . . find little attraction in the idea of using FAA regulations because they were not formulated for the purpose of defining the reasonableness of citizens' expectations of privacy. They were designed to promote air safety." *State* v. *Davis*, 51 Ore. App. 827, 831, 627 P. 2d 492, 494 (1981).

reasonable expectation of privacy in what can be seen from that road—even if, in fact, people rarely pass that way.

The police officer positioned 400 feet above Riley's backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley's fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access. In such circumstances it makes no more sense to rely on the legality of the officer's position in the skies than it would to judge the constitutionality of the wiretap in *Katz* by the legality of the officer's position outside the telephone booth. The simple inquiry whether the police officer had the legal right to be in the position from which he made his observations cannot suffice, for we cannot assume that Riley's curtilage was so open to the observations of passersby in the skies that he retained little privacy or personal security to be lost to police surveillance. The question before us must be not whether the police were where they had a right to be, but whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable. To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U. S., at 361 (Harlan, J., concurring).[4] While, as we held in *Ciraolo*, air traffic at elevations of 1,000 feet or more may be so common that whatever could be seen with the naked eye from that elevation is unprotected by the Fourth Amendment, it is a large step from there to say that the Amendment offers no protection against low-level helicopter surveillance of enclosed curtilage

---

[4] Cf. *California* v. *Greenwood*, 486 U. S. 35, 54 (1988) (BRENNAN, J., dissenting) ("The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents . . .").

areas. To take this step is error enough. That the plurality does so with little analysis beyond its determination that the police complied with FAA regulations is particularly unfortunate.

II

Equally disconcerting is the lack of any meaningful limit to the plurality's holding. It is worth reiterating that the FAA regulations the plurality relies on as establishing that the officer was where he had a right to be set no minimum flight altitude for helicopters. It is difficult, therefore, to see what, if any, helicopter surveillance would run afoul of the plurality's rule that there exists no reasonable expectation of privacy as long as the helicopter is where it has a right to be.

Only in its final paragraph does the plurality opinion suggest that there might be some limits to police helicopter surveillance beyond those imposed by FAA regulations:

> "Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment." *Ante*, at 452.[5]

I will deal with the "intimate details" below. For the rest, one wonders what the plurality believes the purpose of the Fourth Amendment to be. If through noise, wind, dust, and threat of injury from helicopters the State "interfered with respondent's normal use of the greenhouse or of other parts

[5] Without actually stating that it makes any difference, the plurality also notes that "there is nothing in the record or before us to suggest" that helicopter traffic at the 400-foot level is so rare as to justify Riley's expectation of privacy. *Ante*, at 451. The absence of anything "in the record or before us" to suggest the opposite, however, seems not to give the plurality pause. It appears, therefore, that it is the FAA regulations rather than any empirical inquiry that is determinative.

of the curtilage," Riley might have a cause of action in inverse condemnation, but that is not what the Fourth Amendment is all about. Nowhere is this better stated than in JUSTICE WHITE'S opinion for the Court in *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967): "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." See also *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978) (same); *Schmerber* v. *California*, 384 U. S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment . . ."), overruled on other grounds, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Boyd* v. *United States*, 116 U. S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . .").

If indeed the purpose of the restraints imposed by the Fourth Amendment is to "safeguard the privacy and security of individuals," then it is puzzling why it should be the helicopter's noise, wind, and dust that provides the measure of whether this constitutional safeguard has been infringed. Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably "where they had a right to be." Would to-

day's plurality continue to assert that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not infringed by such surveillance? Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the Fourth Amendment is offended only if the aerial surveillance interferes with the use of the backyard as a garden spot. Nor is there anything in the plurality's opinion to suggest that any different rule would apply were the police looking from their helicopter, not into the open curtilage, but through an open window into a room viewable only from the air.

III

Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." *Ante*, at 452. What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be "intimate" in order to be protected by the Constitution?

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very

nice people," *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (dissenting opinion), and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the Fourth Amendment imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." 58 Minn. L. Rev., at 403.[6]

IV

I find little to disagree with in JUSTICE O'CONNOR's concurrence, apart from its closing paragraphs. A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of

---

[6] See also *United States* v. *White*, 401 U. S. 745, 789–790 (1971) (Harlan, J., dissenting):

"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. . . . The interest [protected by the Fourth Amendment] is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously . . . . Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."

public observation of his backyard from aerial traffic at 400 feet.

What separates me from JUSTICE O'CONNOR is essentially an empirical matter concerning the extent of public use of the airspace at that altitude, together with the question of how to resolve that issue. I do not think the constitutional claim should fail simply because "there is reason to believe" that there is "considerable" public flying this close to earth or because Riley "introduced no evidence to the contrary before the Florida courts." *Ante*, at 455 (O'CONNOR, J., concurring in judgment). I should think that this might be an apt occasion for the application of Professor Davis' distinction between "adjudicative" and "legislative" facts. See Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402–410 (1942); see also Advisory Committee's Notes on Fed. Rule Evid. 201, 28 U. S. C. App., pp. 683–684. If so, I think we could take judicial notice that, while there may be an occasional privately owned helicopter that flies over populated areas at an altitude of 400 feet, such flights are a rarity and are almost entirely limited to approaching or leaving airports or to reporting traffic congestion near major roadways. And, as the concurrence agrees, *ante*, at 455, the extent of police surveillance traffic cannot serve as a bootstrap to demonstrate public use of the airspace.

If, however, we are to resolve the issue by considering whether the appropriate party carried its burden of proof, I again think that Riley must prevail. Because the State has greater access to information concerning customary flight patterns and because the coercive power of the State ought not be brought to bear in cases in which it is unclear whether the prosecution is a product of an unconstitutional, warrantless search, cf. *Bumper* v. *North Carolina*, 391 U. S. 543, 548 (1968) (prosecutor has burden of proving consent to search), the burden of proof properly rests with the State and

not with the individual defendant. The State quite clearly has not carried this burden.[7]

V

The issue in this case is, ultimately, "how tightly the fourth amendment permits people to be driven back into the recesses of their lives by the risk of surveillance." Amsterdam, *supra*, at 402. The Court today approves warrantless helicopter surveillance from an altitude of 400 feet. While JUSTICE O'CONNOR's opinion gives reason to hope that this altitude may constitute a lower limit, I find considerable cause for concern in the fact that a plurality of four Justices would remove virtually all constitutional barriers to police surveillance from the vantage point of helicopters. The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:

> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." Nineteen Eighty-Four 4 (1949).

---

[7] The issue in *Jones* v. *United States*, 362 U. S. 257, 261 (1960), cited by JUSTICE O'CONNOR, was whether the defendant had standing to raise a Fourth Amendment challenge. While I would agree that the burden of alleging and proving facts necessary to show standing could ordinarily be placed on the defendant, I fail to see how that determination has any relevance to the question where the burden should lie on the merits of the Fourth Amendment claim.

Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.

JUSTICE BLACKMUN, dissenting.

The question before the Court is whether the helicopter surveillance over Riley's property constituted a "search" within the meaning of the Fourth Amendment. Like JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE STEVENS, and JUSTICE O'CONNOR, I believe that answering this question depends upon whether Riley has a "reasonable expectation of privacy" that no such surveillance would occur, and does not depend upon the fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much.

The inquiry then becomes how to determine whether Riley's expectation was a reasonable one. JUSTICE BRENNAN, the two Justices who have joined him, and JUSTICE O'CONNOR all believe that the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet. Again, I agree.

How is this factual issue to be decided? JUSTICE BRENNAN suggests that we may resolve it ourselves without any evidence in the record on this point. I am wary of this approach. While I, too, suspect that for most American communities it is a rare event when nonpolice helicopters fly over one's curtilage at an altitude of 400 feet, I am not convinced that we should establish a *per se* rule for the entire Nation based on judicial suspicion alone. See Coffin, Judicial Balancing, 63 N. Y. U. L. Rev. 16, 37 (1988).

But we need not abandon our judicial intuition entirely. The opinions of both JUSTICE BRENNAN and JUSTICE O'CONNOR, by their use of "cf." citations, implicitly recognize that none of our prior decisions tells us who has the burden of proving whether Riley's expectation of privacy was reasonable. In the absence of precedent on the point, it is appropriate for us to take into account our estimation of the

frequency of nonpolice helicopter flights. See 4 W. LaFave, Search and Seizure § 11.2(b), p. 228 (2d ed. 1987) (burdens of proof relevant to Fourth Amendment issues may be based on a judicial estimate of the probabilities involved). Thus, because I believe that private helicopters rarely fly over curtilages at an altitude of 400 feet, I would impose upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy. Indeed, I would establish this burden of proof for any helicopter surveillance case in which the flight occurred below 1,000 feet—in other words, for any aerial surveillance case not governed by the Court's decision in *California* v. *Ciraolo*, 476 U. S. 207 (1986).

In this case, the prosecution did not meet this burden of proof, as JUSTICE BRENNAN notes. This failure should compel a finding that a Fourth Amendment search occurred. But because our prior cases gave the parties little guidance on the burden of proof issue, I would remand this case to allow the prosecution an opportunity to meet this burden.

The order of this Court, however, is not to remand the case in this manner. Rather, because JUSTICE O'CONNOR would impose the burden of proof on Riley and because she would not allow Riley an opportunity to meet this burden, she joins the plurality's view that no Fourth Amendment search occurred. The judgment of the Court, therefore, is to reverse outright on the Fourth Amendment issue. Accordingly, for the reasons set forth above, I respectfully dissent.

Syllabus

CITY OF RICHMOND *v.* J. A. CROSON CO.

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

No. 87-998. Argued October 5, 1988—Decided January 23, 1989

Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBE's), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove* v. *Klutznick*, 448 U. S. 448; and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBE's were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U. S. C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived from the principal opinion in *Fullilove*, *supra*, which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, in

which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teachers' union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

822 F. 2d 1355, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, III–B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 498–506.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 498–499.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by *anyone* in the city's construction industry. The fact that the Plan declares itself to be "remedial" is insufficient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBE's

in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBE's eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 499–504.

(c) The "evidence" relied upon by JUSTICE MARSHALL's dissent—the city's history of school desegregation and numerous congressional reports—does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, JUSTICE MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 504–506.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. P. 506.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30% quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBE's, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and

waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 507–508.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 486–493.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts III–A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant*'s strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by JUSTICE MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification

before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks constitute approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 493–498.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 509–511.

JUSTICE STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 511–518.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 512–513.

(b) Legislative bodies such as the city council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proved guilty of violations of law. Pp. 513–514.

(c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 514–517.

JUSTICE KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 518–520.

JUSTICE SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 520–525.

2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 526–528.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE, J., joined, and an opinion with respect to Parts III–A and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., *post*, p. 511, and KENNEDY, J., *post*, p. 518, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 520. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 528. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 561.

John Payton argued the cause for appellant. With him on the briefs were *Mark S. Hersh*, *Drew St. J. Carneal*, *Michael L. Sarahan*, *Michael K. Jackson*, and *John H. Pickering*.

Walter H. Ryland argued the cause and filed a brief for appellee.*

*Briefs of *amici curiae* urging reversal were filed for the State of Maryland by *J. Joseph Curran, Jr.*, Attorney General, and *Charles O. Monk II*, Deputy Attorney General; for the State of Michigan by *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, and *Brent E. Simmons*, Assistant Attorney General; for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Suzanne M. Lynn*, *Marjorie Fujiki*, and *Marla Tepper*, Assistant Attorneys General, *John K. Van de Kamp*, Attorney General of California, *Joseph I. Lieberman*, Attorney General of Connecticut, *Frederick D. Cooke*, Corporation Counsel of the District of Columbia, *Neil F. Hartigan*, Attorney General of Illinois, *James M. Shannon*, Attorney General of Massachusetts, *Hubert H. Humphrey III*, Attorney General of Minnesota, *W. Cary Edwards*, Attorney General of New Jersey, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles G. Brown*, Attorney Gen-

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and JUSTICE WHITE join, and an opinion with respect to Parts III–A and V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to amelio-

---

eral of West Virginia, *Donald Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming; for the Alpha Kappa Alpha Sorority et al. by *Eva Jefferson Paterson*, *Robert L. Harris*, *Judith Kurtz*, *William C. McNeill III*, and *Nathaniel Colley;* for the American Civil Liberties Union et al. by *Edward M. Chen*, *Steven R. Shapiro*, *John A. Powell*, and *John Hart Ely;* for the city of San Francisco, California, et al. by *Louise H. Renne* and *Burk E. Delventhal;* for the Lawyer's Committee for Civil Rights under Law et al. by *Stephen J. Pollak*, *James R. Bird*, *Paula A. Sweeney*, *Grover Hankins*, *Judith L. Lichtman*, *Conrad K. Harper*, *Stuart J. Land*, *Norman Redlich*, *William L. Robinson*, *Judith A. Winston*, and *Antonia Hernandez;* for the Maryland Legislative Black Caucus by *Koteles Alexander* and *Bernadette Gartrell;* for the Minority Business Enterprise Legal Defense and Education Fund, Inc., et al. by *Anthony W. Robinson*, *H. Russell Frisby, Jr.*, and *Andrew L. Sandler;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius L. Chambers*, *Charles Stephen Ralston*, *Ronald L. Ellis*, *Eric Schnapper*, *Napoleon B. Williams, Jr.*, and *Clyde E. Murphy;* and for the National League of Cities et al. by *Benna Ruth Solomon* and *David A. Strauss.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Ayer*, *Deputy Assistant Attorney General Clegg*, *Glen G. Nager*, and *David K. Flynn;* for the Anti-Defamation League of B'nai B'rith by *Robert A. Helman*, *Michele Odorizzi*, *Daniel M. Harris*, *Justin J. Finger*, *Jeffrey P. Sinensky*, and *Jill L. Kahn;* for Associated Specialty Contractors, Inc., by *John A. McGuinn* and *Gary L. Lieber;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* for the Mountain States Legal Foundation by *Constance E. Brooks;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley;* for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

rate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, *e. g.*, *South Florida Chapter, Associated General Contractors of America, Inc.* v. *Metropolitan Dade County*, 723 F. 2d 846 (CA11), cert. denied, 469 U. S. 871 (1984); *Ohio Contractors Assn.* v. *Keip*, 713 F. 2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, *e. g.*, *Michigan Road Builders Assn., Inc.* v. *Milliken*, 834 F. 2d 583 (CA6 1987), appeal docketed, No. 87–1860; *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83–69–59, codified in Richmond, Va., City Code, § 12–156(a) (1985). The 30% set-

aside did not apply to city contracts awarded to minority-owned prime contractors. *Ibid.*

The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." § 12–23, p. 941. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Ibid.* There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." § 12–158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. *Ibid.*[1]

The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." § 12–157. To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses). Paragraph D of these rules provided:

> "No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the

[1] The expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8–9 (1978).

contract to enable meeting the 30% MBE goal." ¶ D, Record, Exh. 24, p. 1; see *J. A. Croson Co.* v. *Richmond*, 779 F. 2d 181, 197 (CA4 1985) *(Croson I)*.

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. *Id.*, at 194. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Record, Exh. 24, p. 3. Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. The prime contractor's commitment form or request for a waiver of the 30% set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBE's named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor's request for a partial or complete waiver of the 30% set-aside. *Croson I*, 779 F. 2d, at 196. The Director of General Services made the final determination on compliance with the set-aside provisions or the propriety of granting a waiver. *Ibid.* His discretion in this regard appears to have been plenary. There was no direct administrative appeal from the Director's denial of a waiver. Once a contract had been awarded to another firm a bidder denied an award for failure to comply with the MBE requirements had a general right of protest under Richmond procurement policies. Richmond, Va., City Code, § 12–126(a) (1985).

The Plan was adopted by the Richmond City Council after a public hearing. App. 9–50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime con-

struction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement:

> "There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread." *Id.*, at 41.

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See *id.*, at 42 (statement of Councilperson Kemp) ("[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBE's had little probative value in establishing discrimination in the construction industry. *Id.*, at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there

were enough MBE's in the Richmond area to satisfy the 30% set-aside requirement. *Id.*, at 32 (statement of Mr. Beck); *id.*, at 33 (statement of Mr. Singer); *id.*, at 35–36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. *Ibid.* Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBE's eligible for the 30% set-aside. *Id.*, at 44. Some of the representatives of the local contractors' organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking out minority members. *Id.*, at 38 (statement of Mr. Shuman) ("The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us"); see also *id.*, at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his concern about the legality of the Plan, and asked that a vote be delayed pending consultation with outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two, with Councilperson Gillespie abstaining. *Id.*, at 49.

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J. A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. Products of either of two manufacturers were specified, Acorn Engineering Company (Acorn) or Bradley Manufacturing Company (Bradley). Bonn determined that

to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures. The provision of the fixtures amounted to 75% of the total contract price.

On September 30, Bonn contacted five or six MBE's that were potential suppliers of the fixtures, after contacting three local and state agencies that maintained lists of MBE's. No MBE expressed interest in the project or tendered a quote. On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBE's. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wished to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. One supplier, Ferguson Plumbing Supply, which is not an MBE, had already made a quotation directly to Croson, and refused to quote the same fixtures to Continental. Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures. The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would take at least 30 days to complete.

On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of $126,530. Brown and Bonn met personally at the bid opening, and Brown informed Bonn that his difficulty in obtaining credit approval had hindered his submission of a bid.

By October 19, 1983, Croson had still not received a bid from Continental. On that date it submitted a request for a waiver of the 30% set-aside. Croson's waiver request indicated that Continental was "unqualified" and that the other MBE's contacted had been unresponsive or unable to quote. Upon learning of Croson's waiver request, Brown contacted an agent of Acorn, the other fixture manufacturer specified by the city. Based upon his discussions with Acorn, Brown subsequently submitted a bid on the fixtures to Croson. Continental's bid was $6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This

constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by $7,663.16. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental, an MBE, could supply the fixtures specified in the city jail contract. On November 2, 1983, the city denied Croson's waiver request, indicating that Croson had 10 days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in its bid being considered unresponsive.

Croson wrote the city on November 8, 1983. In the letter, Bonn indicated that Continental was not an authorized supplier for either Acorn or Bradley fixtures. He also noted that Acorn's quotation to Brown was subject to credit approval and in any case was substantially higher than any other quotation Croson had received. Finally, Bonn noted that Continental's bid had been submitted some 21 days after the prime bids were due. In a second letter, Croson laid out the additional costs that using Continental to supply the fixtures would entail, and asked that it be allowed to raise the overall contract price accordingly. The city denied both Croson's request for a waiver and its suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote the city asking for a review of the waiver denial. The city's attorney responded that the city had elected to rebid the project, and that there is no appeal of such a decision. Shortly thereafter Croson brought this action under 42 U. S. C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

The District Court upheld the Plan in all respects. See Supplemental App. to Juris. Statement 112–232 (Supp. App.). In its original opinion, a divided panel of the Fourth Circuit

Court of Appeals affirmed. *Croson I*, 779 F. 2d. 181 (1985). Both courts applied a test derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), and *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). See *Croson I*, *supra*, at 188. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove*, the panel majority indicated its view that the same standard should be applied to the Richmond City Council, stating:

> "Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing the evidence. Rather, it is to determine whether 'the legislative history . . . demonstrates that [the council] reasonably concluded that . . . private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.'" 779 F. 2d, at 190 (quoting *Fullilove*, *supra*, at 503 (Powell, J., concurring)).

The majority found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, rendered the city council's conclusion that low minority participation in city contracts was due to past discrimination "reasonable." *Croson I*, 779 F. 2d, at 190, and n. 12. The panel opinion then turned to the second part of its "synthesized *Fullilove*" test, examining whether the racial quota was "narrowly tailored to the legislative goals of the Plan." *Id.*, at 190. First, the court upheld the 30% set-aside figure, by comparing it not to the number of MBE's in Richmond, but rather to the percentage of minority persons in the city's population. *Id.*, at 191. The panel held that to remedy the effects of past discrimination, "a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter

the contracting industry and to allow existing minority contractors to grow." *Ibid.* Thus, in the court's view the 30% figure was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." *Ibid.*

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986). See 478 U. S. 1016 (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *J. A. Croson Co.* v. *Richmond*, 822 F. 2d 1355 (CA4 1987) *(Croson II)*. The majority found that the "core" of this Court's holding in *Wygant* was that, "[t]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." 822 F. 2d, at 1357. As the court read this requirement, "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.*'" *Id.*, at 1358 (quoting *Wygant*, *supra*, at 274) (emphasis in original).

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts . . . ." *Croson II*, *supra*, at 1358. Moreover, the statistics comparing the minority population of Richmond to the percentage of *prime* contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested "more of a political than a remedial basis for the racial preference." 822 F. 2d, at 1359. The court concluded that, "[i]f this plan is supported by a compelling governmental interest, so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.*, at 1360.

The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. *Ibid.* The dissenting judge argued that the majority had "misconstrue[d] and misapplie[d]" our decision in *Wygant*. 822 F. 2d, at 1362. We noted probable jurisdiction of the city's appeal, 484 U. S. 1058 (1988), and we now affirm the judgment.

II

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove*, we upheld the minority set-aside contained in § 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, 42 U. S. C. § 6701 *et seq.* (Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a $4 billion appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: "'Except to the extent the Secretary

determines otherwise, no grant shall be made under this Act . . . unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.'" *Fullilove*, 448 U. S., at 454 (quoting 91 Stat. 116, 42 U. S. C. § 6705(f)(2)). MBE's were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Ibid.*

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U. S., at 472. The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? *Id.*, at 473.

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. *Id.*, at 475–476. Congress could mandate state and local government compliance with the set-aside program under its § 5 power to enforce the Fourteenth Amendment. *Id.*, at 476 (citing *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966)).

The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside.

First was the unique remedial powers of Congress under § 5 of the Fourteenth Amendment:

> "Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U. S., at 483 (principal opinion) (emphasis added).

Because of these unique powers, the Chief Justice concluded that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct." *Id.*, at 483–484 (emphasis added).

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. *Id.*, at 458–467. The Chief Justice also noted that Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. *Id.*, at 463–467. The Chief Justice concluded that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.*, at 478.

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would as-

sure that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10% requirement. *Id.*, at 487–488. Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of prior discrimination." *Id.*, at 488. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster." *Id.*, at 487.

In his concurring opinion, Justice Powell relied on the legislative history adduced by the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.*, at 503. Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. *Id.*, at 514–515. Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.*, at 515–516, n. 14.

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant 32 (footnote omitted).

What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach* v. *Morgan*, 384 U. S., at 651 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"). See also *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326 (1966) (similar interpretation of congressional power under § 2 of the Fifteenth Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, 100 U. S. 339, 345 (1880), the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of

the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. See *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d, at 929 (Kozinski, J.) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action"); see also Days, Fullilove, 96 Yale L. J. 453, 474 (1987) (hereinafter Days) ("*Fullilove* clearly focused on the constitutionality of a *congressionally* mandated set-aside program") (emphasis in original); Bohrer, *Bakke, Weber*, and *Fullilove:* Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L. J. 473, 512–513 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone").

We do not, as JUSTICE MARSHALL's dissent suggests, see *post*, at 557–560, find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, "'a *positive* grant of legislative power'" to Congress. *Post*, at 557, quoting *Katzenbach* v. *Morgan*, *supra*, at 651 (emphasis in dissent). Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), cited by the dissent, *post*, at 560, the Court noted that the Civil War Amendments granted "additional powers to the Federal government," and laid "additional restraints upon those of the States." 16 Wall., at 68.

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimina-

tion within its own legislative jurisdiction.[2] This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." *Wygant*, 476 U. S., at 274. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood* v. *Harrison*, 413 U. S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce,

---

[2] In its original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set-aside program. *Croson I*, 779 F. 2d 181, 184–186 (CA4 1985). That determination was not disturbed by the court's subsequent holding that the Plan violated the Equal Protection Clause.

encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).

III

A

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of*

California Regents v. *Bakke*, 438 U. S., at 298 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. *Wygant*, 476 U. S., at 279–280; *id.*, at 285–286 (O'CONNOR, J., concurring in part and concurring in judgment). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 105 (1973) (MARSHALL, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established") (footnotes omitted).

Our continued adherence to the standard of review employed in *Wygant* does not, as JUSTICE MARSHALL's dissent suggests, see *post*, at 552, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." As we indicate, see *infra*, at 509–510, States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, *supra*, at 289–290.

Under the standard proposed by JUSTICE MARSHALL's dissent, "race-conscious classifications designed to further remedial goals," *post*, at 535, are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of

the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975) ("[T]he 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"). The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," *Wygant*, *supra*, at 320 (STEVENS, J., dissenting) (footnote omitted), will never be achieved.

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a mi-

nority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739, n. 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

In *Bakke*, *supra*, the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups. *Id.*, at 288–289. Among the justifications offered in support of the plan were the desire to "reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination." *Id.*, at 306 (citations omitted). Five Members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. *Id.*, at 271–272 (Powell, J.) (addressing constitutionality of Davis plan); *id.*, at 408 (STEVENS, J., joined by Burger, C. J. and Stewart and REHNQUIST, JJ. concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.*, at 307. Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs

worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Ibid.* He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. *Ibid.* Only then does the government have a compelling interest in favoring one race over another. *Id.*, at 308–309.

In *Wygant*, 476 U. S. 267 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, *supra*, at 276.

The role model theory employed by the lower courts failed for two reasons. First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. 476 U. S., at 276; see also *id.*, at 294 (O'CONNOR, J., concurring in part and concurring in judgment) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination"). Second, because the role model theory had no

relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to "justify" race-based decisionmaking essentially limitless in scope and duration. *Id.*, at 276 (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

B

We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the *construction industry*." Supp. App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant*, *supra*, at 275 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." Brief for Appellant 23–24. The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding pro-

cedures, and disability caused by an inadequate track record. *Id.*, at 25–26, and n. 41.

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate "facts" in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp. App. 163–167.

None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U. S., at 277 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. *Id.*, at 274–275; see also *id.*, at 293 (O'CONNOR, J., concurring).

The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger* v. *Wiesenfeld*, 420 U. S., at 648, n. 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"). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

The District Court also relied on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry "in this area, and the State, and around the nation." App. 41 (statement of Councilperson Marsh). It also noted that the city manager had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh. *Id.*, at 42 (statement of Mr. Deese). These statements are of little probative value in establishing identified discrimination in the Richmond construction industry. The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. See *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 488–489 (1955). But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. See *McLaughlin* v. *Florida*, 379 U. S. 184, 190–192 (1964). A

governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. See *id.*, at 193; *Wygant*, *supra*, at 277. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. See *Korematsu* v. *United States*, 323 U. S. 214, 235–240 (1944) (Murphy, J., dissenting).

Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, at 308, n. 13. See also *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620 (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. See *Teamsters* v. *United States*, 431 U. S. 324, 337–338 (1977) (statistical comparison between minority truckdrivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating

discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood*, *supra*, at 308; *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 651–652 (1987) (O'CONNOR, J., concurring in judgment).

In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Cf. *Ohio Contractors Assn.* v. *Keip*, 713 F. 2d, at 171 (relying on percentage of minority *businesses* in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside). Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d, at 933 ("There is no finding—and we decline to assume—that male caucasian contractors will award contracts only to other male caucasians").[3] Indeed, there is evidence in this record that overall minority participation in city contracts in Richmond is 7 to 8%, and that minority contractor participation in Community Block Development Grant *construction* projects is 17 to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any in-

[3] Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. See Reply Brief for Appellant 18, n. 42 (citing Richmond, Va., City Code, § 17.2 *et seq.* (1985)). The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the dissent's vision of a "tight-knit industry" which has prevented blacks from obtaining the experience necessary to participate in construction contracting. See *post*, at 542–543.

formation on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. See The State of Small Business: A Report of the President 201 (1986) ("Relative to the distribution of all businesses, black-owned businesses are more than proportionally represented in the transportation industry, but considerably less than proportionally represented in the wholesale trade, manufacturing, and finance industries"). The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination. Cf. *Bazemore* v. *Friday*, 478 U. S. 385, 407–408 (1986) (mere existence of single race clubs in absence of evidence of exclusion by race cannot create a duty to integrate).

For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBE's eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood*, 413 U. S., at 465; *Ohio Contractors*, *supra*, at 171 (upholding minority set-aside based in part on earlier District Court finding that "the state had become 'a joint participant' with private industry and certain craft unions in

a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area. See *Fullilove*, 448 U. S., at 487 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. See Days 480–481 ("[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions").

JUSTICE MARSHALL apparently views the requirement that Richmond identify the discrimination it seeks to remedy in its own jurisdiction as a mere administrative headache, an

"onerous documentary obligatio[n]." *Post*, at 548. We cannot agree. In this regard, we are in accord with JUSTICE STEVENS' observation in *Fullilove*, that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove*, *supra*, at 533–535 (dissenting opinion) (footnotes omitted). The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

Moreover, JUSTICE MARSHALL's suggestion that findings of discrimination may be "shared" from jurisdiction to jurisdiction in the same manner as information concerning zoning and property values is unprecedented. See *post*, at 547, quoting *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 51–52 (1986). We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See *Milliken* v. *Bradley*, 418 U. S. 717, 746 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity

and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . ." *Bakke*, 438 U. S., at 296–297 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp. App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant*, 476 U. S., at 284, n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").

IV

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See *United States* v. *Paradise*, 480 U. S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies"). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See *Fullilove*, 448 U. S., at 463–467; see also *id.*, at 511 (Powell, J., concurring) ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 494 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of

one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

V

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore* v. *Friday*, 478 U. S., at 398; *Teamsters* v. *United States*, 431 U. S., at 337–339. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, *e. g.*, *New York State Club Assn.* v. *New York City*, 487 U. S. 1, 10–11, 13–14 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–803 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters*, *supra*, at 338.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding

procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U. S., at 277.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that re-

covery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." *Fullilove*, 448 U. S., at 539 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. See *ante*, at 493–494.[1] I do, however, agree with the Court's explana-

[1] In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point—as I explained at some length in *Fullilove* v. *Klutznick*, 448 U. S. 448, 532–554 (1980) (dissenting opinion)—I am not prepared to assume that even a more narrowly tailored set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past

tion of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III–B, and IV of its opinion. I write separately to emphasize three aspects of the case that are of special importance to me.

First, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. This case is therefore completely unlike *Wygant*, in which I thought it quite obvious that the school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty. As I pointed out in my dissent in that case, even if we completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking.[2] In the

---

discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point: I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to acknowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n. 2, *infra;* see also Justice Powell's discussion in *University of California Regents* v. *Bakke*, 438 U. S. 265, 311–319 (1978).

[2] "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.

. . . . . .

"[I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city

case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

Second, this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.[3] It is the judicial system, rather than the legislative process, that is best equipped to iden-

---

with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

"In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant* v. *Jackson Board of Education*, 476 U. S., at 313–315 (footnotes omitted).

[3] See U. S. Const., Art. I, § 9, cl. 3, § 10, cl. 1. Of course, legislatures frequently appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy. See, *e. g.*, Pub. L. 100–383, 102 Stat. 903 (provision of restitution to interned Japanese-Americans during World War II). Thus, it would have been consistent with normal practice for the city of Richmond to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past. Such a voluntary decision by a public body is, however, quite different from a decision to require one private party to compensate another for an unproven injury.

tify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15–16 (1971).[4]

Third, instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation,[5] I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452–453 (1985) (STEVENS, J., concurring).[6] In this case that approach con-

---

[4] As I pointed out in my separate opinion concurring in the judgment in *United States* v. *Paradise*, 480 U. S. 149, 193–194 (1987):

"A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.' The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution."

[5] "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig* v. *Boren*, 429 U. S. 190, 211–212 (1976) (STEVENS, J., concurring).

[6] "I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality

vinces me that, instead of carefully identifying the characteristics of the two classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause. Whether we look at the class of persons benefited by the ordinance or at the disadvantaged class, the same conclusion emerges.

The justification for the ordinance is the fact that in the past white contractors—and presumably other white citizens in Richmond—have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination—it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.

The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of

---

that must always characterize the performance of the sovereign's duty to govern impartially.

. . . . . .

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.'" *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S., at 452–453 (STEVENS, J., concurring).

white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975.[7] Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law,[8] and some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.[9]

There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its

---

[7] See *ante*, at 502, n. 3.

[8] There is surely some question about the power of a legislature to impose a statutory burden on private citizens for engaging in discriminatory practices at a time when such practices were not unlawful. Cf. *Teamsters* v. *United States*, 431 U. S. 324, 356–357, 360 (1977).

[9] There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander. Cf. *Karcher* v. *Daggett*, 462 U. S. 725, 744–765 (1983) (STEVENS, J., concurring); *Rogers* v. *Lodge*, 458 U. S. 613, 631–653 (1982) (STEVENS, J., dissenting); *Mobile* v. *Bolden*, 446 U. S. 55, 83–94 (1980) (STEVENS, J., concurring in judgment); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 848–853 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 893 (1972). A southern State with a long history of discrimination against Republicans in the awarding of public contracts could not rely on such past discrimination as a basis for granting a legislative preference to Republican contractors in the future.

supposed beneficiaries. For, as I explained in my opinion in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980):

> "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Id.*, at 545.
>
> "The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.
>
> "When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.
>
> "In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition." *Id.*, at 552–554 (footnote omitted).

Accordingly, I concur in Parts I, III–B, and IV of the Court's opinion, and in the judgment.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join all but Part II of JUSTICE O'CONNOR's opinion and give this further explanation.

Part II examines our case law upholding congressional power to grant preferences based on overt and explicit classification by race. See *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980). With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. JUSTICE SCALIA's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed. His opinion would make it crystal clear to the

political branches, at least those of the States, that legislation must be based on criteria other than race.

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in JUSTICE O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. My reasons for doing so are as follows. First, I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort. Second, the rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause. I note, in this connection, that evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court. Third, the strict scrutiny rule is consistent with our precedents, as JUSTICE O'CONNOR's opinion demonstrates.

The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We

are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

JUSTICE SCALIA, concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is "remedial" or "benign." *Ante*, at 493, 495. I do not agree, however, with JUSTICE O'CONNOR's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." *Ante*, at 476–477. The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, *e. g.*, *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 274–276 (1986) (plurality opinion) (discrimination in teacher assignments to provide "role models" for minority students); *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses"); *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)* (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution

to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, The Morality of Consent 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee* v. *Washington*, *supra*—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia*, 100 U. S. 339, 345 (1880); 2 J. Story, Commentaries on the Constitution § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, Constitutional Limitations 439 (2d ed. 1871).

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those holdings to the States. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), we upheld legislative action by Congress similar in its asserted purpose to that at issue here. And we have permitted federal courts to prescribe quite severe, race-conscious remedies when confronted with egregious and persistent unlawful discrimination, see, *e. g.*, *United States* v. *Paradise*, 480 U. S. 149 (1987); *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986). As JUSTICE O'CONNOR acknowledges, however, *ante*, at 486–491, it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U. S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in

matters of race that Amendment was specifically directed, see Amdt. 14, § 1. As we said in *Ex parte Virginia*, *supra*, at 345, the Civil War Amendments were designed to "take away all possibility of oppression by law because of race or color" and "to be . . . limitations on the power of the States and enlargements of the power of Congress." Thus, without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions supporting the judgment, none of which commanded more than three votes, compare 448 U. S., at 453–495 (opinion of Burger, C. J., joined by WHITE and Powell, JJ.), with *id.*, at 495–517 (opinion of Powell, J.), and *id.*, at 517–522 (opinion of MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ.)), I do not believe our decision in that case controls the one before us here.

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination"—political qualities already to be doubted in a national legislature, *Fullilove*, *supra*, at 527 (Stewart, J., with whom REHNQUIST, J., joined, dissenting)—are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. See, *e. g.*, *Ex parte Virginia*, *supra* (denying writ of habeas corpus to a state judge in custody under federal indictment for excluding jurors on the basis of race); H. Hyman & W. Wiecek, Equal Justice Under Law, 1835–1875, pp. 312–334 (1982); Logan, Judicial Federalism in the Court of History, 66 Ore. L. Rev. 454, 494–515 (1988). And the struggle retains that character in modern times. See, *e. g.*, *Brown* v. *Board of Education*, 349 U. S. 294 (1955) *(Brown II)*; *United States* v. *Montgomery Board of Educa-*

tion, 395 U. S. 225 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Griffin* v. *Prince Edward County School Board*, 377 U. S. 218 (1964); *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Not all of that struggle has involved discrimination against blacks, see, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) (Chinese); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (Hispanics), and not all of it has been in the Old South, see, *e. g.*, *Columbus Board of Education* v. *Penick*, 443 U. S. 449 (1979); *Keyes* v. *School Dist. No. 1, Denver, Colorado*, 413 U. S. 189 (1973). What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

> "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961).

The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit)—and blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turnabout is not fair play.

In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore* v. *Friday*, 478 U. S. 385, 395–396 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. While there is no doubt that those cases have taken into account the continuing "effects" of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a "dual school system." We have stressed each school district's constitutional "duty to *dismantle* its dual system," and have found that "[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment." *Columbus Board of Education* v. *Penick*, *supra*, at 458–459 (emphasis added). Concluding in this context that race-neutral efforts at "dismantling the state-imposed dual system" were so ineffective that they might "indicate a lack of good faith," *Green* v. *New Kent County School Board*, 391 U. S. 430, 439 (1968); see also

Raney v. *Board of Education of Gould School Dist.*, 391 U. S. 443 (1968), we have permitted, as part of the local authorities' "affirmative duty to disestablish the dual school system[s]," such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race for the same purpose. *McDaniel* v. *Barresi*, 402 U. S. 39, 40–41 (1971). While thus permitting the use of race to *de*classify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. See, *e. g.*, *Columbus Board of Education* v. *Penick*, *supra*, at 465; *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U. S. 717, 744 (1974); *Keyes* v. *School Dist. No. 1, Denver, Colorado*, *supra*, at 213. And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976) (federal court may not require racial assignment in such circumstances).

Our analysis in *Bazemore* v. *Friday*, *supra*, reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4–H and Homemaker Clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there was no further obligation to use racial reassignments to eliminate continuing effects—that is, any remaining all-black and all-white clubs. 478 U. S., at 407–408. "[H]owever sound *Green* [v. *New Kent County School Board*, *supra*] may have been in the context of the public schools," we said, "it has no application to this wholly different milieu." *Id.*, at 408. The same is so here.

A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may "undo the effects of past discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." *Ante*, at 507–508. In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action—see, *e. g.*, *ante*, at 504–506, 507–508—but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race.* In other words, far from justifying racial classification, iden-

tification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

In his final book, Professor Bickel wrote:

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Bickel, The Morality of Consent, at 133.

Those statements are true and increasingly prophetic. Apart from their societal effects, however, which are "in the aggregate disastrous," *id.*, at 134, it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 677 (1987) (SCALIA, J., dissenting). As Justice Douglas observed: "A DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis* v. *Odegaard*, 416 U. S. 312, 337 (1974) (dissenting opinion). When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the

source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980).

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's

position[1] is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council *has* supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is

[1] In the interest of convenience, I refer to the opinion in this case authored by JUSTICE O'CONNOR as "the majority," recognizing that certain portions of that opinion have been joined by only a plurality of the Court.

the harsh reality of the majority's decision, but it is not the Constitution's command.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. *Ante*, at 479–481. In so doing, the majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.

Six years before Richmond acted, Congress passed, and the President signed, the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, 42 U. S. C. § 6701 *et seq.* (Act), a measure which appropriated $4 billion in federal grants to state and local governments for use in public works projects. Section 103(f)(2) of the Act was a minority business set-aside provision. It required state or local grantees to use 10% of their federal grants to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups, absent an administrative waiver. In 1980, in *Fullilove*, *supra*, this Court upheld the validity of this federal set-aside. Chief Justice Burger's principal opinion noted the importance of overcoming those "criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, ac-

cess by the minority business community to public funds made available by congressional appropriations." *Fullilove*, 448 U. S., at 480. Finding the set-aside provision properly tailored to this goal, the Chief Justice concluded that the program was valid under either strict or intermediate scrutiny. *Id.*, at 492.

The congressional program upheld in *Fullilove* was based upon an array of congressional and agency studies which documented the powerful influence of racially exclusionary practices in the business world. A 1975 Report by the House Committee on Small Business concluded:

> "The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. *The presumption must be made that past discriminatory systems have resulted in present economic inequities.*" H. R. Rep. No. 94–468, pp. 1–2 (1975) (quoted in *Fullilove*, *supra*, at 465) (opinion of Burger, C. J.) (emphasis deleted and added).

A 1977 Report by the same Committee concluded:

> "[O]ver the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present,

> this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry in particular." H. R. Rep. No. 94–1791, p. 182 (1977), summarizing H. R. Rep. No. 94–468, p. 17 (1976) (quoted in *Fullilove*, *supra*, at 466, n. 48).

Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors. A report submitted to Congress in 1975 by the United States Commission on Civil Rights, for example, described the way in which fledgling minority-owned businesses were hampered by "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *Fullilove*, *supra*, at 467 (summarizing United States Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975)).

Thus, as of 1977, there was "abundant evidence" in the public domain "that minority businesses ha[d] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, *supra*, at 477–478.[2] Signifi-

[2] Other Reports indicating the dearth of minority-owned businesses include H. R. Rep. No. 92–1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the "long history of racial bias" has created "major problems" for minority businessmen); H. R. Doc. No. 92–194, p. 1 (1972) (text of message from President Nixon to Con-

cantly, this evidence demonstrated that discrimination had prevented existing or nascent minority-owned businesses from obtaining not only federal contracting assignments, but state and local ones as well. See *Fullilove*, *supra*, at 478.[3]

The members of the Richmond City Council were well aware of these exhaustive congressional findings, a point the

---

gress, describing federal efforts "to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open"); H. R. Doc. No. 92–169, p. 1 (1971) (text of message from President Nixon to Congress, describing paucity of minority business ownership and federal efforts to give "every man an equal chance at the starting line").

[3] Numerous congressional studies undertaken after 1977 and issued before the Richmond City Council convened in April 1983 found that the exclusion of minorities had continued virtually unabated—and that, because of this legacy of discrimination, minority businesses across the Nation had still failed, as of 1983, to gain a real toehold in the business world. See, *e. g.*, H. R. Rep. No. 95–949, pp. 2, 8 (1978) (Report of House Committee on Small Business, finding that minority businesses "are severely undercapitalized" and that many minorities are disadvantaged "because they are identified as members of certain racial categories"); S. Rep. No. 95–1070, pp. 14–15 (1978); (Report of Senate Select Committee on Small Business, finding that the federal effort "has fallen far short of its goal to develop strong and growing disadvantaged small businesses," and "recogniz[ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); S. Rep. No. 96–31, pp. IX, 107 (1979) (Report of Senate Select Committee on Small Business, finding that many minorities have "suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control"); S. Rep. No. 96–974, p. 3 (1980) (Report of Senate Select Committee on Small Business, finding that government aid must be "significantly increased" if minority-owned businesses are to "have the maximum practical opportunity to develop into viable small businesses"); H. R. Rep. No. 97–956, p. 35 (1982) (Report of House Committee on Small Business, finding that federal programs to aid minority businesses have had "limited success" to date, but concluding that success could be "greatly expanded" with "appropriate corrective actions"); H. R. Rep. No. 98–3, p. 1 (1983) (Report of House Committee on Small Business, finding that "the small business share of Federal contracts continues to be inadequate").

majority, tellingly, elides. The transcript of the session at which the council enacted the local set-aside initiative contains numerous references to the 6-year-old congressional set-aside program, to the evidence of nationwide discrimination barriers described above, and to the *Fullilove* decision itself. See, *e. g.*, App. 14–16, 24 (remarks of City Attorney William H. Hefty); *id.*, at 14–15 (remarks of Councilmember William J. Leidinger); *id.*, at 18 (remarks of minority community task force president Freddie Ray); *id.*, at 25, 41 (remarks of Councilmember Henry L. Marsh III); *id.*, at 42 (remarks of City Manager Manuel Deese).

The city council's members also heard testimony that, although minority groups made up half of the city's population, only 0.67% of the $24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors. *Id.*, at 43 (remarks of Councilmember Henry W. Richardson). They heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members.[4] Finally, they heard testimony from city officials as to the exclusionary history of the local construction industry.[5] As the District Court noted, not a

---

[4] According to testimony by trade association representatives, the Associated General Contractors of Virginia had no blacks among its 130 Richmond-area members, App. 27–28 (remarks of Stephen Watts); the American Subcontractors Association had no blacks among its 80 Richmond members, *id.*, at 36 (remarks of Patrick Murphy); the Professional Contractors Estimators Association had 1 black member among its 60 Richmond members, *id.*, at 39 (remarks of Al Shuman); the Central Virginia Electrical Contractors Association had 1 black member among its 45 members, *id.*, at 40 (remarks of Al Shuman); and the National Electrical Contractors Association had 2 black members among its 81 Virginia members. *Id.*, at 34 (remarks of Mark Singer).

[5] Among those testifying to the discriminatory practices of Richmond's construction industry was Councilmember Henry Marsh, who had served as mayor of Richmond from 1977 to 1982. Marsh stated:

"I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State,

single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread. Civ. Action No. 84–0021 (ED Va., Dec. 3, 1984) (reprinted in Supp. App. to Juris. Statement 164–165).[6] So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, 301 (1986) (MARSHALL, J., dissenting). My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional scrutiny. *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (1978) (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted); see also *Wygant*, *supra*, at 301–302 (MARSHALL, J., dissenting); *Fullilove*, 448 U. S., at 517–519

---

and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

"I think the situation involved in the City of Richmond is the same . . . . I think the question of whether or not remedial action is required is not open to question." *Id.*, at 41.

Manuel Deese, who in his capacity as City Manager had oversight responsibility for city procurement matters, stated that he fully agreed with Marsh's analysis. *Id.*, at 42.

[6] The representatives of several trade associations did, however, deny that their particular organizations engaged in discrimination. See, *e. g.*, *id.*, at 38 (remarks of Al Shuman, on behalf of the Central Virginia Electrical Contractors Association).

(MARSHALL, J., concurring in judgment). Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." *Fullilove*, *supra*, at 519 (MARSHALL, J., concurring in judgment).

A

1

Turning first to the governmental interest inquiry, Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important, interest. In *Fullilove*, six Members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement. The decision, in holding that the federal set-aside provision satisfied the equal protection principles under any level of scrutiny, recognized that the measure sought to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct." 448 U. S., at 478; see also *id.*, at 502–506 (Powell, J., concurring); *id.*, at 520 (MARSHALL, J., concurring in judgment). Indeed, we have repeatedly reaffirmed the government's interest in breaking down barriers erected by past racial discrimination in cases involving access to public education, *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971); *University of California Regents* v. *Bakke*, 438 U. S., at 320 (opinion of Powell, J.); *id.*, at 362–364 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), employment, *United States* v. *Paradise*, 480 U. S. 149, 167 (1987) (plurality opinion); *id.*, at 186–189 (Powell, J., concurring), and valuable government contracts, *Fullilove*, 448 U. S., at 481–484 (opinion of Burger, C. J.); *id.*, at 496–497 (Powell,

J., concurring); *id.*, at 521 (MARSHALL, J., concurring in judgment).

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. See *Fullilove*, 448 U. S., at 475 (noting Congress' conclusion that "the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities"); *id.*, at 503 (Powell, J., concurring).

The majority pays only lipservice to this additional governmental interest. See *ante*, at 491–493, 503–504. But our decisions have often emphasized the danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations. In *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), this Court recognized this interest as a constitutional command, holding unanimously that the Equal Protection Clause forbids courts to enforce racially restrictive covenants even where such covenants satisfied all requirements of state law and where the State harbored no discriminatory intent. Similarly, in *Norwood* v. *Harrison*, 413 U. S. 455 (1973), we invalidated a program in which a State purchased textbooks and loaned them to students in public and private schools, including private schools with racially discriminatory policies. We stated that the Constitution requires a State "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.*, at 467; see also *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974) (upholding federal-court order forbidding city to allow private segregated schools which allegedly discriminated on the basis of race to use public parks).

The majority is wrong to trivialize the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination—an interest which this Court has repeatedly deemed compelling. See, *e. g.*, *New York State Club Assn.* v. *New York City*, 487 U. S. 1, 14, n. 5 (1988); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984); *Bob Jones University* v. *United States*, 461 U. S. 574, 604 (1983); *Runyon* v. *McCrary*, 427 U. S. 160, 179 (1976). The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. But see *North Carolina Bd. of Education* v. *Swann*, 402 U. S. 43, 46 (1971) (Constitution may require consideration of race in remedying state-sponsored school segregation); *McDaniel*, *supra*, at 41 (same, and stating that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes"). But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through

its own decisionmaking, it served an interest of the highest order.

2

The remaining question with respect to the "governmental interest" prong of equal protection analysis is whether Richmond has proffered satisfactory proof of past racial discrimination to support its twin interests in remediation and in governmental nonperpetuation. Although the Members of this Court have differed on the appropriate standard of review for race-conscious remedial measures, see *United States* v. *Paradise*, 480 U. S., at 166, and 166–167, n. 17 (plurality opinion); *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 480 (1986) (plurality opinion), we have always regarded this factual inquiry as a practical one. Thus, the Court has eschewed rigid tests which require the provision of particular species of evidence, statistical or otherwise. At the same time we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere "paternalistic stereotyping, not on a careful consideration of modern social conditions." *Fullilove* v. *Klutznick*, *supra*, at 519 (MARSHALL, J., concurring in judgment).

The separate opinions issued in *Wygant* v. *Jackson Bd. of Education*, a case involving a school board's race-conscious layoff provision, reflect this shared understanding. Justice Powell's opinion for a plurality of four Justices stated that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." 476 U. S., at 277. JUSTICE O'CONNOR's separate concurrence required "a firm basis for concluding that remedial action was appropriate." *Id.*, at 293. The dissenting opinion I authored, joined by JUSTICES BRENNAN and BLACKMUN, required a government body to present a "legitimate factual predicate" and a reviewing court to "genuinely consider the circumstances of the provision at issue." *Id.*, at 297, 303. Finally, JUSTICE

STEVENS' separate dissent sought and found "a rational and unquestionably legitimate basis" for the school board's action. *Id.*, at 315–316. Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms." *University of California Regents* v. *Bakke*, 438 U. S., at 387 (separate opinion of MARSHALL, J.).

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the city council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response. As I have noted, *supra*, at 530–534, Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that "'present economic inequities'" in construction contracting resulted from "'past discriminatory systems.'" *Supra*, at 531 (quoting H. R. Rep. No. 94–468, pp. 1–2 (1975)). The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern. The fact that just 0.67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices. That *no one* who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present

inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized "societal discrimination" which the majority decries as a basis for remedial action. *Ante*, at 496, 499, 505. But characterizing the plight of Richmond's minority contractors as mere "societal discrimination" is not the only respect in which the majority's critique shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise. The majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, "standing alone," see, *e. g.*, *ante*, at 503, suffices to prove past discrimination. But items of evidence do not, of course, "stan[d] alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.

In any event, the majority's criticisms of individual items of Richmond's evidence rest on flimsy foundations. The majority states, for example, that reliance on the disparity between the share of city contracts awarded to minority firms (0.67%) and the minority population of Richmond (approximately 50%) is "misplaced." *Ante*, at 501. It is true that, when the factual predicate needed to be proved is one of *present* discrimination, we have generally credited statistical contrasts between the racial composition of a work force and the general population as proving discrimination only where this contrast revealed "gross statistical disparities." *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977) (Title VII case); see also *Teamsters* v. *United States*, 431 U. S. 324, 339 (1977) (same). But this principle does not impugn Richmond's statistical contrast, for two reasons. First, considering how minuscule the share of Richmond pub-

lic construction contracting dollars received by minority-owned businesses is, it is hardly unreasonable to conclude that this case involves a "gross statistical disparit[y]." *Hazelwood School Dist.*, *supra*, at 307. There are roughly equal numbers of minorities and nonminorities in Richmond—yet minority-owned businesses receive *one-seventy-fifth* of the public contracting funds that other businesses receive. See *Teamsters*, *supra*, at 342, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers. . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'") (citation omitted) (quoted in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 656–657 (1987) (O'CONNOR, J., concurring in judgment)).

Second, and more fundamentally, where the issue is not present discrimination but rather whether *past* discrimination has resulted in the *continuing exclusion* of minorities from a historically tight-knit industry, a contrast between population and work force is entirely appropriate to help gauge the degree of the exclusion. In *Johnson* v. *Transportation Agency, Santa Clara County, supra*, JUSTICE O'CONNOR specifically observed that, when it is alleged that discrimination has prevented blacks from "obtaining th[e] experience" needed to qualify for a position, the "relevant comparison" is not to the percentage of blacks in the pool of qualified candidates, but to "the total percentage of blacks in the labor force." *Id.*, at 651; see also *Steelworkers* v. *Weber*, 443 U. S. 193, 198–199, and n. 1 (1979); *Teamsters*, *supra*, at 339, n. 20. This contrast is especially illuminating in cases like this, where a main avenue of introduction into the work force—here, membership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments—is itself grossly dominated by nonminorities. The majority's assertion that the city "does not even know how many MBE's in the relevant market are qualified," *ante*, at 502, is thus entirely beside the

point. If Richmond indeed has a monochromatic contracting community—a conclusion reached by the District Court, see Civ. Action No. 84–0021 (ED Va. 1984) (reprinted in Supp. App. to Juris. Statement 164)—this most likely reflects the lingering power of past exclusionary practices. Certainly this is the explanation Congress has found persuasive at the national level. See *Fullilove*, 448 U. S., at 465. The city's requirement that prime public contractors set aside 30% of their subcontracting assignments for minority-owned enterprises, subject to the ordinance's provision for waivers where minority-owned enterprises are unavailable or unwilling to participate, is designed precisely to ease minority contractors into the industry.

The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials—including councilmembers, a former mayor, and the present city manager—asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of this discrimination. The majority, however, states that where racial classifications are concerned, "simple legislative assurances of good intention cannot suffice." *Ante*, at 500. It similarly discounts as minimally probative the city council's designation of its set-aside plan as remedial. "[B]lind judicial deference to legislative or executive pronouncements," the majority explains, "has no place in equal protection analysis." *Ante*, at 501.

No one, of course, advocates "blind judicial deference" to the findings of the city council or the testimony of city leaders. The majority's suggestion that wholesale deference is what Richmond seeks is a classic straw-man argument. But the majority's trivialization of the testimony of Richmond's leaders is dismaying in a far more serious respect. By disregarding the testimony of local leaders and the judgment of local government, the majority does violence to the very principles of comity within our federal system which this

Court has long championed. Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good "within their respective spheres of authority." *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 244 (1984); see also *FERC* v. *Mississippi*, 456 U. S. 742, 777–778 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The majority, however, leaves any traces of comity behind in its headlong rush to strike down Richmond's race-conscious measure.

Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history. In *Richmond* v. *United States*, 422 U. S. 358 (1975), for example, this Court denounced Richmond's decision to annex part of an adjacent county at a time when the city's black population was nearing 50% because it was "infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office." *Id.*, at 373; see also *id.*, at 382 (BRENNAN, J., dissenting) (describing Richmond's "flagrantly discriminatory purpose . . . to avert a transfer of political control to what was fast becoming a black-population majority") (citation omitted).[7]

In *Bradley* v. *School Bd. of Richmond*, 462 F. 2d 1058, 1060, n. 1 (CA4 1972), aff'd by an equally divided Court, 412

[7] For a disturbing description of the lengths to which some Richmond white officials went during recent decades to hold in check growing black political power, see J. Moeser & R. Dennis, The Politics of Annexation—Oligarchic Power in a Southern City 50–188 (1982).

U. S. 92 (1973), the Court of Appeals for the Fourth Circuit, sitting en banc, reviewed in the context of a school desegregation case Richmond's long history of inadequate compliance with *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and the cases implementing its holding. The dissenting judge elaborated:

> "The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other courts, and need not be repeated in detail here. It suffices to say that there was massive resistance and every state resource, including the services of the legal officers of the state, the services of private counsel (costing the State hundreds of thousands of dollars), the State police, and the power and prestige of the Governor, was employed to defeat *Brown I*. In Richmond, as has been mentioned, not even freedom of choice became actually effective until 1966, *twelve years after the decision of Brown I*." 462 F. 2d, at 1075 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

The Court of Appeals majority in *Bradley* used equally pungent words in describing public and private housing discrimination in Richmond. Though rejecting the black plaintiffs' request that it consolidate Richmond's school district with those of two neighboring counties, the majority nonetheless agreed with the plaintiffs' assertion that "within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." *Id.*, at 1065 (citing numerous public and private acts of discrimination).[8]

[8] Again the dissenting judge—who would have consolidated the school districts—elaborated:

"[M]any other instances of state and private action contribut[ed] to the concentration of black citizens within Richmond and white citizens without. These were principally in the area of residential development. Racially restrictive convenants were freely employed. Racially discriminatory

When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place. It may well be that "the autonomy of a State is an essential component of federalism," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 588 (1985) (O'CONNOR, J., dissenting), and that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare," *FERC* v. *Mississippi*, *supra*, at 777 (O'CONNOR, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and officials. Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of proving unconstitutionality at trial, *Wygant*, 476 U. S., at 277–278 (plurality opinion), has *at no point* come forward with *any* direct evidence that the city council's motives were anything other than sincere.[9]

Finally, I vehemently disagree with the majority's dismissal of the congressional and Executive Branch findings

---

practices in the prospective purchase of county property by black purchasers were followed. Urban renewal, subsidized public housing and government-sponsored home mortgage insurance had been undertaken on a racially discriminatory basis. [The neighboring counties] provided schools, roads, zoning and development approval for the rapid growth of the white population in each county at the expense of the city, without making any attempt to assure that the development that they made possible was integrated. Superimposed on the pattern of government-aided residential segregation . . . had been a discriminatory policy of school construction, i. e., the selection of school construction sites in the center of racially identifiable neighborhoods manifestly to serve the educational needs of students of a single race.

"The majority does not question the accuracy of these facts." 462 F. 2d, at 1075–1076 (Winter, J.) (emphasis in original) (footnote omitted).

[9] Cf. *Fullilove* v. *Klutznick*, 448 U. S. 448, 541 (1980) (STEVENS, J., dissenting) (noting statements of sponsors of federal set-aside that measure was designed to give their constituents "a piece of the action").

noted in *Fullilove* as having "extremely limited" probative value in this case. *Ante*, at 504. The majority concedes that Congress established nothing less than a "presumption" that minority contracting firms have been disadvantaged by prior discrimination. *Ibid.* The majority, inexplicably, would forbid Richmond to "share" in this information, and permit only Congress to take note of these ample findings. *Ante*, at 504–505. In thus requiring that Richmond's local evidence be severed from the context in which it was prepared, the majority would require cities seeking to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel and engage in unnecessarily duplicative, costly, and time-consuming factfinding.

No principle of federalism or of federal power, however, forbids a state or local government to draw upon a nationally relevant historical record prepared by the Federal Government. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 51–52 (1986) (city is "entitled to rely on the experiences of Seattle and other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the cities relies upon is reasonably believed to be relevant to the problem that the city addresses"); see also *Steelworkers* v. *Weber*, 443 U. S., at 198, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); cf. *Wygant*, *supra*, at 296 (MARSHALL, J., dissenting) ("No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum").[10] Of course, Richmond could have built an even more

[10] Although the majority sharply criticizes Richmond for using data which it did not itself develop, it is noteworthy that the federal set-aside program upheld in *Fullilove* was adopted as a floor amendment "without any congressional hearings or investigation whatsoever." L. Tribe, American Constitutional Law 345 (2d ed. 1988). The principal opinion in *Fullilove*

compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such onerous documentary obligations upon States and localities once the reality of past discrimination is apparent. See *infra*, at 555–561.

B

In my judgment, Richmond's set-aside plan also comports with the second prong of the equal protection inquiry, for it is substantially related to the interests it seeks to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate that discrimination. The most striking aspect of the city's ordinance is the similarity it bears to the "appropriately limited" federal set-aside provision upheld in *Fullilove*. 448 U. S., at 489. Like the federal provision, Richmond's is limited to five years in duration, *ibid.*, and was not renewed when it came up for reconsideration in 1988. Like the federal provision, Richmond's contains a waiver provision freeing from its subcontracting requirements those nonminority firms that demonstrate that they cannot comply with its provisions. *Id.*, at 483–484. Like the federal provision, Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of *public* contracting dollars, that translates to only

---

justified the set-aside by relying heavily on the aforementioned studies by agencies like the Small Business Administration and on legislative reports prepared in connection with prior, failed legislation. See *Fullilove* v. *Klutznick*, 448 U. S., at 478 (opinion of Burger, C. J.) ("Although the Act recites no preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination"); see also *id.*, at 549–550, and n. 25 (STEVENS, J., dissenting) (noting "perfunctory" consideration accorded the set-aside provision); Days, Fullilove, 96 Yale L. J. 453, 465 (1987) ("One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition") (citation and footnote omitted).

3% of overall Richmond area contracting. Brief for Appellant 44, n. 73 (recounting federal census figures on construction in Richmond); see *Fullilove*, *supra*, at 484 (burden shouldered by nonminority firms is "relatively light" compared to "overall construction contracting opportunities").

Finally, like the federal provision, Richmond's does not interfere with any vested right of a contractor to a particular contract; instead it operates entirely prospectively. 448 U. S., at 484. Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors—here, businesses owned or controlled by nonminorities which seek subcontracting work on public construction projects. The plurality in *Wygant* emphasized the importance of not disrupting the settled and legitimate expectations of innocent parties. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U. S., at 283; see *Steelworkers v. Weber*, *supra*, at 208.

These factors, far from "justify[ing] a preference of any size or duration," *ante*, at 505, are precisely the factors to which this Court looked in *Fullilove*. The majority takes issue, however, with two aspects of Richmond's tailoring: the city's refusal to explore the use of race-neutral measures to increase minority business participation in contracting, *ante*, at 507, and the selection of a 30% set-aside figure. *Ante*, at 507–508. The majority's first criticism is flawed in two respects. First, the majority overlooks the fact that since 1975, Richmond has barred both discrimination by the city in awarding public contracts and discrimination by public contractors. See Richmond, Va., City Code § 17.1 *et seq.* (1985). The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars,

strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity. Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures as a program of city financing for small firms, *ante*, at 507, ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry. For this reason, this Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside. See *Fullilove*, 448 U. S., at 463–467 (noting inadequacy of previous measures designed to give experience to minority businesses); see also *id.*, at 511 (Powell, J., concurring) ("By the time Congress enacted [the federal set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere. Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of JUSTICE BLACKMUN, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *University of California Regents* v. *Bakke*, 438 U. S., at 407 (separate opinion).[11]

---

[11] The majority also faults Richmond's ordinance for including within its definition of "minority group members" not only black citizens, but also citizens who are "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." *Ante*, at 506. This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove*, *supra*, at 454. Even accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated.

As for Richmond's 30% target, the majority states that this figure "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Ante*, at 507. The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring has far less impact than the majority suggests. But more important, the majority ignores the fact that Richmond's 30% figure was patterned directly on the *Fullilove* precedent. Congress' 10% figure fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Fullilove*, *supra*, at 513–514 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its choice of a set-aside figure, the majority honors *Fullilove* only in the breach.

III

I would ordinarily end my analysis at this point and conclude that Richmond's ordinance satisfies both the governmental interest and substantial relationship prongs of our Equal Protection Clause analysis. However, I am compelled to add more, for the majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. *Ante*, at 493–494; *ante*, at 520 (SCALIA, J., concurring in judgment). This is an unwelcome development. A profound difference separates governmental actions that themselves are racist,

and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, *e. g.*, *Wygant* v. *Jackson Bd. of Education*, 476 U. S., at 301–302 (MARSHALL, J., dissenting); *Fullilove*, *supra*, at 517–519 (MARSHALL, J., concurring in judgment); *University of California Regents* v. *Bakke*, 438 U. S., at 355–362 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Id.*, at 357–358. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove:* "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional 'strict scrutiny'—scrutiny that is strict in theory, but fatal in fact." *Fullilove*, *supra*, at 518–519 (citation omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful think-

ing, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

B

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. *Ante*, at 495. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city. *Ibid.* In support of this characterization of dominance, the majority observes that "blacks constitute approximately 50% of the population of the city of Richmond" and that "[f]ive of the nine seats on the City Council are held by blacks." *Ibid.*

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified *other* "traditional indicia of suspectness": whether a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." *Ibid.* Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within

the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. *Ante*, at 493. If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, see *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), and to persons with below-average incomes, see *San Antonio Independent School Dist.*, *supra*, at 28, stand on extremely shaky ground. See *Castaneda* v. *Partida*, 430 U. S. 482, 504 (1977) (MARSHALL, J., concurring).

In my view, the "circumstances of this case," *ante*, at 495, underscore the importance of *not* subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life—discrimination amply documented in the decisions of the federal judiciary. See *supra*, at 544–546. This history of "purposefully unequal treatment" forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy—and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not "simple racial politics." *Ante*, at 493.

Richmond's own recent political history underscores the facile nature of the majority's assumption that elected officials' voting decisions are based on the color of their skins. In recent years, white and black councilmembers in Richmond have increasingly joined hands on controversial matters. When the Richmond City Council elected a black man mayor in 1982, for example, his victory was won with the

support of the city council's four white members. Richmond Times-Dispatch, July 2, 1982, p. 1, col. 1. The vote on the set-aside plan a year later also was not purely along racial lines. Of the four white councilmembers, one voted for the measure and another abstained. App. 49. The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. The majority restricts the use of such measures to situations in which a State or locality can put forth "a prima facie case of a constitutional or statutory violation." *Ante*, at 500. In so doing, the majority calls into question the validity of the business set-asides which dozens of municipalities across this Nation have adopted on the authority of *Fullilove*.

Nothing in the Constitution or in the prior decisions of this Court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out. By its very terms, the majority's standard effectively cedes control of a large component of the content of that constitutional provision to Congress and to state legislatures. If an antecedent Virginia or Richmond law had defined as unlawful the award to nonminorities of an overwhelming share of a city's contracting dollars, for example, Richmond's subsequent set-aside initiative would then satisfy

the majority's standard. But without such a law, the initiative might not withstand constitutional scrutiny. The meaning of "equal protection of the laws" thus turns on the happenstance of whether a state or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority's constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action.

Similar flaws would inhere in the majority's standard even if it incorporated only federal antidiscrimination statutes. If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*—or alternatively, if it repealed that legislation altogether—the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.[12]

---

[12] Although the majority purports to "adher[e] to the standard of review employed in *Wygant*," *ante*, at 494, the "prima facie case" standard it adopts marks an implicit rejection of the more generally framed "strong basis in evidence" test endorsed by the *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267 (1986) plurality, and the similar "firm basis" test endorsed by JUSTICE O'CONNOR in her separate concurrence in that case. See *id.*, at 289; *id.*, at 286. Under those tests, proving a prima facie violation of Title VII would appear to have been but one means of adducing sufficient proof to satisfy Equal Protection Clause analysis. See *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 632 (1987) (plurality opinion) (criticizing suggestion that race-conscious relief be conditioned on showing of a prima facie Title VII violation).

The rhetoric of today's majority opinion departs from *Wygant* in another significant respect. In *Wygant*, a majority of this Court rejected as unduly inhibiting and constitutionally unsupported a requirement that a municipality demonstrate that its remedial plan is designed only to benefit specific victims of discrimination. See 476 U. S., at 277–278; *id.*, at 286

To the degree that this parsimonious standard is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered States and localities from remedying past racial discrimination, *ante*, at 490–491, 504, the majority is seriously mistaken. With respect, first, to § 5, our precedents have never suggested that this provision—or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments—was meant to pre-empt or limit state police power to undertake race-conscious remedial measures. To the contrary, in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), we held that § 5 "is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.*, at 651 (emphasis added); see *id.*, at 653–656; *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326–327 (1966) (interpreting similar provision of the Fifteenth Amendment to empower Congress to "implemen[t] the rights created" by its passage); see also *City of Rome* v.

(O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 305 (MARSHALL, J., dissenting). JUSTICE O'CONNOR noted the Court's general agreement that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. . . . [A] plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.*, at 286–287. The majority's opinion today, however, hints that a "specific victims" proof requirement might be appropriate in equal protection cases. See, *e. g.*, *ante*, at 504 (States and localities "must identify that discrimination . . . with some specificity"). Given that just three Terms ago this Court rejected the "specific victims" idea as untenable, I believe these references—and the majority's cryptic "identified discrimination" requirement—cannot be read to require States and localities to make such highly particularized showings. Rather, I take the majority's standard of "identified discrimination" merely to require some quantum of proof of discrimination within a given jurisdiction that exceeds the proof which Richmond has put forth here.

United States, 446 U. S. 156, 173 (1980) (same). Indeed, we have held that Congress has this authority even where no constitutional violation has been found. See *Katzenbach* v. *Morgan*, *supra* (upholding Voting Rights Act provision nullifying state English literacy requirement we had previously upheld against Equal Protection Clause challenge). Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked § 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a race-conscious condition on the dispensation of federal funds by state and local grantees. See *Fullilove*, 448 U. S., at 476 (basing decision on § 5 because "[i]n certain contexts, there are limitations on the reach of the Commerce Power").

As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States—or for that matter, the Federal Government, to whom the equal protection guarantee has largely been applied, see *Bolling* v. *Sharpe*, 347 U. S. 497 (1954)—from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality. So, too, does JUSTICE SCALIA. He would further limit consideration of race to those cases in which States find it "necessary to eliminate their own maintenance of a system of unlawful racial classification"—a "distinction" which, he states, "explains our school desegregation cases." *Ante*, at 524 (SCALIA, J., concurring in judgment). But this Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and affirmative action)

stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. JUSTICE SCALIA's artful distinction allows him to avoid having to repudiate "our school desegregation cases," *ibid.*, but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach "would freeze the status quo that is the very target" of the remedial actions of States and localities. *McDaniel* v. *Barresi*, 402 U. S., at 41; see also *North Carolina Bd. of Education* v. *Swann*, 402 U. S., at 46 (striking down State's flat prohibition on assignment of pupils on basis of race as impeding an "effective remedy"); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 159–162 (1977) (upholding New York's use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. As four Justices, of whom I was one, stated in *University of California Regents* v. *Bakke:*

> "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. *Nothing*

> *whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed.* Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. 'To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.' *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 98 (Frankfurter, J., concurring)." 438 U. S., at 368 (footnote omitted; emphasis added).

In short, there is simply no credible evidence that the Framers of the Fourteenth Amendment sought "to transfer the security and protection of all the civil rights . . . from the States to the Federal government." The *Slaughter-House Cases*, 16 Wall. 36, 77–78 (1873).[13] The three Reconstruction Amendments undeniably "worked a dramatic change in the balance between congressional and state power," *ante*, at 490: they forbade state-sanctioned slavery, forbade the state-sanctioned denial of the right to vote, and (until the content of the Equal Protection Clause was substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment) uniquely forbade States to deny equal protection. The Amendments also specifically empowered the Federal Government to combat discrimination at a time when the breadth of federal power under the Constitution was less apparent than it is today. But nothing in the Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that

[13] Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. *Ante*, at 491. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

States, exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.

IV

The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U. S., at 463. The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

I join JUSTICE MARSHALL's perceptive and incisive opinion revealing great sensitivity toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. JUSTICE MARSHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.

So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights—a fulfillment that would make this Nation very special.

Syllabus

UNITED STATES *v.* BROCE ET AL.

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

No. 87–1190. Argued October 4, 1988—Decided January 23, 1989

Respondents pleaded guilty to two separate conspiracy indictments in a single proceeding in District Court. One indictment charged respondents with entering into an agreement to rig bids on a certain highway project in violation of the Sherman Act, and the other made similar charges with respect to a different project. After the District Court conducted a hearing, at which respondents were represented by counsel, and found the guilty pleas free and voluntary and made with an understanding of their consequences and of the nature of the charges, convictions were entered on the pleas and sentences were imposed. Respondents subsequently filed a motion to vacate the convictions and sentences under the second indictment, contending, in reliance on the District Court's holding in another case involving the same bid-rigging conspiracy, that only one conspiracy existed and that double jeopardy principles required their convictions and sentences to be set aside. The District Court denied the motion, but the Court of Appeals reversed, holding that notwithstanding their guilty pleas, respondents were entitled to introduce evidence outside the original record to support their one-conspiracy claim, since in pleading guilty they admitted only the acts described in the indictments, not their legal consequences, and that moreover, since the indictments did not expressly state that the two conspiracies were separate, no such concessions could be inferred from the pleas. On remand, the District Court granted the motion, finding that there was only a single conspiracy, and the Court of Appeals affirmed.

Held: Respondents' double jeopardy challenge is foreclosed by their guilty pleas and convictions. Pp. 569–576.

(a) In holding that the admissions inherent in a guilty plea "go only to the acts constituting the conspiracy," the Court of Appeals misapprehended the nature and effect of the plea. By entering a guilty plea, the accused does not simply state that he did the discrete acts described in the indictment; he admits guilt of a substantive crime. Here, the indictments alleged two distinct agreements, and the Court of Appeals erred in concluding that because the indictments did not explicitly state that the conspiracies were separate, respondents did not concede their separate nature by pleading guilty to both. When respondents pleaded

guilty to both indictments, they conceded guilt to two separate offenses. Pp. 569–571.

(b) By pleading guilty, respondents relinquished the opportunity to receive a factual hearing on their double jeopardy claim. That their attorney did not discuss double jeopardy issues with them prior to their pleas, and that they had not considered the possibility of raising a double jeopardy defense before pleading, did not entitle respondents to claim that they had not waived their right to raise a double jeopardy defense. Conscious waiver is not necessary with respect to each potential defense relinquished by a guilty plea. Pp. 571–574.

(c) Under the well-settled principle that a voluntary and intelligent guilty plea by an accused who has been advised by competent counsel may not be collaterally attacked, respondents, who have not called into question the voluntary and intelligent character of their pleas, were not entitled to the collateral relief they sought. P. 574.

(d) The exception to the rule barring collateral attack on a guilty plea established by *Blackledge* v. *Perry*, 417 U. S. 21, and *Menna* v. *New York*, 423 U. S. 61, in cases where a conviction under a second indictment must be set aside because the defendant's right not to be haled into court was violated, has no application in this case. Here, in contrast to those cases which were resolved without any need to go beyond the indictments and the original record, respondents could not prove their double jeopardy claim without introducing new evidence into the record. Pp. 574–576.

Reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 580. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 581.

Roy T. Englert, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen*, and *Deputy Assistant Attorney General Starling*.

Glenn E. Casebeer II argued the cause for respondents. With him on the brief was *Curt T. Schneider*.

JUSTICE KENNEDY delivered the opinion of the Court.

We consider here the circumstances under which a defendant who has entered a plea of guilty to a criminal charge may assert a double jeopardy claim in a collateral attack upon the sentence. Respondents, upon entering guilty pleas, were convicted of two separate counts of conspiracy, but contend now that only one conspiracy existed and that double jeopardy principles require the conviction and sentence on the second count to be set aside. The United States Court of Appeals for the Tenth Circuit held that respondents were entitled to introduce evidence outside the original record supporting their claim and directed further proceedings in the District Court. We hold that the double jeopardy challenge is foreclosed by the guilty pleas and the judgments of conviction.

I

A

Respondents, Ray C. Broce and Broce Construction Co., Inc., bid for work on highway projects in Kansas. Two of the contracts awarded to them became the subject of separate indictments charging concerted acts to rig bids and suppress competition in violation of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The relevant portions of the indictments are set forth in the Appendix to our opinion. The first indictment charged respondents with entering into an agreement, sometime in or about April 1978, to rig bids on a particular highway project. The second charged respondents with entering into a similar agreement, sometime in or about July 1979, to rig bids on a different project. Both indictments were discussed during plea negotiations, and respondents acknowledged in plea agreements that they were subject to separate sentences on each conspiracy charged. Plea Agreement between the United States of America and Defendant Ray C. Broce, App. to Pet. for Cert. 126a, 127a; Plea Agreement between the United States of America and

Defendant Broce Construction Co., Inc., App. to Pet. for Cert. 133a, 134a.

Respondents pleaded guilty to the two indictments in a single proceeding. The District Court conducted a hearing fully in accord with Rule 11 of the Federal Rules of Criminal Procedure and found that the pleas were free and voluntary, made with an understanding of their consequences and of the nature of the charges. Respondents had counsel at all stages and there are no allegations that counsel was ineffective. Convictions were entered on the pleas. The District Court then sentenced Broce to two years' imprisonment on each count, the terms to run concurrently, and to a fine of $50,000 on each count. Broce was also sentenced for mail fraud under 18 U. S. C. § 1341, a conviction which is not relevant here. The corporation was fined $750,000 on each count, for a total of $1,500,000. Neither respondent having appealed, the judgments became final.

B

On the same day that respondents entered their pleas, an indictment was filed against Robert T. Beachner and Beachner Construction Co. charging a violation of both the Sherman Act and the mail fraud statute. The indictment alleged a bid-rigging conspiracy involving yet a third Kansas highway construction project. These defendants, however, chose a different path than that taken by the *Broce* respondents: they proceeded to trial and were acquitted. After the acquittal in the *Beachner* case *(Beachner I)*, a second indictment was returned by the grand jury charging Beachner Construction Co. with three new Sherman Act violations and three new acts of mail fraud. The Sherman Act counts charged bid-rigging conspiracies on three Kansas highway projects not mentioned in *Beachner I*.

Once again, Beachner pursued a different strategy than that followed by Broce and Broce Construction Co. Prior to trial, Beachner moved to dismiss the indictment on the ground that the bid-rigging arrangements identified were

merely smaller parts of one overarching conspiracy existing among Kansas highway contractors to rig highway bids within the State. In light of its acquittal in *Beachner I*, the company argued that a second prosecution would place it in double jeopardy.

The District Court granted the motion to dismiss. *United States* v. *Beachner Construction Co.*, 555 F. Supp. 1273 (Kan. 1983) *(Beachner II)*. It found that a "continuous, cooperative effort among Kansas highway contractors to rig bids, thereby eliminating price competition, has permeated the Kansas highway construction industry in excess of twenty-five years, including the period of April 25, 1978, to February 7, 1980, the time period encompassed by the Beachner I and Beachner II indictments." *Id.*, at 1277. The District Court based the finding on its determination that there had been a common objective among participants to eliminate price competition, a common method of organizing bidding for projects, and a common jargon throughout the industry, and that mutual and interdependent obligations were created among highway contractors. Concluding that the District Court's findings were not clearly erroneous, the Court of Appeals affirmed the dismissal. *United States* v. *Beachner Construction Co.*, 729 F. 2d 1278 (CA10 1984).

C

One might surmise that the *Broce* defendants watched the *Beachner* proceedings with awe, if not envy. What is certain is that the *Broce* defendants sought to profit from Beachner's success. After the District Court issued its decision to dismiss in *Beachner II*, the *Broce* respondents filed a motion pursuant to Federal Rule of Criminal Procedure 35(a) to vacate their own sentences on the Sherman Act charge contained in the second indictment. Relying on *Beachner II*, they argued that the bid-rigging schemes alleged in their indictments were but a single conspiracy. The District Court denied the motion, concluding that respondents' earlier guilty pleas were an admission of the Government's allegations of

two conspiracies, an admission that foreclosed and concluded new arguments to the contrary. Nos. 81–20119–01 and 82–20011–01 (Kan., Nov. 18, 1983), App. to Pet. for Cert. 112a.

A panel of the Court of Appeals for the Tenth Circuit reversed. 753 F. 2d 811 (1985). That judgment was vacated and the case reheard en banc. Citing our decisions in *Blackledge* v. *Perry*, 417 U. S. 21 (1974), and *Menna* v. *New York*, 423 U. S. 61 (1975) *(per curiam)*, a divided en banc court concluded that respondents were entitled to draw upon factual evidence outside the original record, including the *Beachner II* findings, to support the claim of a single conspiracy. 781 F. 2d 792 (1986). The en banc court rejected the Government's argument that respondents had waived the right to raise their double jeopardy claim by pleading guilty, holding that the Double Jeopardy Clause "does not constitute an individual right which is subject to waiver." *Id.*, at 795. It further rejected the Government's contention that respondents' guilty pleas must be construed as admissions that there had been separate conspiracies. The Court of Appeals observed that the indictments did not "specifically allege separate conspiracies," and held that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed." *Id.*, at 796.

On remand, the District Court, citing *Beachner II*, concluded that the indictments merely charged different aspects of the same conspiracy to restrain competition. It vacated the judgments and sentences entered against both respondents on the second indictment. Nos. 81–20119–01 and 82–20011–01 (Kan., June 30, 1986), App. to Pet. for Cert. 5a. In its decision on appeal from that judgment, the Court of Appeals noted that our intervening decision in *Ricketts* v. *Adamson*, 483 U. S. 1 (1987), made clear that the protection against double jeopardy is subject to waiver. Nonetheless, it concluded that while *Ricketts* invalidated the broader rationale underlying its earlier en banc opinion that double jeopardy protections could not be waived, it left intact its

narrower holding that the guilty pleas in this case did not themselves constitute such waivers. It then held that the District Court's finding of a single conspiracy was not clearly erroneous, and affirmed. Nos. 86–2166 and 86–2202 (CA10, Aug. 18, 1987), App. to Pet. for Cert. 1a. We granted certiorari, 485 U. S. 903 (1988).

II

A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack. There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence. We discuss those exceptions below and find them inapplicable. The general rule applies here to bar the double jeopardy claim.

A

The Government's petition for certiorari did not seek review of the determination that the bid-rigging described in the two *Broce* indictments was part of one overall conspiracy. Instead, the Government challenges the theory underlying the en banc judgment in the Court of Appeals that respondents were entitled, notwithstanding their earlier guilty pleas, to a factual determination on their one-conspiracy claim. That holding was predicated on the court's view that, in pleading guilty, respondents admitted only the acts described in the indictments, not their legal consequences. As the indictments did not include an express statement that the two conspiracies were separate, the Court of Appeals reasoned, no such concession may be inferred from the pleas.

In holding that the admissions inherent in a guilty plea "go only to the acts constituting the conspiracy," 781 F. 2d, at 796, the Court of Appeals misapprehended the nature and effect of the plea. A guilty plea "is more than a confession which admits that the accused did various acts." *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969). It is an "admission that he committed the crime charged against him." *North Carolina* v. *Alford*, 400 U. S. 25, 32 (1970). By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime. That is why the defendant must be instructed in open court on "the nature of the charge to which the plea is offered," Fed. Rule Crim. Proc. 11(c)(1), and why the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts," *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969).

Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes. The *Broce* indictments alleged two distinct agreements: the first, an agreement beginning in April 1978 to rig bids on one specified highway project, and the second, an agreement beginning 15 months later to rig bids on a different project. The Court of Appeals erred in concluding that because the indictments did not explicitly state that the conspiracies were separate, respondents did not concede their separate nature by pleading guilty to both. In a conspiracy charge, the term "agreement" is all but synonymous with the conspiracy itself, and as such has great operative force. We held in *Braverman* v. *United States*, 317 U. S. 49, 53 (1942), that "[t]he gist of the crime of conspiracy as defined by the statute is the agreement . . . to commit one or more unlawful acts," from which it follows that "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects." A single agreement to commit several crimes

constitutes one conspiracy. By the same reasoning, multiple agreements to commit separate crimes constitute multiple conspiracies. When respondents pleaded guilty to two charges of conspiracy on the explicit premise of two agreements which started at different times and embraced separate objectives, they conceded guilt to two separate offenses.*

Respondents had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictments and to attempt to show the existence of only one conspiracy in a trial-type proceeding. They chose not to, and hence relinquished that entitlement. In light of *Beachner*, respondents may believe that they made a strategic miscalculation. Our precedents demonstrate, however, that such grounds do not justify setting aside an otherwise valid guilty plea.

In *Brady* v. *United States*, 397 U. S. 742 (1970), the petitioner had been charged with kidnaping in violation of what was then 18 U. S. C. § 1201(a) (1964 ed.). He entered a knowing and voluntary plea of guilty. Nine years after the plea, we had held in *United States* v. *Jackson*, 390 U. S. 570

---

*That is certainly how all participants viewed the indictments at the time. As noted earlier, see *supra*, at 565, respondents acknowledged in their plea agreements that they were subject to receiving separate sentences for each offense to which they were pleading. Furthermore, the District Judge informed Broce at the Rule 11 hearing of the maximum punishment "on each charge," and Broce stated that he understood. App. 36. Prior to sentencing, the Government prepared an "Official Version of the Offense" for inclusion in the presentence report which stated that there were "two separate conspiracies" giving rise to the indictments. *Id.*, at 51. At his sentencing hearing, Broce was given an opportunity to state "any dispute with what the government has included in the pre-sentence report about the official version of the offense," and did not dispute the statement that the conspiracies were separate ones. *Id.*, at 63–64. We do not suggest that any of these events are necessary to our holding that respondents have forfeited the opportunity to dispute the separate nature of the conspiracies; on the contrary, the guilty pleas are alone a sufficient basis for that conclusion. We review these incidents simply to note that our reading of the indictments is the necessary one, and was shared by all participants to the plea proceedings at the time the pleas were entered.

(1968), that the provision of § 1201(a) providing for a death penalty only upon the recommendation of the jury was unconstitutional. This was of no avail to Brady, however, because the possibility that his plea might have been influenced by an erroneous assessment of the sentencing consequences if he had proceeded to trial did not render his plea invalid. We observed:

> "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U. S., at 757 (citation omitted).

Similarly, we held in *McMann* v. *Richardson*, 397 U. S. 759 (1970), that a counseled defendant may not make a collateral attack on a guilty plea on the allegation that he misjudged the admissibility of his confession. "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *Id.*, at 770. See also *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973) ("[J]ust as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings") (citation omitted).

Respondents have submitted the affidavit of Kenneth F. Crockett, who served as their attorney when their pleas were entered. App. 72–73. Crockett avers that he did not

discuss double jeopardy issues with respondents prior to their pleas, and that respondents had not considered the possibility of raising a double jeopardy defense before pleading. Respondents contend that, under these circumstances, they cannot be held to have waived the right to raise a double jeopardy defense because there was no "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938).

Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required. For example, the respondent in *Tollett* pleaded guilty to first-degree murder, and later filed a petition for habeas corpus contending that his plea should be set aside because black citizens had been excluded from the grand jury that indicted him. The collateral challenge was foreclosed by the earlier guilty plea. Although at the time of the indictment the facts relating to the selection of the grand jury were not known to respondent and his attorney, we held that to be irrelevant:

> "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. But just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." 411 U. S., at 266.

See also *Menna*, 423 U. S., at 62, n. 2 ("[W]aiver was not the basic ingredient of this line of cases").

The Crockett affidavit, as a consequence, has no bearing on whether respondents' guilty plea served as a relinquishment of their opportunity to receive a factual hearing on a double jeopardy claim. Relinquishment derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions neces-

sarily made upon entry of a voluntary plea of guilty. The trial court complied with Rule 11 in ensuring that respondents were advised that, in pleading guilty, they were admitting guilt and waiving their right to a trial of any kind. A failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea.

In sum, as we explained in *Mabry* v. *Johnson*, 467 U. S. 504, 508 (1984), "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." That principle controls here. Respondents have not called into question the voluntary and intelligent character of their pleas, and therefore are not entitled to the collateral relief they seek.

B

An exception to the rule barring collateral attack on a guilty plea was established by our decisions in *Blackledge* v. *Perry*, 417 U. S. 21 (1974), and *Menna* v. *New York*, *supra*, but it has no application to the case at bar.

The respondent in *Blackledge* had been charged in North Carolina with the state-law misdemeanor of assault with a deadly weapon. Pursuant to state procedures, he was tried in the county District Court without a jury, but was permitted, once he was convicted, to appeal to the county Superior Court and obtain a trial *de novo*. After the defendant filed an appeal, the prosecutor obtained an indictment charging felony assault with a deadly weapon with intent to kill and inflict serious bodily injury. The defendant pleaded guilty. We held that the potential for prosecutorial vindictiveness against those who seek to exercise their right to appeal raised sufficiently serious due process concerns to require a rule forbidding the State to bring more serious charges against defendants in that position. The plea of guilty did not foreclose a subsequent challenge because in *Blackledge*, unlike in *Brady* and *Tollett*, the defendant's right was "the

right not to be haled into court at all upon the felony charge. The very initiation of proceedings against him . . . thus operated to deny him due process of law." 417 U. S., at 30–31.

The petitioner in *Menna* had refused, after a grant of immunity, to obey a court order to testify before a grand jury. He was adjudicated in contempt of court and sentenced to a term in civil jail. After he was released, he was indicted for the same refusal to answer the questions. He pleaded guilty and was sentenced, but then appealed on double jeopardy grounds. The New York Court of Appeals concluded that Menna had waived his double jeopardy claim by pleading guilty. We reversed, citing *Blackledge* for the proposition that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." 423 U. S., at 62. We added, however, an important qualification:

> "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Id.*, at 63, n. 2 (emphasis added).

In neither *Blackledge* nor *Menna* did the defendants seek further proceedings at which to expand the record with new evidence. In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered on the basis of the existing record. Both *Blackledge* and *Menna* could be (and ultimately were) resolved without any need to venture beyond that record. In *Blackledge*, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all. In *Menna*, the indictment was facially duplicative of the earlier offense of which the defendant had been convicted and sen-

tenced so that the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense.

Respondents here, in contrast, pleaded guilty to indictments that on their face described separate conspiracies. They cannot prove their claim by relying on those indictments and the existing record. Indeed, as noted earlier, they cannot prove their claim without contradicting those indictments, and that opportunity is foreclosed by the admissions inherent in their guilty pleas. We therefore need not consider the degree to which the decision by an accused to enter into a plea *bargain* which incorporates concessions by the Government, such as the one agreed to here, heightens the already substantial interest the Government has in the finality of the plea. The judgment of the Court of Appeals is

Reversed.

APPENDIX TO OPINION OF THE COURT

Excerpts from Indictments

"UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

"Criminal No. 81-20119-01

"UNITED STATES OF AMERICA
v.
BROCE CONSTRUCTION CO., INC., RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS

"[Filed: Nov. 17, 1981]

. . . . .

"V

"OFFENSE CHARGED

"11. Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

"12. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

"(a) To allocate to Broce Construction Co., Inc., Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978; and

"(b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced Federal-Aid highway project.

"13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:

"(a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. 23-60-RS-1080(9);

"(b) Designating the successful low bidder on the above-referenced Federal-Aid highway project;

"(c) Submitting intentionally high or complementary bids on the above-referenced Federal-Aid highway project on

which Broce Construction Co., Inc. had been designated as the successful low bidder;

"(d) Submitting bid proposals on the above-referenced Federal-Aid highway project containing false, fictitious and fraudulent statements and entries; and

"(e) Discussing the submission of prospective bids on other projects let by the State of Kansas on April 25, 1978."

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

"Criminal No. 82-20011

"UNITED STATES OF AMERICA
v.
RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS.

"[Filed: Feb. 4, 1982]

. . . . . .

"V

"OFFENSE CHARGED

"10. Beginning sometime in or about July, 1979, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979, which contract involved construction work on a public highway in the State of Kansas, in un-

reasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

"11. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

"(a) To allocate to Broce Construction Co., Inc., Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979; and

"(b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced public highway construction project.

"12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:

"(a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. KRL 29-2(26);

"(b) Designating the successful low bidder on the above-referenced public highway construction project;

"(c) Submitting intentionally high or complementary bids on the above-referenced public highway construction project on which Broce Construction Co., Inc. had been designated as the successful low bidder;

"(d) Submitting bid proposals on the above-referenced public highway construction project containing false, fictitious and fraudulent statements and entries; and

"(e) Discussing the payment of consideration of value to another contractor to induce that contractor to submit a non-competitive, rigged bid on the above-referenced public highway construction project."

JUSTICE STEVENS, concurring.

While I join the Court's opinion, I write separately to identify the doubtful character of the basic premise on which respondents' double jeopardy claim rests. Respondents assume that their price-fixing activities in April 1978 and July 1979 were not separate crimes because they were carried out pursuant to an overarching conspiracy that had been in existence for more than 25 years.

"A conspiracy is a partnership in criminal purposes." *United States* v. *Kissel*, 218 U. S. 601, 608 (1910). It "does not become several conspiracies because it continues over a period of time" or because it is an "agreement to commit several offenses." *Braverman* v. *United States*, 317 U. S. 49, 52 (1942). Thus, the continuous, cooperative effort among Kansas highway contractors to rig bids, which permeated the Kansas highway construction industry for more than 25 years, see *ante*, at 567, was unquestionably a single, continuing conspiracy that violated § 1 of the Sherman Act, 15 U. S. C. § 1. It does not necessarily follow, however, that separate bid-rigging arrangements carried out in furtherance of an illegal master plan may not be prosecuted separately.

All of the elements of a Sherman Act violation were alleged in the indictment charging respondents with price fixing on the Kansas highway project bid on April 25, 1978. App. 143a–151a. The same is true with respect to the indictment relating to the second project, bid more than a year later and to be performed in a different county. *Id.*, at 136a–142a. Each indictment alleged a separate crime. I am not at all sure that the fact that both may have been committed pursuant to still another continuing violation of the Sherman Act should bar separate prosecutions for each of those violations.

There is something perverse in the assumption that respondents' constitutional rights may have been violated by separately prosecuting them for each of two complete and flagrant violations of the Sherman Act simply because they may also have been guilty of an ongoing and even more serious vi-

olation of the same statute for more than a quarter of a century. Whether the law requires that all of these violations be merged into one is a question that need not be decided in this case. Yet I believe there is value in making it clear that the Court has not decided that question today.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

A guilty plea, for all its practical importance in the day-to-day administration of justice, does not bestow on the Government any power to prosecute that it otherwise lacks. Here, after remand, the District Court found, and the Court of Appeals affirmed, that the two indictments brought against respondents charged two parts of the same conspiracy, and therefore sought to punish respondents twice for the same behavior, in violation of the Double Jeopardy Clause of the Fifth Amendment.

The Government, see *ante*, at 569, does not contest the finding that in fact there was only one conspiracy. It argues, however, that the defendants' guilty pleas render this fact wholly irrelevant, and urges us to let stand convictions that otherwise are barred. Because I believe it inappropriate for a reviewing court to close its eyes to this constitutional violation, and because I find that the basis of respondents' double jeopardy challenge is obvious from a reading of the two indictments and entitles respondents to a hearing, I dissent from the majority's ruling that the guilty pleas are conclusive.

I

As noted in *Brady*[1] and by the majority today, in most instances a guilty plea is conclusive and resolves all factual issues necessary to sustain a conviction. But in *Blackledge* v. *Perry*, 417 U. S. 21 (1974), and in *Menna* v. *New York*, 423 U. S. 61 (1975), this Court unequivocally held that a guilty

[1] *Brady* v. *United States*, 397 U. S. 742, 748 (1970); see also *McMann* v. *Richardson*, 397 U. S. 759, 766 (1970).

plea does not waive a defendant's right to contest the constitutionality of a conviction "[w]here the State is precluded by the United States Constitution from haling a defendant into court." *Id.*, at 62; see also *Blackledge*, 417 U. S., at 30. Although our recent decision in *Ricketts* v. *Adamson*, 483 U. S. 1 (1987), allows a defendant to waive a double jeopardy claim as part of a clearly worded plea agreement, none of our prior cases limited a defendant's ability, under *Menna* and *Blackledge*, absent an express waiver, to challenge the Government's authority to bring a second charge.

It is true, as the majority notes, that neither *Blackledge* nor *Menna* involved an independent evidentiary hearing to assess the defendants' double jeopardy claims. But nothing in *Blackledge* or *Menna* indicates that the general constitutional rule announced in those cases was dependent on the fortuity that the defendants' double jeopardy claims were apparent from the records below without resort to an evidentiary hearing. This is not surprising. There simply was no need for an evidentiary hearing in either *Blackledge* or *Menna*. Certainly, nothing in those cases suggests that a collateral proceeding would be inappropriate. *Blackledge* was a habeas proceeding in which the record was already fully developed, 417 U. S., at 23; and the remand in *Menna* from this Court to the New York Court of Appeals was not limited in any way, 423 U. S., at 63. To the extent that the majority reads the particular circumstances of those cases as compelling, or even implying, that the need for an evidentiary hearing alters the effect of a guilty plea, it infuses mere happenstance with constitutional meaning and draws distinctions where none belong.

The majority also justifies its outcome by looking to four words of *dicta* in a footnote in *Menna*, 423 U. S., at 62–63, n. 2. The relevant language in the *Menna* footnote is: "[A] plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute" (emphasis added). The majority

takes this language to mean that respondents can prevail only if they prove their claim by relying on nothing more than the indictment and the record.

A much better reading of the *Menna* footnote, however, is to place the emphasis on the word "claim." Accordingly, if a claim that the Government was without power to prosecute is apparent on the face of the indictment, read in light of the existing record, a court should not consider the claim to have been waived, and must go on to consider its merits. This interpretation is true to the outcome in both *Menna* and *Blackledge*. It also gives appropriate force to the footnote's language and its apparent purpose of placing some limit on the ability of a defendant who has pleaded guilty to make a later collateral attack without some foundation in the prior proceedings. Most important, it gives real content to the defendants' constitutional rights.

II

This case provides a powerful example of why there is an especially great need to maintain the right collaterally to attack guilty pleas in the conspiracy context. Conspiracy, that "elastic, sprawling and pervasive offense," *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949) (Jackson, J., concurring in judgment and opinion of Court), long has been recognized as difficult to define and even more difficult to limit. When charging a conspiracy, a prosecutor is given the opportunity to "cast his nets" in order to cover a broad timeframe and numerous acts and individuals, in part because conspiracies by their nature are clandestine and difficult to uncover. See, *e. g.*, *Blumenthal* v. *United States*, 332 U. S. 539, 557 (1947). But this very permissible breadth of conspiracy indictments provides potential for abuse and confusion. Judge Parker said it meaningfully 50 years ago:

> "Blanket charges of 'continuing' conspiracy with named defendants and with 'other persons to the grand jurors unknown' fulfil a useful purpose in the prosecution

> of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. . . . The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading." *Short* v. *United States*, 91 F. 2d 614, 624 (CA4 1937).

This Court noted in *Sanabria* v. *United States*, 437 U. S. 54, 65–66 (1978): "The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, 'in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction,'" quoting *Cochran* v. *United States*, 157 U. S. 286, 290 (1895). See also *Russell* v. *United States*, 369 U. S. 749 (1962).

As the Court of Appeals recognized, the two indictments at issue here were broad and vague and substantially overlapped. Although the majority has included in the Appendix to its opinion, *ante*, p. 576, the few paragraphs in the two indictments which differ, it fails to acknowledge that the indictments otherwise are almost identical.

The indictments alleged acts occurring in the same place, having the same object of eliminating competition on a high-

way project, and having the same effect of restraining competition. More important, the first indictment is vague and open-ended in a number of material respects. While alleging a definite beginning date, the first indictment specified no termination date. As a consequence, the acts alleged in the second indictment were contained within the timeframe of the first. Moreover, the first indictment alleged that respondents conspired with "others known and unknown"; so, too, did the second indictment. Both indictments, therefore, may have involved the same participants. This vagueness, coupled with the express identical elements, provides a strong inference that the two agreements alleged were part of the same conspiracy.[2] For this reason alone, there are sufficient grounds for raising a double jeopardy challenge under a proper reading of our decisions in *Menna* and *Blackledge*.

That the two indictments were duplicitous is further betrayed by the nature of the charged offense. The indictments state that the conspirators designated a low bidder on each project, submitted artificially high or complementary bids, and discussed paying consideration to other contractors to induce those contractors to submit noncompetitive rigged bids as well. *Ante*, at 577–578, 579. Although it is theoretically possible that such a conspiracy might involve only one project, it is highly unlikely. Rather, it seems reasonably clear to me, as it should have been to the Government, that in order to make any sense such an agreement must involve a number of projects, so that a conspirator who agreed to sub-

[2] In determining how many conspiracies are involved in a particular case, courts have looked to a number of discrete factors. Some of these include the relevant (1) time, (2) participants, (3) statutory offenses charged, (4) overt acts charged, and (5) places where the alleged acts took place. See *United States* v. *Ragins*, 840 F. 2d 1184, 1188–1189 (CA4 1988); *United States* v. *Atkins*, 834 F. 2d 426, 432 (CA5 1987); see also *United States* v. *Korfant*, 771 F. 2d 660, 662 (CA2 1985) (considering eight factors).

mit a sham bid on one project would be rewarded by being chosen for the successful bid on another project. In fact, a Justice Department release issued several weeks after the second indictment was filed described a Tennessee highway bid-rigging scheme as follows: "'The prearranged low bidder would usually get the job as other contractors submitted intentionally high bids, knowing their turn as low bidder was coming.'" 42 BNA Antitrust & Trade Regulation Rep. 523 (1982), quoting unpublished release. See generally U. S. General Accounting Office, Report to the House Committee on Public Works and Transportation, Actions Being Taken to Deal with Bid Rigging in the Federal Highway Program (May 23, 1983). The very nature of the conspiracy alleged all but compels the conclusion that the initial indictment charged an ongoing agreement covering numerous projects.[3]

The Government argues that the respondents should have realized all this, and refused to plead to the second indictment. I agree. But it is no less true that the Government should have been aware that it could be charging duplicitous conspiracies, and, if so, not brought the second indictment. I fail to see why a reviewing court should punish the respondents' oversight, but reward the Government's.

"'The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units.'" *Sanabria* v. *United States*, 437 U. S., at 72, quoting *Brown* v. *Ohio*, 432 U. S. 161, 169 (1977). As we pointed out in *Braverman* v. *United States*, 317 U. S. 49, 52 (1942), there may be a "single continuing agreement to com-

---

[3] The majority's reading of the indictments appears to focus solely on the fact that each states a separate agreement, relating to a separate project. See *ante*, at 570–571. Had the majority reached the issue raised by JUSTICE STEVENS, in his separate concurring opinion, *ante*, p. 580, and decided that multiple conspiracies within an ongoing conspiracy could be prosecuted separately, then those allegations might be determinative. The majority, however, has not done this.

mit several offenses." On the face of the two indictments, there was clear support for a claim that prosecuting the second indictment was barred by double jeopardy.

III

The question remains as to what procedures a reviewing court should follow when faced with such a double jeopardy claim.

As noted above, our prior cases and common sense require that the reviewing court consider the record in determining whether the claim of double jeopardy is sufficient to bar the second prosecution. It may be that in most cases the issue can be determined by reference to the record alone. Statements made at the plea hearing or other pretrial proceeding may be sufficient to clarify any ambiguity, or may constitute an express waiver of any double jeopardy challenge. But in the absence of a definitive record, an evidentiary hearing may be necessary in order to assure that the questioned indictment in fact alleges separate criminal conduct.

An evidentiary hearing on the double jeopardy issue would not be overly burdensome or replicate the trial that the guilty plea avoided. As noted in *Abney* v. *United States*, 431 U. S. 651, 659 (1977), in a claim of double jeopardy "the defendant makes no challenge whatsoever to the merits of the charge against him." Although the nature of the evidentiary hearing obviously will depend on the facts of the particular case, for a challenge similar to the one here the hearing probably would involve only the Government's explanation of how the conduct charged in the second indictment differs from the facts established by the guilty plea to the first indictment, and the defendants' arguments to the contrary. The truth of many of the relevant facts will have been established by the guilty plea to the first indictment, and the legal sufficiency and independence of the second indictment should be determin-

able without substantial additional testimony.[4] These challenges rarely should involve extensive proceedings.

The Government's complaint that conducting an evidentiary hearing will present it with problems of proof, as well as administrative headaches, may have a modicum of force. Every prosecutor, however, has the power to avoid this by more carefully considering the actual scope of the alleged conspiracy, and by carefully drawing the indictment. The prosecutor also may ensure that any double jeopardy concerns are addressed at the plea hearing by describing with some particularity the scope of the agreement that is the basis of the conspiracy.[5] While such steps are not absolutely required, each makes good sense, and would help to assure that every issue that should be raised at the plea hearing will be raised. Directly addressing double jeopardy questions at the plea hearing will prevent situations like the one at issue here. Once on notice, a defendant might expressly waive any double jeopardy challenge, see *Ricketts* v. *Adamson*, 483 U. S. 1 (1987), or might reconsider his inclination to plead guilty and, instead, litigate the issue.

This solution, it seems to me, properly balances the interests of the Government in finality of convictions pursuant to guilty pleas with those of criminal defendants who may have been unaware of their rights when pleading guilty. The Constitution's prohibition against placing a defendant in jeopardy twice for the same conduct is fundamental, and no less applicable because a complicated question of conspiracy law

---

[4] Indeed, we know already that this case did not require a long, complicated hearing. By the Government's stipulation, the District Court considered the record in the *Beachner* case, see *ante*, at 566–567, as if that record had been a part of the plea proceedings.

[5] It would also be worthwhile for the Government to provide a defendant with a copy of each indictment well in advance of the scheduled plea hearing. Here the defendants first received a copy of the second indictment on February 8, 1981, the same day on which the guilty pleas were entered. This may have contributed to respondents' failure to raise the double jeopardy issue at that time.

may be presented. Because I believe that there is no legitimate interest in either punishing defendants twice for the same conduct or in allowing the Government to gain untoward benefits from the use of vague and imprecise indictments, and that an evidentiary hearing would not be a significant burden in the few cases where it would be necessary, I dissent.

ORING *v.* STATE BAR OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 87–1224. Argued January 10, 1988—Decided January 23, 1989

Appeal dismissed.

Theodore A. Cohen argued the cause for appellant. With him on the briefs was *Scott Spolin*.

Diane C. Yu argued the cause for appellee. With her on the brief were *Truitt A. Richey, Jr.*, and *Erica Tabachnick*.

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

Reporter's Note

The next page is purposely numbered 801. The numbers between 590 and 801 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.

ORDERS FOR OCTOBER 3, 1988, THROUGH FEBRUARY 3, 1989

OCTOBER 3, 1988

Appeals Dismissed

No. 87–1337. BOERSMA, PERSONAL REPRESENTATIVE OF THE ESTATES OF BOERSMA ET AL. *v.* KARNES, NEBRASKA STATE TAX COMMISSIONER, ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 227 Neb. 329, 417 N. W. 2d 341.

No. 87–1586. CHALKO *v.* CHALKO. Appeal from Ct. App. Cal., 4th App. Dist. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question.

No. 87–1647. ANDERSON *v.* SNO-KING VILLAGE ASSN., INC., ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 745 P. 2d 540.

No. 87–1783. BRACKENRIDGE *v.* AMETEK, INC., ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 517 So. 2d 667.

No. 87–1837. PARKVIEW ASSOCIATES *v.* CITY OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 71 N. Y. 2d 274, 519 N. E. 2d 1372.

No. 87–1892. COK *v.* COK. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 533 A. 2d 534.

No. 87–1944. POLYAK *v.* HULEN ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 837 F. 2d 475.

No. 87–1948. SNYDER *v.* WILSON. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 518 Pa. 52, 540 A. 2d 264.

No. 87–2045. DOUGLAS *v.* NEBRASKA EX REL. NEBRASKA STATE BAR ASSN. Appeal from Sup. Ct. Neb. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 227 Neb. 1, 416 N. W. 2d 515.

No. 87–2110. JONES *v.* SCHAFFER ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 845 F. 2d 1012.

No. 87–2132. GJESSING ET AL. *v.* WEST INDIAN CO., LTD., ET AL.; and

No. 87–2133. LEGISLATURE OF THE VIRGIN ISLANDS *v.* WEST INDIAN CO., LTD., ET AL. Appeals from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 844 F. 2d 1007.

No. 87–7036. LEMONS *v.* MYERS ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 842 F. 2d 327.

No. 87–7084. WOOL *v.* HINKEL ET AL.; and WOOL *v.* HORWITZ ET AL. Appeals from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. Reported below: 833 F. 2d 1006 (first case); 836 F. 2d 1343 (second case).

No. 87–7181. RAY *v.* TEXAS. Appeal from Ct. App. Tex., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–7216. MAHLERWEIN *v.* FEDERAL LAND BANK OF LOUISVILLE. 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.

No. 87–7293. MAHLERWEIN *v.* STITSINGER ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 833 F. 2d 1012.

No. 87–7294. MAHLERWEIN *v.* BRUEWER ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 840 F. 2d 17.

No. 87–7324. BURGESS *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS. 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. Reported below: 826 F. 2d 1069.

No. 88–113. POLYAK *v.* HAMILTON, JUDGE, CIRCUIT COURT OF LAWRENCE COUNTY, TENNESSEE. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 840 F. 2d 17.

No. 88–180. BOWLES *v.* UNITED STATES ARMY CORPS OF ENGINEERS. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 841 F. 2d 112.

No. 88–212. HALL *v.* HAWAII ET AL. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 7 Haw. App. 274, 756 P. 2d 1048.

No. 88–213. LOCKSTROM *v.* LOCKSTROM. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–238. SNAVELY *v.* WATSON. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 846 F. 2d 754.

No. 88–5033. BIRGES *v.* NEVADA. 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: 103 Nev. 796.

No. 88–5084. MARTIN *v.* MARYLAND STATE BOARD OF LAW EXAMINERS ET AL. Appeal from Ct. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 312 Md. 659, 541 A. 2d 994.

No. 88–5165. ROTT *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSOCIATION OF JAMES TOWN, NORTH DAKOTA. Appeal from Sup. Ct. N. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 422 N. W. 2d 98.

No. 88–5167. MCALISTER *v.* ATLANTIC RICHFIELD CO. ET AL. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 242 Kan. ix, 763 P. 2d 16.

No. 88–5239. BOLTON *v.* CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–5323. GAUNCE *v.* ST. PAUL MERCURY INSURANCE CO. ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 844 F. 2d 789.

No. 87–1818. BADHAM ET AL. *v.* EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. Appeal from D. C. N. D. Cal. dismissed for want of jurisdiction. JUSTICE WHITE and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 694 F. Supp. 664.

No. 87–1842. KALTSAS ET AL. *v.* CITY OF NORTH CHICAGO ET AL. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE BLACK-

MUN, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 160 Ill. App. 3d 302, 513 N. E. 2d 438.

No. 87–1889. AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC., ET AL. *v.* WASHINGTON PUBLIC POWER SUPPLY SYSTEM ET AL.;

No. 87–1897. HABERMAN ET AL. *v.* WASHINGTON PUBLIC POWER SUPPLY SYSTEM ET AL.; and

No. 87–2109. WOOD DAWSON SMITH & HELLMAN *v.* HABERMAN ET AL. Appeals from Sup. Ct. Wash. dismissed for want of jurisdiction. Reported below: 109 Wash. 2d 107, 744 P. 2d 1032 and 750 P. 2d 254.

No. 87–1896. ROSENTHAL *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Reported below: 43 Cal. 3d 612, 738 P. 2d 723.

No. 87–2007. COLONIAL PIPELINE CO. *v.* WRIGHT CONTRACTING CO. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Reported below: 258 Ga. 115, 365 S. E. 2d 827.

No. 87–2088. BLANKEMEYER ET UX. *v.* FEDERAL LAND BANK OF OMAHA. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 228 Neb. 249, 422 N. W. 2d 81.

No. 87–2129. WHITE, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, PHILADELPHIA COUNTY *v.* JUDICIAL INQUIRY AND REVIEW BOARD OF PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 517 Pa. 417, 538 A. 2d 473.

No. 87–6994. LARSON *v.* NORTH DAKOTA. Appeal from Sup. Ct. N. D. dismissed for want of substantial federal question. Reported below: 419 N. W. 2d 897.

No. 88–171. HERZOG ET UX. *v.* COLDING, COLLIER COUNTY PROPERTY APPRAISER, ET AL. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. Reported below: 525 So. 2d 888.

No. 88–181. HOUSTON LIGHTING & POWER CO. *v.* PUBLIC UTILITY COMMISSION OF TEXAS. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 748 S. W. 2d 439.

No. 88–230. SAVINGS LEAGUE OF WISCONSIN, LTD., ET AL. *v.* WISCONSIN DEPARTMENT OF REVENUE ET AL. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 141 Wis. 2d 918, 416 N. W. 2d 650.

No. 87–7100. LARSON *v.* SHAWANO COUNTY ET AL. Appeal from C. A. 7th Cir. Motion of appellant for sanctions denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–7198. SCOTT *v.* RAINS ET AL. Appeal from Sup. Ct. Tex. dismissed for want of properly presented federal question.

Certiorari Granted—Vacated and Remanded

No. 87–1898. BRYANT *v.* CARLUCCI, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Webster* v. *Doe*, 486 U. S. 592 (1988). Reported below: 838 F. 2d 465.

No. 87–1933. GOLGART ET AL. *v.* CENTRAL PLASTICS CO. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196 (1988), and *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265 (1988).

No. 87–2011. WASHINGTON STATE ELECTRICAL CONTRACTORS ASSN., INC., ET AL. *v.* FORREST ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Patrick* v. *Burget*, 486 U. S. 94 (1988). JUSTICE KENNEDY took no part in the consideration or decision of this case. Reported below: 839 F. 2d 547.

No. 87–2079. SHIRK ET UX., DBA OREGON MEAT CUTTING SCHOOL *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128 (1988). Reported below: 833 F. 2d 1326.

No. 87–6717. JOHNSON *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Houston* v. *Lack*, 487 U. S. 266 (1988).

No. 87-6751. MILLER *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Houston* v. *Lack*, 487 U. S. 266 (1988). Reported below: 836 F. 2d 551.

No. 87-6833. LLOYD *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mills* v. *Maryland*, 486 U. S. 367 (1988). Reported below: 321 N. C. 301, 364 S. E. 2d 316.

No. 87-6948. WOLF *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona* v. *Roberson*, 486 U. S. 675 (1988). Reported below: 842 F. 2d 334.

No. 87-7110. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Houston* v. *Lack*, 487 U. S. 266 (1988).

No. 87-7290. COOK *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Satterwhite* v. *Texas*, 486 U. S. 249 (1988). Reported below: 741 S. W. 2d 928.

Miscellaneous Orders

No. — — ——. BANK OF SAN MARINO BUILDING, LTD. *v.* DEFAULT SERVICE CO. ET AL. Motion of one who is not a member of the Bar of this Court to direct the Clerk to file petition for writ of certiorari denied.

No. — — ——. DRABICK *v.* DRABICK. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. FORD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. VALLES *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–239 (No. 114, Orig.). LOUISIANA *v.* MISSISSIPPI ET AL. Application for stay of proceedings in the United States District Court for the Southern District of Mississippi in the case of *Houston et al.* v. *Thomas et al.*, C. A. No. W86–0080(B), presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. A–260. ARMONTROUT, WARDEN *v.* SMITH. Application of the Attorney General of Missouri for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. D–717. IN RE DISBARMENT OF ALFIERI. Richard Joseph Alfieri, of Fort Lauderdale, Fla., 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 June 20, 1988 [487 U. S. 1202], is hereby discharged.

No. D–719. IN RE DISBARMENT OF EZRIN. Herbert Stanley Ezrin, 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 June 20, 1988 [487 U. S. 1203], is hereby discharged.

No. D–720. IN RE DISBARMENT OF MACGUIRE. Disbarment entered. [For earlier order herein, see 487 U. S. 1214.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $14,085.35 for the period March 28 through June 30, 1988, to be paid equally by the parties. [For earlier decision herein, see, *e. g.*, 485 U. S. 388.]

No. 86–1856. NORTHWEST CENTRAL PIPELINE CORP. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Sup. Ct. Kan. [Probable jurisdiction noted, 486 U. S. 1021.] Motions of Interstate Oil Compact Commission and Council of State Governments et al. for leave to file briefs as *amici curiae* granted.

No. 87–154. DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, ET AL. *v.* WINNEBAGO COUNTY DEPARTMENT OF SOCIAL

SERVICES ET AL. C. A. 7th Cir. [Certiorari granted, 485 U. S. 958.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–163. UNITED STATES ARMY CORPS OF ENGINEERS ET AL. *v.* AMERON, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 485 U. S. 958.] Motion of respondents for divided argument denied.

No. 87–201. MANSELL *v.* MANSELL. Ct. App. Cal., 5th App. Dist. [Probable jurisdiction noted, 487 U. S. 1217.] Motion of Retired Officers Association et al. for leave to file a brief as *amici curiae* granted.

No. 87–470. FORT WAYNE BOOKS, INC. *v.* INDIANA ET AL. Sup. Ct. Ind. [Certiorari granted, 485 U. S. 933.] Motion of James J. Clancy et al. for leave to file a brief as *amici curiae* granted.

No. 87–636. KARAHALIOS *v.* NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1263. C. A. 9th Cir. [Certiorari granted, 486 U. S. 1041.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–980. MISSISSIPPI BAND OF CHOCTAW INDIANS *v.* HOLYFIELD ET AL. Sup. Ct. Miss. [Probable jurisdiction postponed, 486 U. S. 1021.] Motion of Swinomish Tribal Community et al. for leave to file a brief as *amici curiae* granted.

No. 87–1020. DAVIS *v.* MICHIGAN DEPARTMENT OF THE TREASURY. Ct. App. Mich. [Probable jurisdiction noted, 487 U. S. 1217.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1054. FIRESTONE TIRE & RUBBER CO. ET AL. *v.* BRUCH ET AL. C. A. 3d Cir. [Certiorari granted, 485 U. S. 986.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1097. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GEORGETOWN UNIVERSITY HOSPITAL ET AL. C. A. D. C. Cir. [Certiorari granted, 485 U. S. 903.] Motion of Ohio Power Co. for leave to file a brief as *amicus curiae* out of time denied.

No. 87–1165. CALIFORNIA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 485 U. S. 1020.] Motion of the Solicitor General for divided argument granted.

No. 87–1241. PENNSYLVANIA *v.* UNION GAS CO. C. A. 3d Cir. [Certiorari granted, 485 U. S. 958.] Motion of Pacific Legal Foundation for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 87–1372. ARGENTINE REPUBLIC *v.* AMERADA HESS SHIPPING CORP. ET AL. C. A. 2d Cir. [Certiorari granted, 485 U. S. 1005.] Motion of respondents and *amicus curiae*, Republic of Liberia, for divided argument to permit Republic of Liberia to participate in oral argument as *amicus curiae* denied. Motions for leave to file briefs as *amici curiae* filed by the following are granted: Republic of Liberia, American Institute of Marine Underwriters, American Institute of Merchant Shipping et al., Maritime Law Association, International Human Rights Law Group, and International Association of Independent Tanker Owners.

No. 87–1437. BLANTON ET AL. *v.* CITY OF NORTH LAS VEGAS, NEVADA. Sup. Ct. Nev. [Certiorari granted, 487 U. S. 1203.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 87–1602. CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. *v.* PEOPLES. C. A. 3d Cir. [Certiorari granted, 486 U. S. 1004.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Robert E. Welsh, Jr., Esq., of Philadelphia, Pa., be appointed to serve as counsel for respondent in this case.

No. 87–1614. MARTIN ET AL. *v.* WILKS ET AL.;

No. 87–1639. PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL. *v.* WILKS ET AL.; and

No. 87–1668. ARRINGTON ET AL. *v.* WILKS ET AL. C. A. 11th Cir. [Certiorari granted, 487 U. S. 1204.] Motion of the Solicitor General for divided argument granted. Motion of petitioners for divided argument granted.

No. 87–1703. ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL. *v.* METHOW VALLEY CITIZENS COUNCIL ET AL.; and

No. 87–1704. MARSH, SECRETARY OF THE ARMY, ET AL. *v.* OREGON NATURAL RESOURCES COUNCIL ET AL. C. A. 9th Cir.

[Certiorari granted, 487 U. S. 1217.] Motion of the Solicitor General to dispense with printing the joint appendix granted. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 87–1955. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA *v.* CONTINENTAL BANK CORP. ET AL. Appeal from C. A. 11th Cir.;

No. 87–1979. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL. Sup. Ct. Va.;

No. 87–2118. ROJAS ET AL. *v.* VICTORIA INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from D. C. S. D. Tex.;

No. 88–36. BENEFICIAL CORP. ET AL. *v.* DEUTSCHMAN. C. A. 3d Cir.;

No. 88–42. HALLSTROM ET UX. *v.* TILLAMOOK COUNTY. C. A. 9th Cir.;

No. 88–124. BREININGER *v.* SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6. C. A. 6th Cir.; and

No. 88–127. NORFOLK & WESTERN RAILWAY CO. *v.* GOODE. Sup. Ct. Va. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–2048. TEXACO INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL. C. A. 9th Cir. Motions of National Association of Texaco Wholesalers, Society of Independent Gasoline Marketers of America et al., Petroleum Marketers Association of America, and National Association of Manufacturers of the United States et al. for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 87–7077. MCDEVITT *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir.;

No. 87–7193. BARTOS *v.* CHICAGO BOARD OF ELECTION ET AL. C. A. 7th Cir.;

No. 87–7240. ORYNICZ *v.* VETERANS ADMINISTRATION. C. A. 3d Cir.;

No. 87–7306. JACKSON *v.* UNITED STATES. C. A. 9th Cir.; and

No. 88–5041. LANDES *v.* DEPARTMENT OF STATE ET AL. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 24,

1988, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 87–7273. VEST *v.* UNITED STATES. C. A. 1st Cir.; and No. 88–5188. BENNETT *v.* CORROON & BLACK CORP. ET AL. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 24, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–464. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 7th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. 88–5054. SULLIVAN *v.* SULLIVAN. Appeal from Sup. Ct. Tex. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until October 24, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal for want of jurisdiction and, treating the papers whereon the appeal would be taken as a petition for writ of certiorari, deny the petition for writ of certio-

rari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5126. TALLMAN *v.* NORTHWEST ACUTE CARE CORP., DBA NORTHWEST HOSPITAL. Appeal from Ct. App. Iowa;

No. 88–5141. TALLMAN *v.* ORT ET AL. Appeal from Ct. App. Iowa; and

No. 88–5254. TALLMAN *v.* UNITED STATES ET AL. Appeal from C. A. 8th Cir. Motions of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until October 24, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit statements as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeals for want of jurisdiction and, treating the papers whereon the appeals would be taken as petitions for writs of certiorari, deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–5240. BARGET *v.* BARGET. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 24, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–7157. IN RE HYLTON. County Ct. at Law, Liberty County, Tex.;

No. 87–7183. IN RE MCDONALD. Sup. Ct. Tenn.;

No. 87–7220. IN RE MCDONALD. Sup. Ct. Tenn.;

No. 87–7236. IN RE PEARSON. Super. Ct. Ga., Clarke County; and

No. 88–5006. IN RE MCDONALD. Ct. Crim. App. Tenn. Petitions for writs of common-law certiorari denied.

No. 88–5148. IN RE VELLA. Petition for writ of habeas corpus denied.

No. 87–1989. IN RE GOULD ET AL.;
No. 87–7043. IN RE GRIFFIN;
No. 87–7051. IN RE REDDEN ET UX.;
No. 87–7114. IN RE DAVIS;
No. 87–7115. IN RE GILL;
No. 87–7135. IN RE PHILLIPS ET AL.;
No. 87–7232. IN RE BALAWAJDER;
No. 87–7349. IN RE MINGLEDOLPH;
No. 88–55. IN RE ROBERTS;
No. 88–152. IN RE ALL AMERICAN SERVICES, LTD.; and
No. 88–310. IN RE MASON ET UX. Petitions for writs of mandamus denied.

No. 87–7176. IN RE BALAWAJDER. Petition for writ of mandamus and/or certiorari denied.

No. 87–7002. IN RE SHARIF; and
No. 88–5140. IN RE RADVAN-ZIEMNOWICZ. Petitions for writs of mandamus and/or prohibition denied.

No. 87–7024. IN RE POTE. Motion of petitioner for imposition of sanctions denied. Petition for writ of mandamus and/or prohibition denied.

No. 88–260. IN RE DAVIS. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 87–1945. FRAZEE *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL. Appeal from App. Ct. Ill., 3d Dist. Probable jurisdiction noted. Reported below: 159 Ill. App. 3d 474, 512 N. E. 2d 789.

No. 87–2098. BURNLEY, SECRETARY OF TRANSPORTATION *v.* MID-AMERICA PIPELINE CO. Appeal from D. C. N. D. Okla. Probable jurisdiction noted.

No. 87–1862. CALIFORNIA ET AL. *v.* ARC AMERICA CORP. ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 817 F. 2d 1435.

No. 87–1943. MINNESOTA NEWSPAPER ASSN., INC. *v.* POSTMASTER GENERAL OF THE UNITED STATES ET AL.; and

No. 87–1956. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. *v.* MINNESOTA NEWSPAPER ASSN., INC. Appeals from D. C. Minn. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 677 F. Supp. 1400.

Certiorari Granted

No. 87–1490. MALLARD *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA ET AL. C. A. 8th Cir. Certiorari granted.

No. 87–1759. TEXAS STATE TEACHERS ASSN. ET AL. *v.* GARLAND INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 837 F. 2d 190.

No. 87–1848. CITY OF DALLAS ET AL. *v.* STANGLIN, INDIVIDUALLY AND DBA TWILIGHT SKATING RINK. Ct. App. Tex., 5th Dist. Certiorari granted. Reported below: 744 S. W. 2d 165.

No. 87–1855. GILHOOL, SECRETARY OF EDUCATION OF PENNSYLVANIA *v.* MUTH ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 839 F. 2d 113.

No. 87–1865. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS & LOAN ASSN. *v.* TICKTIN ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 832 F. 2d 1438.

No. 87–1868. MEAD CORP. *v.* TILLEY ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 815 F. 2d 989.

No. 87–1973. FINLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted.

No. 87–2013. BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK ET AL. *v.* FOX ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 841 F. 2d 1207.

No. 88–1. CONSOLIDATED RAIL CORPORATION *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 845 F. 2d 1187.

No. 88–32. MASSACHUSETTS *v.* MORASH. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 402 Mass. 287, 522 N. E. 2d 409.

No. 88–226. WARD ET AL. *v.* ROCK AGAINST RACISM. C. A. 2d Cir. Certiorari granted. Reported below: 848 F. 2d 367.

No. 88–266. OKLAHOMA TAX COMMISSION *v.* GRAHAM ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 846 F. 2d 1258.

No. 87–1882. NEITZKE ET AL. *v.* WILLIAMS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 837 F. 2d 304.

No. 87–2050. COUNTY OF ALLEGHENY ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ET AL.;
No. 88–90. CHABAD *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.; and
No. 88–96. CITY OF PITTSBURGH *v.* AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 842 F. 2d 655.

No. 87–6571. GRAHAM *v.* CONNOR ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 827 F. 2d 945.

No. 88–97. FORD MOTOR CO. *v.* BRYANT. C. A. 9th Cir. Motion of American Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari granted.* Reported below: 844 F. 2d 602.

Certiorari Denied. (See also Nos. 87–1647, 87–1783, 87–1837, 87–1892, 87–1944, 87–1948, 87–2045, 87–2110, 87–2132, 87–2133, 87–7036, 87–7084, 87–7181, 87–7216, 87–7293, 87–7294, 87–7324, 88–113, 88–180, 88–212, 88–213, 88–238, 88–5033, 88–5084, 88–5165, 88–5167, 88–5239, 88–5323, 87–7100, 87–7157, 87–7183, 87–7220, 87–7236, 88–5006, and 87–7176, *supra.*)

No. 87–1584. GELDERMANN, INC. *v.* COMMODITY FUTURES TRADING COMMISSION; and
No. 87–1663. BOARD OF TRADE OF CITY OF CHICAGO *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 310.

---

*[REPORTER'S NOTE: The portion of this order granting certiorari was subsequently vacated and certiorari was denied. See *post*, p. 986.]

No. 87–1648. POOLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 561.

No. 87–1691. ORELLANES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 809 F. 2d 1526.

No. 87–1707. STAUBER *v.* CLINE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 837 F. 2d 395.

No. 87–1717. BONILLA ROMERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 836 F. 2d 39.

No. 87–1718. UNSECURED CREDITORS' COMMITTEE ET AL. *v.* FIRST NATIONAL BANK & TRUST COMPANY OF ESCANABA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 599.

No. 87–1722. BARNHART ET UX. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 345 Pa. Super. 10, 497 A. 2d 616.

No. 87–1726. EL GAWLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 837 F. 2d 142.

No. 87–1737. BUCKNO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 517 Pa. 361, 537 A. 2d 811.

No. 87–1740. POLLIO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–1743. OMNI U. S. A., INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 840 F. 2d 912.

No. 87–1755. SOX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87–1762. ELLIS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 25 Mass. App. 1112, 518 N. E. 2d 1166.

No. 87–1769. ANDREWS ET AL. *v.* VETERANS ADMINISTRATION. C. A. 10th Cir. Certiorari denied. Reported below: 838 F. 2d 418.

No. 87–1789. BAKER, SMITH & MILLS, FKA BAKER, MILLER, MILLS & MURRAY *v.* MINEREX ERDOEL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 781.

No. 87–1791. NORTHWESTERN NATIONAL INSURANCE COMPANY OF MILWAUKEE, WISCONSIN *v.* MELLON BANK. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1207.

No. 87–1797. JORDAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 518 So. 2d 1186.

No. 87–1804. TRI-BIO LABORATORIES, INC. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 836 F. 2d 135.

No. 87–1807. DIAZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 287.

No. 87–1808. TERCO, INC. *v.* FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 839 F. 2d 236.

No. 87–1835. CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *v.* BONNEVILLE POWER ADMINISTRATION ET AL.; and

No. 87–1836. CALIFORNIA PUBLIC UTILITIES COMMISSION *v.* BONNEVILLE POWER ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 1467.

No. 87–1838. MEDRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 861.

No. 87–1845. CHAISSON *v.* RUTLAND. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 729 S. W. 2d 923.

No. 87–1847. ARONSON, A MINOR, BY ARONSON, HER MOTHER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 401 Mass. 244, 516 N. E. 2d 137.

No. 87–1852. LOPEZ *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 522 So. 2d 390.

No. 87–1858. WISNIEWSKI *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–1867. TURNER ET AL. *v.* MCMAHON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1003.

No. 87–1870. ESTATE OF O'LEARY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87–1876. ASSOCIATED CONVALESCENT ENTERPRISES, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1436.

No. 87–1883. MALONE *v.* FRANK, UNITED STATES POSTMASTER GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 128.

No. 87–1885. MAGIC II, INC. *v.* GROPPO, COMMISSIONER OF REVENUE SERVICES OF CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 206 Conn. 253, 537 A. 2d 998.

No. 87–1886. GREENBERG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1293.

No. 87–1890. LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 465.

No. 87–1891. DRUID HILLS CIVIC ASSN., INC., ET AL. *v.* FEDERAL HIGHWAY ADMINISTRATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1545.

No. 87–1893. MILLER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–1894. PET, INC. *v.* BUCKNER. Ct. App. Okla. Certiorari denied.

No. 87–1895. EILRICH *v.* REMAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 2d 630.

No. 87–1900. FEDERICO ET AL. *v.* LINGL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–1901. TRANSAMERICAN NATURAL GAS CORP. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 394.

No. 87–1902. ALLIED-GENERAL NUCLEAR SERVICES ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 839 F. 2d 1572.

No. 87–1903. FITGER BREWING CO. *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 416 N. W. 2d 200.

No. 87–1906. MORRISON ET UX. *v.* COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–1909. HOULTON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 227 Neb. 215, 416 N. W. 2d 588.

No. 87–1910. WESTMORELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 572.

No. 87–1912. WARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–1915. GARCIA-CABAN ET AL. *v.* UNIVERSITY OF PUERTO RICO ET AL. Sup. Ct. P. R. Certiorari denied. Reported below: 120 D. P. R. 167.

No. 87–1917. LOVE BOX CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 842 F. 2d 1213.

No. 87–1918. TRANS WORLD AIRLINES, INC. *v.* NATIONAL MEDIATION BOARD ET AL.;

No. 87–2069. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* TRANS WORLD AIRLINES, INC.; and

No. 87–2101. BOLLER ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 130, 839 F. 2d 809, and 270 U. S. App. D. C. 175, 848 F. 2d 232.

No. 87–1919. YUKON ENERGY CORP. *v.* HAGERMAN. C. A. 8th Cir. Certiorari denied. Reported below: 839 F. 2d 407.

No. 87–1920. CHOLODENKO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–1921. WINSLOW ET UX. *v.* WILLIAMS ET AL. Ct. App. Colo. Certiorari denied. Reported below: 749 P. 2d 433.

No. 87–1922. NL INDUSTRIES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 839 F. 2d 1578.

No. 87–1923. GARVER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 846 F. 2d 1029.

No. 87–1925. PATH-SCIENCE LABORATORIES, INC., ET AL. *v.* GREENE COUNTY HOSPITAL. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 589.

No. 87–1928. SINGER ET AL. *v.* SHANNON & LUCHS CO. C. A. D. C. Cir. Certiorari denied.

No. 87–1930. SMITH *v.* FIRST NATIONAL BANK OF ATLANTA. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1575.

No. 87–1931. FITZSIMMONS *v.* FITZSIMMONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 87–1934. GLASSBORO SERVICE ASSN., INC. *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1119.

No. 87–1935. PALAZZOLO *v.* UNITED STATES; and
No. 87–7224. EVOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 158.

No. 87–1936. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION ET AL. *v.* SINCLAIR OIL CORP. ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 748 P. 2d 283.

No. 87–1938. INTERSTATE COMMERCE COMMISSION *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 184.

No. 87–1940. FUDGE ET AL. *v.* PENTHOUSE INTERNATIONAL, LTD., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 840 F. 2d 1012.

No. 87–1946. PERHOLTZ *v.* UNITED STATES;
No. 87–7011. JACKSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 347, 842 F. 2d 343.

No. 87–1947. VITALE ET AL. *v.* SNAIDER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1288.

No. 87–1949. VACANTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 2d 22.

No. 87–1953. MISSOURI *v.* CONTINENTAL INSURANCE COS. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 842 F. 2d 977.

No. 87–1958. GIARDINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1380.

No. 87–1959. PHILLIPS PETROLEUM CO. ET AL. *v.* BROWN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 838 F. 2d 451.

No. 87–1960. SPOOR *v.* BIGFORD. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1213.

No. 87–1963. KOZIARA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1126.

No. 87–1964. MELNICK *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 106 N. M. 726, 749 P. 2d 1105.

No. 87–1966. JENSEN *v.* HAINES, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 87–1967. BARROW *v.* HOOD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 337.

No. 87–1969. BOROUGH OF BERWICK ET AL. *v.* NEIDERHISER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 840 F. 2d 213.

No. 87–1970. OHAI *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 867, 809 P. 2d 614.

No. 87–1971. GRIFFIN, BY AND THROUGH HER NEXT FRIEND AND NATURAL FATHER, GRIFFIN, ET AL. *v.* FORD MOTOR CO. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1369.

No. 87–1974. ROUSSELLE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 514 So. 2d 577.

No. 87–1976. ALUMAX INC. *v.* U. S. ALUMINUM CORPORATION/TEXAS. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 878.

No. 87–1977. MARINE BANK OF SPRINGFIELD, SPECIAL ADMINISTRATOR OF THE ESTATE OF WELLER *v.* HENDRICKSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 2d 500.

No. 87–1978. MEHTA ET AL. *v.* BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1203.

No. 87–1980. JIMENEZ-NETTLESHIP ET AL. *v.* CORTES-QUINONES. C. A. 1st Cir. Certiorari denied. Reported below: 842 F. 2d 556.

No. 87–1981. HARRIS *v.* REFINERS TRANSPORT & TERMINAL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 549.

No. 87–1983. JOHNSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 222.

No. 87–1984. THOMAS *v.* SEABOARD SYSTEM RAILROAD, INC. Sup. Ct. Va. Certiorari denied.

No. 87–1986. COLZIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1388.

No. 87–1987. MOORE *v.* CONSOLIDATED RAIL CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1013.

No. 87–1988. MIAMI CENTER LIMITED PARTNERSHIP ET AL. *v.* BANK OF NEW YORK. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1547.

No. 87–1990. BODDIE *v.* FAISON ET UX. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 1, 839 F. 2d 680.

No. 87–1991. GUINNANE ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 197 Cal. App. 3d 862, 241 Cal. Rptr. 787.

No. 87–1992. KERO *v.* MOREL ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–1995. HOOPER *v.* MUSOLINO ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 234 Va. 558, 364 S. E. 2d 207.

No. 87–2000. LAST CHANCE MINING CO., INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 77.

No. 87–2001. SCHIFFERLY *v.* COMMISSIONER OF PATENTS. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 2d 1033.

No. 87–2002. RIGHT TO LIFE ADVOCATES, INC., ET AL. *v.* AARON WOMEN'S CLINIC. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 737 S. W. 2d 564.

No. 87–2009. GREENMAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 2d 1034.

No. 87–2010. CALIFORNIA ET AL. *v.* UNITED STATES ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 44 Cal. 3d 448, 749 P. 2d 324.

No. 87–2014. RHINEBARGER ET AL. *v.* ORR, GOVERNOR OF INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 839 F. 2d 387.

No. 87–2015. PRINCE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 162 Ill. App. 3d 1166, 528 N. E. 2d 1114.

No. 87–2017. BINTZ *v.* RIDDICK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1342.

No. 87–2018. REINISCH ET UX. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–2019. PINEMAN ET AL. *v.* FALLON, CHAIRMAN OF THE CONNECTICUT STATE EMPLOYEES RETIREMENT COMMISSION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 598.

No. 87–2020. MANN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 1.

No. 87–2021. WCCO RADIO, INC., A DIVISION OF MIDWEST COMMUNICATIONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 511.

No. 87–2024. KORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 368.

No. 87–2026. SOCHIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 351.

No. 87–2028. COCHRANE *v.* CONTE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 473.

No. 87–2029. HILL *v.* DEPARTMENT OF THE AIR FORCE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 844 F. 2d 1407.

No. 87–2031. LONG *v.* LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 840 F. 2d 743.

No. 87–2032. LILLY *v.* EBSCO INDUSTRIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 333.

No. 87–2033. MICHIGAN *v.* TULLOCK. Ct. App. Mich. Certiorari denied.

No. 87–2035. GORDON ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 96.

No. 87–2036. HEROLD *v.* BURLINGTON NORTHERN INC. C. A. 8th Cir. Certiorari denied. Reported below: 838 F. 2d 296.

No. 87–2040. MISSOURI ET AL. *v.* ROCKWOOD SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 839 F. 2d 400.

No. 87–2041. JONES *v.* NIAGARA FRONTIER TRANSPORTATION AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 836 F. 2d 731.

No. 87–2042. WARNER CABLE COMMUNICATIONS, INC. *v.* CITY OF NICEVILLE, FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 520 So. 2d 245.

No. 87–2043. MOORE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 525 So. 2d 899.

No. 87–2044. THRUSH ET AL. *v.* THRUSH. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1016.

No. 87–2046. UNIROYAL, INC., ET AL. *v.* RUDKIN-WILEY CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1044.

No. 87–2053. LIBERTY LOBBY, INC. *v.* DOW JONES & CO., INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 267 U. S. App. D. C. 337, 838 F. 2d 1287.

No. 87–2055. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY ET AL. *v.* FUCHILLA. Sup. Ct. N. J. Certiorari denied. Reported below: 109 N. J. 319, 537 A. 2d 652.

No. 87–2059. MIRRO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1210.

No. 87–2060. MORAN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 231 Mont. 387, 753 P. 2d 333.

No. 87–2061. COLLINS *v.* BARRY, DIRECTOR, OHIO DEPARTMENT OF HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1297.

No. 87–2062. HARGROVE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 68.

No. 87–2063. DANIEL *v.* EATON CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 839 F. 2d 263.

No. 87–2064. B. F. GOODRICH CO. *v.* LAKE. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 449.

No. 87–2065. RUZA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 371 Pa. Super. 648, 534 A. 2d 134.

No. 87–2071. RODRIGUEZ DIAZ ET AL. *v.* MEXICANA DE AVION, S. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 498.

No. 87–2074. A. H. ROBINS CO., INC. *v.* MARESSA. C. A. 4th Cir. Certiorari denied. Reported below: 839 F. 2d 220.

No. 87–2075. BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA ET AL. *v.* MEDICAL LAUNDRY SERVICE, A DIVISION OF OPLCO, INC. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 840.

No. 87–2076. J & C, INC., ET AL. *v.* COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC., ET AL. Ct. App. Ky. Certiorari denied.

No. 87–2077. STERN *v.* NIX, CHIEF JUSTICE, SUPREME COURT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 840 F. 2d 208.

No. 87–2078. PANTER ET AL. *v.* AMERICAN SYNTHETIC RUBBER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 327.

No. 87–2081. SPERRAZZA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 282.

No. 87–2087. SITKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 845 F. 2d 43.

No. 87–2089. CARLISLE *v.* COUNTY OF SAN MATEO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 2d 1128.

No. 87–2090. JAIN *v.* UNIVERSITY OF TENNESSEE AT MARTIN. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1391.

No. 87–2091. ALLIED VAN LINES INC. *v.* WILKERSON ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 360 Pa. Super. 523, 521 A. 2d 25.

No. 87–2092. ANDERSON *v.* ALABAMA STATE PERSONNEL BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 844 F. 2d 796.

No. 87–2097. CARDIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 73 Md. App. 200, 533 A. 2d 928.

No. 87–2100. LORETTO *v.* GROUP W CABLE, INC., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 135 App. Div. 2d 444, 522 N. Y. S. 2d 543.

No. 87–2103. BARREN, AN INCOMPETENT, BY HIS GUARDIAN, BARREN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 839 F. 2d 987.

No. 87–2104. LAKE NACIMIENTO RANCH CO. *v.* COUNTY OF SAN LUIS OBISPO, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 2d 872.

No. 87–2105. LINER ET AL. *v.* TERREBONNE PARISH SCHOOL BOARD ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 519 So. 2d 777.

No. 87–2106. KASCHAK *v.* SUPERIOR COURT OF CALIFORNIA, KERN COUNTY (PINE MOUNTAIN CLUB PROPERTY OWNERS'

ASSN., REAL PARTY IN INTEREST). Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 87–2107. LEWIS *v.* ANCLOTE MANOR HOSPITAL, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87–2108. BLACKFEET INDIAN TRIBE *v.* MONTANA POWER CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 1055.

No. 87–2112. BURAK *v.* GENERAL AMERICAN LIFE INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 836 F. 2d 1287.

No. 87–2113. JACKSON *v.* ALASKA. Ct. App. Alaska. Certiorari denied. Reported below: 750 P. 2d 821.

No. 87–2115. BAIRD ET VIR *v.* BOHLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1125.

No. 87–2116. GILBERT *v.* OFFICE OF BAR COUNSEL OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 538 A. 2d 742.

No. 87–2117. JAMESBURY CORP. *v.* LITTON INDUSTRIAL PRODUCTS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 839 F. 2d 1544.

No. 87–2119. MOLENAAR *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–2121. DOBARD *v.* OSCAR DASTE & SONS, INC. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 516 So. 2d 1331.

No. 87–2122. FERGUSON *v.* BERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 546.

No. 87–2124. UNIMET CORP. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 879.

No. 87–2125. MILES *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1391.

No. 87–2126. STAR COLOR PLATE SERVICE, DIVISION OF EINHORN ENTERPRISES, INC. *v.* NATIONAL LABOR RELATIONS BOARD

ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 843 F. 2d 1507.

No. 87–2128. CHAIRES *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87–2130. NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–2131. WALDHART ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1519.

No. 87–2134. SCHNECKENBURGER *v.* LOUISIANA COMMISSION ON ETHICS FOR PUBLIC EMPLOYEES. Sup. Ct. La. Certiorari denied. Reported below: 518 So. 2d 497.

No. 87–2135. ISLAMIC REPUBLIC OF IRAN BROADCASTING *v.* BEHROOZIAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 101, 839 F. 2d 780.

No. 87–2136. CITIZENS BANK OF CLOVIS ET AL. *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 841 F. 2d 344.

No. 87–2137. VALERO ENERGY CORP. ET AL. *v.* URRUTIA. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 123.

No. 87–6291. PINSON *v.* JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 896.

No. 87–6430. SMITH *v.* YLST, SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 826 F. 2d 872.

No. 87–6475. CARUSO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 119 Ill. 2d 376, 519 N. E. 2d 440.

No. 87–6499. LEWIS *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 1446.

No. 87–6502. BOWMAN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 741 S. W. 2d 10.

No. 87-6518. POWELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 321 N. C. 364, 364 S. E. 2d 332.

No. 87-6553. MCGANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 197.

No. 87-6558. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 159 Ill. App. 3d 991, 513 N. E. 2d 852.

No. 87-6624. MCCASLIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 365 Pa. Super. 644, 526 A. 2d 814.

No. 87-6653. SCRIBNER *v.* WARREN. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 1060.

No. 87-6656. WEBB *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87-6690. HEIRENS *v.* MIZELL, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 87-6698. BURNETT *v.* MARTIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 1319.

No. 87-6712. PARKER *v.* SMITH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1219.

No. 87-6716. DEMPSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 87-6723. SULLIVAN *v.* FREEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 87-6724. LOUDERMILK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 195 Cal. App. 3d 996, 241 Cal. Rptr. 208.

No. 87-6730. HART *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 143.

No. 87-6735. HICKS *v.* DARNALL. C. A. 2d Cir. Certiorari denied.

No. 87-6757. AQEEL *v.* SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied.

No. 87-6782. MATTIAS *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 87-6791. BRUNDAGE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 145, 839 F. 2d 824.

No. 87-6793. ZAVALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 2d 523.

No. 87-6797. KNOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 14.

No. 87-6800. JURAS *v.* PHELPS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6807. WICKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 192.

No. 87-6813. WILLIAMS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 87-6841. LAWSON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 837 F. 2d 653.

No. 87-6858. SCHNEIDER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 570.

No. 87-6866. CROWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 1427.

No. 87-6867. HOLMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 840 F. 2d 246.

No. 87-6868. KEENAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1220.

No. 87-6878. AQEEL *v.* SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 87–6897. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 816 F. 2d 433.

No. 87–6902. FRAZIER *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 878.

No. 87–6908. ALICEA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 837 F. 2d 103.

No. 87–6931. SOLER ET AL. *v.* G & U, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1104.

No. 87–6940. LIBERTA *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 839 F. 2d 77.

No. 87–6941. KRZYSKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 1013.

No. 87–6942. FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 2d 639.

No. 87–6943. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 673.

No. 87–6949. MUHAMMAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 475.

No. 87–6950. WILEY *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 195 Cal. App. 3d 398, 240 Cal. Rptr. 717.

No. 87–6974. RICKS ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 312 Md. 11, 537 A. 2d 612.

No. 87–6978. NERON *v.* TIERNEY, ATTORNEY GENERAL OF MAINE, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 841 F. 2d 1197.

No. 87–6982. RIZK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 523 and 842 F. 2d 111.

No. 87–6986. ALSTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 134 App. Div. 2d 433, 521 N. Y. S. 2d 56.

No. 87–6989. BISHOP *v.* OSBORN TRANSPORTATION, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1173.

No. 87–6993. GILLESPIE *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 837 F. 2d 628.

No. 87–6995. DUFFY *v.* TEASE, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1010.

No. 87–6996. JONES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 2d 1441.

No. 87–6998. DUNSMORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1028.

No. 87–7001. SHERIDAN *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 87–7003. WINFREY *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 406.

No. 87–7004. MYER *v.* WEEKS. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87–7005. MARTIN *v.* SHANK ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 306, 841 F. 2d 428.

No. 87–7006. TORRES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–7009. MATTOX *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 2d 1523.

No. 87–7012. KELLY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1288.

No. 87–7013. COLGATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 333.

No. 87–7016. SANDERS *v.* CAMPBELL, SHERIFF OF LEAVENWORTH COUNTY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–7020. JORDAN *v.* KYLE, CLERK OF COURTS, ALLEGHENY COUNTY, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 601.

No. 87–7025. SYME *v.* WECKESSER. Ct. Sp. App. Md. Certiorari denied.

No. 87–7026. WEST *v.* PUNG, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1027.

No. 87–7027. TAYLOR *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1392.

No. 87–7031. ROBINSON ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 843 F. 2d 1.

No. 87–7033. YOUNG *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 518 So. 2d 822.

No. 87–7034. EDWARDS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 87–7035. BENTLEY *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 522 So. 2d 628.

No. 87–7039. DAVENPORT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 185 Ga. App. XXVIII.

No. 87–7042. DICKEY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 87–7048. THOMPSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 525 So. 2d 816.

No. 87–7049. QUANSAH *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 474.

No. 87–7050. NELSON *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–7053. KING *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 841 F. 2d 1123.

No. 87–7055. LAAMAN *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 25 Mass. App. 354, 518 N. E. 2d 861.

No. 87–7056. CUERO-FLORES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–7057. JACKSON *v.* DOUGLAS ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–7058. JOHNSON *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 844 F. 2d 482.

No. 87–7059. BARCUME *v.* BARCUME, NKA HAGER (two cases). Sup. Ct. Haw. Certiorari denied.

No. 87–7060. HUNTER *v.* CAMPBELL ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–7061. FORBES ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–7062. GULLEY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 769.

No. 87–7063. BROWN *v.* MISSOURI BOARD OF PROBATION AND PAROLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–7066. SMITH *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–7067. WALKER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 837.

No. 87–7068. GRANT ET AL. *v.* SILVA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 196 Cal. App. 3d 675, 241 Cal. Rptr. 869.

No. 87–7069. BOROM *v.* LACY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1025.

No. 87–7070. GAMBLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 751 P. 2d 751.

No. 87–7071. CLEMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 843 F. 2d 741.

No. 87–7072. BRADFORD *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 514 So. 2d 534.

No. 87–7075. BALAWAJDER *v.* CARPENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87–7078. PRIOLEAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–7079. THOMPSON *v.* KENTUCKY. Cir. Ct. Ky., Kenton County. Certiorari denied.

No. 87–7081. WATTS *v.* UNITED STATES MARINE CORPS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 24.

No. 87–7085. PAREZ *v.* JONES, COUNTY TREASURER/TAX COLLECTOR. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–7086. PAREZ *v.* LOPEZ ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–7089. GRAYS *v.* CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 87–7092. FLEEK *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTE, LEWISBURG, PENNSYLVANIA. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 466.

No. 87–7093. HEADLEY *v.* ZON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 546.

No. 87–7095. CRUMMEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–7096. KINSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 383.

No. 87–7097. JOHNS *v.* BOSTWICK (three cases). Sup. Ct. Haw. Certiorari denied. Reported below: 69 Haw. 662 (first case).

No. 87–7099. DENNIS *v.* MILLER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1010.

No. 87–7102. MIRANDA-ENRIQUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 842 F. 2d 1211.

No. 87–7105. DAVIS ET AL. *v.* TRENTON RESINS CREDIT UNION. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1125.

No. 87–7108. RINGO *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 333.

No. 87–7109. TORRES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 844 F. 2d 795.

No. 87–7112. ARCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 2d 1019.

No. 87–7120. JIMENEZ *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 739 S. W. 2d 499.

No. 87–7121. TARPLEY, AKA TOPLEY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 2d 359.

No. 87–7122. TAYLOR *v.* SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. C. A. 9th Cir. Certiorari denied.

No. 87–7123. SATTERFIELD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 369 Pa. Super. 652, 531 A. 2d 528.

No. 87–7124. SMALL *v.* HARRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87–7126. MURR *v.* NELSON. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 332.

No. 87–7127. SHAFFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1392.

No. 87–7131. SAMM *v.* SOUTHEASTERN UNIVERSITY. Ct. App. D. C. Certiorari denied.

No. 87–7132. PORTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 122 Ill. 2d 64, 521 N. E. 2d 1158.

No. 87–7134. PERRERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 73.

No. 87–7138. CALHOUN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–7139. GANEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 837.

No. 87–7140. FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1031.

No. 87–7141. GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 844 F. 2d 795.

No. 87–7142. DOLENC *v.* OWENS, SUPERINTENDENT OF PHILADELPHIA PRISONS. C. A. 3d Cir. Certiorari denied.

No. 87–7146. MEDINA *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 835.

No. 87–7147. MUTH *v.* CENTRAL BUCKS SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 839 F. 2d 113.

No. 87–7148. OQUELI-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 311.

No. 87–7149. NIKRASCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 792.

No. 87–7151. WIGGINS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 840 F. 2d 12.

No. 87–7152. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 87–7153. SYDNOR, AKA BEY *v.* ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1015.

No. 87–7154. SVEE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 143 Wis. 2d 892, 421 N. W. 2d 117.

No. 87–7156. MAY *v.* OHIO UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 87–7160. HOLLOWAY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 792.

No. 87–7161. FORREST *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–7162. BILAL *v.* LITTLE ROCK SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1026.

No. 87–7163. EMBREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1027.

No. 87–7164. BUCHAN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1219.

No. 87–7166. WHITE *v.* WARDEN, JAMES RIVER CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 548.

No. 87–7167. VANMATRE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 164 Ill. App. 3d 201, 517 N. E. 2d 768.

No. 87–7169. PATTERSON *v.* KNIGHT. Sup. Ct. Ala. Certiorari denied. Reported below: 519 So. 2d 469.

No. 87–7171. BOOKER *v.* TOWNSHIP OF GENEVA. Cir. Ct. Mich., County of Van Buren. Certiorari denied.

No. 87–7172. GLAUDE *v.* REGIONAL POSTMASTER GENERAL ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–7173. JOHNSON *v.* KAISER, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 87–7175. ECKHARDT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 2d 989.

No. 87–7177. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 311.

No. 87–7178. BROWN *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1289.

No. 87–7179. BROWN *v.* SOUTHERN MARYLAND HOSPITAL CENTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 841 F. 2d 1122.

No. 87–7180. MULAZIM *v.* BURNETT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

No. 87–7182. SHAW *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 87–7184. CONNER *v.* BOWEN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 279.

No. 87–7186. RIVERA *v.* RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1014.

No. 87–7187. MOORE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 159 Ill. App. 3d 1169, 526 N. E. 2d 213.

No. 87–7188. MONTGOMERY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 521 N. E. 2d 1306.

No. 87–7194. JOHNSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 818.

No. 87–7195. BURNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 293.

No. 87–7196. BURNS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 398, 846 F. 2d 1384.

No. 87–7197. BROWN *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 87–7200. JACKSON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–7202. LYNCH *v.* HUTCHENSON, SHERIFF, MISSISSIPPI COUNTY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–7204. DORROUGH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 274, 851 F. 2d 1501.

No. 87–7206. HOLMES *v.* BARTON, SUPERINTENDENT, FLORIDA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87–7207. BROADEN *v.* CITY OF MONTGOMERY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1220.

No. 87–7210. KLUVER *v.* O'BRIEN, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 87–7211. DE YOUNG *v.* REPUBLICAN PARTY OF IOWA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1028.

No. 87–7212. SPENCER *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 87–7213. SPEARMAN, AKA RAMIREZ *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 327.

No. 87–7214. MITCHELL *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–7215. ORTEGA *v.* O'LEARY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 2d 258.

No. 87–7218. LHOTKA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 856.

No. 87–7219. LOVE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 1030.

No. 87–7221. SLAUGHTER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 87–7222. SAFIR *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–7225. COLLINS *v.* BALL, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 501.

No. 87–7227. FAISON *v.* NESBITT, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 23.

No. 87–7229. BROWN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 162 Ill. App. 3d 528, 515 N. E. 2d 1285.

No. 87–7230. HARRIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 162 Ill. App. 3d 618, 515 N. E. 2d 1272.

No. 87–7231. BURNHAM *v.* FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION, CITY OF AUSTIN, TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 715 S. W. 2d 809.

No. 87–7233. AMMERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 855.

No. 87–7234. WILLIAMS *v.* ABSHIRE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 334.

No. 87–7237. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 531 So. 2d 168.

No. 87–7239. WHITE *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–7241. RODRIGUEZ *v.* JOHNSON, SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–7242. HICKS *v.* CHRISTOPHER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1294.

No. 87–7245. GOVANTES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 841 F. 2d 1235.

No. 87–7246. HUGLEY *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 844 F. 2d 795.

No. 87–7247. CORTEZ *v.* MONDRAGON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 87–7248. KLEINSCHMIDT *v.* FLORIDA COMMISSION ON HUMAN RELATIONS ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 519 So. 2d 996.

No. 87–7250. LAKES *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 5th Cir. Certiorari denied.

No. 87–7251. FRAZIER *v.* WILKINSON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 42.

No. 87–7252. CRUMB *v.* SACHS, GREENEBAUM & TAYLER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 489, 836 F. 2d 653.

No. 87–7253. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 793.

No. 87–7256. LAWSON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied.

No. 87–7257. BURTON *v.* REPPOND ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–7258. GRAVES *v.* THURMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 87–7259. HAMM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 72 Md. App. 176, 527 A. 2d 1326.

No. 87–7260. JOHNSON *v.* HARDCASTLE, SHERIFF OF SARASOTA COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 1030.

No. 87–7261. COLEMAN, DBA CYCLE LOGIC *v.* LADD; and IN RE COLEMAN. Sup. Ct. N. H. Certiorari denied.

No. 87–7262. DE YOUNG *v.* SOENS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 87–7266. CURRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 847 F. 2d 325.

No. 87–7267. MCQUARIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 754.

No. 87–7268. MARKHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 844 F. 2d 366.

No. 87–7269. PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–7271. SZAREWICZ *v.* FLAHERTY ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–7274. BARLOW *v.* ESSELTE PENDAFLEX CORP. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1209.

No. 87–7275. HOOPER *v.* GARRAGHTY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 845 F. 2d 471.

No. 87–7277. KOPLOW *v.* CITY OF PORTLAND ET AL. Super. Ct. Me., Cumberland County. Certiorari denied.

No. 87–7278. LOVINGOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1293.

No. 87–7279. CERELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 2d 21.

No. 87–7280. LIBARIOS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 826 F. 2d 1072.

No. 87–7281. BUCCI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 839 F. 2d 825.

No. 87–7283. THOMAS *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 837.

No. 87–7285. TROCHE *v.* HOFFA. C. A. 3d Cir. Certiorari denied.

No. 87–7286. THOMPSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 87–7287. SHIBLES *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 142 Wis. 2d 945, 419 N. W. 2d 574.

No. 87–7288. REUMONT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–7289. SIMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 166 Ill. App. 3d 289, 519 N. E. 2d 921.

No. 87–7291. PALACIOS-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 89.

No. 87–7292. MORONIHAAH, AKA NASH *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 878.

No. 87–7295. MALTBY *v.* KIER CORP. Sup. Ct. Utah. Certiorari denied.

No. 87–7296. GIBSON *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 286.

No. 87–7297. RODRIGUEZ *v.* BEYER, SUPERINTENDENT, NEW JERSEY STATE PRISON AT TRENTON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1120.

No. 87–7299. WHITFIELD *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 87–7300. KING *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1012.

No. 87–7301. CESPEDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 754.

No. 87–7302. DOLENC *v.* OWENS, COMMISSIONER, DEPARTMENT OF CORRECTIONS. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1010.

No. 87–7304. CROSS *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1015.

No. 87–7305. GARRETT *v.* STICKRATH, SUPERINTENDENT, ORIENT CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied.

No. 87–7307. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–7308. WALLACE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1471.

No. 87–7309. SMALL *v.* BENNERSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 842 F. 2d 710.

No. 87–7310. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 751.

No. 87–7312. ROBERTS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 226.

No. 87–7313. PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–7314. RODRIGUEZ DIAZ *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 87–7315. CARR *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–7316. LAWRENCE *v.* OAO CORP. Ct. Sp. App. Md. Certiorari denied.

No. 87–7317. WOLFSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 753.

No. 87–7318. DOZIER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–7319. TREADWELL *v.* WITHROW, SUPERINTENDENT, MICHIGAN DUNES CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 194.

No. 87–7321. AARON *v.* GRADDICK ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–7323. GISRIEL *v.* DEPARTMENT OF EMPLOYMENT AND TRAINING OF MARYLAND ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 72 Md. App. 718.

No. 87–7325. FILIPAS *v.* WORKMEN'S COMPENSATION OF THE INDUSTRIAL COMMISSION OF OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1391.

No. 87–7326. PRUNTY *v.* WALTERS ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–7327. SEALS, AKA CREWS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–7328. WATERHOUSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 522 So. 2d 341.

No. 87–7329. TYDINGS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 87–7330. JONES *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 691.

No. 87–7331. CONTRERAS *v.* NEWTON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 87–7332. HUGHES *v.* HUGHES. Sup. Ct. Ohio. Certiorari denied. Reported below: 35 Ohio St. 3d 165, 518 N. E. 2d 1213.

No. 87–7333. SWARTZ *v.* RICKLEFS ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–7336. HINTZ *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–7337. CARROLL *v.* CENTRAL PRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 69.

No. 87–7338. ARANDA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 100.

No. 87–7339. HALL *v.* ROGERS, SUPERINTENDENT, CASWELL UNIT. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 71.

No. 87–7340. CASSELL *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 394.

No. 87–7341. ALVARADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 394.

No. 87–7342. MOORE *v.* JAWORSKY ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–7343. ROSE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–7344. SKIBINSKI *v.* NEW YORK CITY COMMISSION ON HUMAN RIGHTS. C. A. 2d Cir. Certiorari denied.

No. 87–7345. SIMPSON *v.* UPPER PROVIDENCE TOWNSHIP POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1015.

No. 87–7348. WILLIAMS *v.* DUTTON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 844 F. 2d 790.

No. 87–7350. LAROQUE *v.* UNITED STATES BUREAU OF PRISONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 185.

No. 87–7351. HILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 88–2. MISLIVECEK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 143 Wis. 2d 896, 422 N. W. 2d 463.

No. 88–3. CAMPBELL ET AL. *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 838 F. 2d 1.

No. 88–4. VAN VOORHIS & SKAGGS *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 395.

No. 88–6. CORR ET AL. *v.* HINDS. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 536 A. 2d 1130.

No. 88–8. FERRY *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 78.

No. 88–9. PHONE-MATE, INC. *v.* FORTEL CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 78.

No. 88–11. O'MALLEY *v.* XEROX CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 75.

No. 88–13. EISENHAUER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 754 S. W. 2d 159.

No. 88–15. CHIPMAN FREIGHT SERVICES, A DIVISION OF CHIPMAN CORP. *v.* NATIONAL LABOR RELATIONS BOARD (BROTHERHOOD OF TEAMSTERS & AUTO TRUCKDRIVERS LOCAL 70 OF ALAMEDA COUNTY, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 1224.

No. 88–17. HERMAN BROTHERS, INC., ET AL. *v.* TEAMSTERS LOCAL UNION NO. 430. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 66.

No. 88–18. CITY OF NEW HAVEN, CONNECTICUT *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 841 F. 2d 440.

No. 88–19. KALVANS *v.* COURT OF APPEALS OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 88–21. HENDRICKSON BROTHERS, INC. *v.* NEW YORK; and No. 88–43. LIZZA INDUSTRIES, INC. *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 840 F. 2d 1065.

No. 88–26. CARMOUCHE *v.* AUSTER OIL & GAS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 597.

No. 88–29. BOSCIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 843 F. 2d 1384.

No. 88–30. HORN & HARDART CO. *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 53, 843 F. 2d 546.

No. 88–31. LEWIS *v.* MIDWESTERN STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 197.

No. 88–33. BLEDSOE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 97.

No. 88–35. FEISS *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 841.

No. 88–38. NORTHWESTERN BELL TELEPHONE CO. *v.* MINNESOTA PUBLIC UTILITIES COMMISSION. Ct. App. Minn. Certiorari denied. Reported below: 417 N. W. 2d 274.

No. 88–44. CHILD, INC. *v.* TEXAS EMPLOYMENT COMMISSION. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 738 S. W. 2d 56.

No. 88–45. SPILLANE *v.* SPILLANE. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 820.

No. 88–46. BEHNING ET UX. *v.* CAMELBACK SKI CORP. Ct. App. Md. Certiorari denied. Reported below: 312 Md. 330, 539 A. 2d 1107.

No. 88–48. PRAET *v.* KINGSLEY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–51. MALLEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 843 F. 2d 1096.

No. 88–54. VITIELLO ET AL. *v.* I. KAHLOWSKY & CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 843 F. 2d 1537.

No. 88–56. KANE *v.* EMRANI ET AL. Ct. App. Colo. Certiorari denied.

No. 88–57. FRIEDMAN *v.* HALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1391.

No. 88–59. UNITED STEEL & WIRE CO. *v.* STALLWORTH ET AL. Ct. App. Mich. Certiorari denied.

No. 88–62. OLSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 846 F. 2d 1103.

No. 88–65. GREEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 846 F. 2d 870.

No. 88–67. ALLEN ORGAN CO. *v.* KIMBALL INTERNATIONAL, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 839 F. 2d 1556.

No. 88–68. DELAY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 229, 367 S. E. 2d 806.

No. 88–69. GREANIAS *v.* WRIGLEY. C. A. 7th Cir. Certiorari denied. Reported below: 842 F. 2d 955.

No. 88–71. WEDINGER ET UX. *v.* GOLDBERGER, ASSISTANT REGIONAL ATTORNEY, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 71 N. Y. 2d 428, 522 N. E. 2d 25.

No. 88–75. ELLIS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 88–77. URESTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 750.

No. 88–78. DOE, BY HER PARENT AND NATURAL GUARDIAN, DOE *v.* SOBOL, COMMISSIONER, NEW YORK STATE EDUCATION DEPARTMENT. C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 635.

No. 88–79. $173,081.04 IN UNITED STATES CURRENCY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1141.

No. 88–80. HOLYWELL CORP. ET AL. *v.* SMITH, TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 503.

No. 88–83. ECONOMOU ET UX. *v.* UNITED STATES SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 88–84. JOHN *v.* CITY OF SALAMANCA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 845 F. 2d 37.

No. 88–85. PILAROWSKI *v.* MACOMB COUNTY. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1281.

No. 88–86. SHELTER CREEK DEVELOPMENT CORP. ET AL. *v.* CITY OF OXNARD. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 375.

No. 88–87. PRODUCTION CREDIT ASSOCIATION OF NORTHERN OHIO ET AL. *v.* FARM CREDIT ADMINISTRATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 846 F. 2d 373.

No. 88–88. ILLINOIS *v.* STRUEBIN, ANCILLARY ADMINISTRATOR OF THE ESTATE OF STRUEBIN, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 421 N. W. 2d 874.

No. 88–91. WALKER ET AL. *v.* BELLO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 840 F. 2d 1124.

No. 88–92. KHALIL *v.* UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY–NEW JERSEY MEDICAL SCHOOL. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1119.

No. 88–98. PERKINSON ET AL. *v.* MANION ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 163 Ill. App. 3d 262, 516 N. E. 2d 977.

No. 88–99. WILLIAMS *v.* HEPTING ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 844 F. 2d 138.

No. 88–100. POLYCHRON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 841 F. 2d 833.

No. 88–101. BLACKWELDER *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 88–103. BIGFORD *v.* TAYLOR, INDIVIDUALLY AND AS SHERIFF OF GALVESTON COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1213.

No. 88–104. EISCHEN *v.* KANEY, CIRCUIT JUDGE, ORANGE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–105. ALABAMA *v.* WEEKS. Sup. Ct. Ala. Certiorari denied. Reported below: 531 So. 2d 643.

No. 88–107. CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS *v.* LOVINGER. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 739.

No. 88–108. NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD, DBA NORTH COUNTY TRANSIT DISTRICT, ET AL.

v. HAYNES ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–109. AMERICAN PROTEIN CORP. *v.* AB VOLVO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 2d 56.

No. 88–111. AUSTIN ET AL. *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 2d 678.

No. 88–112. MCDOWELL ET UX. *v.* CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC. Sup. Ct. Mo. Certiorari denied. Reported below: 747 S. W. 2d 630.

No. 88–114. QURESHI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1388.

No. 88–116. STERN *v.* LEUCADIA NATIONAL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 2d 997.

No. 88–117. TONY AND SUSAN ALAMO FOUNDATION *v.* RAGLAND, COMMISSIONER OF THE ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 295 Ark. 12, 746 S. W. 2d 45.

No. 88–119. LEVIN, DBA LEVIN BEAUTY SUPPLY ET AL. *v.* REDKEN LABORATORIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 226.

No. 88–123. COLLINS *v.* ASSOCIATED PATHOLOGISTS, LTD., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 844 F. 2d 473.

No. 88–125. SIMON ET AL. *v.* F/S AIRLEASE II, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 844 F. 2d 99.

No. 88–126. MARSHALL ET AL. *v.* WESTERN GRAIN CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1165.

No. 88–128. CINCOTTI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 847 F. 2d 956.

No. 88–129. COOPER *v.* AMSTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1010.

No. 88–132. SCOTT ET AL. *v.* DEMENNA. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 8.

No. 88–133. MCCARRON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 78.

No. 88–134. THARP *v.* THARP. Ct. App. Wash. Certiorari denied. Reported below: 50 Wash. App. 1050.

No. 88–135. DESIMONE ET UX. *v.* BOVE. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1010.

No. 88–136. HORNER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 88–138. LIBERIS ET AL. *v.* CRAIG, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 326.

No. 88–140. COUSINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 1245.

No. 88–142. ESTATE OF PAYNE, BY PAYNE, PERSONAL REPRESENTATIVE *v.* GRANT COUNTY COURT ET AL. Ct. App. Ind. Certiorari denied. Reported below: 508 N. E. 2d 1331.

No. 88–143. CITY OF PHILADELPHIA ET AL. *v.* CONCERNED CITIZENS OF BRIDESBURG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 843 F. 2d 679.

No. 88–144. SYRE *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1015.

No. 88–145. DIXON *v.* PENROD DRILLING CO. C. A. 5th Cir. Certiorari denied. Reported below: 844 F. 2d 786.

No. 88–149. SUMMA CORP. ET AL. *v.* TRANS WORLD AIRLINES, INC. Sup. Ct. Del. Certiorari denied. Reported below: 540 A. 2d 403.

No. 88–151. MANZO *v.* MANZO. Ct. Sp. App. Md. Certiorari denied. Reported below: 73 Md. App. 765.

No. 88–154. BYRD, DBA KILGORE REAL ESTATE *v.* GARDINIER, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 974.

No. 88–156. DAVISON ET AL. *v.* LOWERY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 526 So. 2d 2.

No. 88–159. UNISYS CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 2d 321.

No. 88–164. WEYERHAEUSER CO. *v.* BRACAMONTES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 271.

No. 88–165. ROMANN *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 1429.

No. 88–166. LEVERT *v.* LEVERT. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 498.

No. 88–167. FINNEGAN *v.* MARYLAND. Cir. Ct. Md., Montgomery County. Certiorari denied.

No. 88–172. SKAW ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 842.

No. 88–174. LOEBNER ET UX. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–175. WADE *v.* GOODWIN, DIRECTOR OF ARKANSAS STATE POLICE. C. A. 8th Cir. Certiorari denied. Reported below: 843 F. 2d 1150.

No. 88–178. BROZYNA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1016.

No. 88–184. DOUGLAS *v.* MAPOTHER & MAPOTHER ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 750 S. W. 2d 430.

No. 88–185. LINK MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 17.

No. 88–186. TEW *v.* ARKY, FREED, STEARNS, WATSON, GREER, WEAVER & HARRIS, P. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 753.

No. 88–187. GROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 166 Ill. App. 3d 413, 519 N. E. 2d 1043.

No. 88–188. PALUGHI *v.* CITY OF MOBILE ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 526 So. 2d 1.

No. 88–193. SCIAMBRA, DBA PERIODICAL MARKETING & CONSULTING CO. *v.* ARA SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 651.

No. 88–194. WEAVER ET AL. *v.* ANDERSON COUNTY FISCAL COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1216.

No. 88–199. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 334.

No. 88–200. MORGENSTERN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 333.

No. 88–203. WESTINGHOUSE ELECTRIC CORP. *v.* WEST VIRGINIA DEPARTMENT OF HIGHWAYS. C. A. 4th Cir. Certiorari denied. Reported below: 845 F. 2d 468.

No. 88–204. SCHIAVONE CONSTRUCTION CO. *v.* MEROLA, ADMINISTRATRIX OF THE ESTATE OF MEROLA, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 848 F. 2d 43.

No. 88–207. ROBERTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 73.

No. 88–208. WARDELL *v.* DIAMOND FARMS CONDOMINIUM. Ct. Sp. App. Md. Certiorari denied. Reported below: 73 Md. App. 773.

No. 88–209. AUTORINO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 207 Conn. 403, 541 A. 2d 110.

No. 88–211. LEHMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 372 Pa. Super. 639, 534 A. 2d 1119.

No. 88–216. ANDRE *v.* BENDIX CORP. C. A. 7th Cir. Certiorari denied. Reported below: 841 F. 2d 172.

No. 88–221. MILLER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 12 Kan. App. 2d lxix, 761 P. 2d 334.

No. 88–222. O'REILLY ET AL. *v.* NEW YORK TIMES CO. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 612.

No. 88–223. REILLY ET VIR *v.* BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 846 F. 2d 416.

No. 88–224. HULL *v.* ATTLEBORO SAVINGS BANK. App. Ct. Mass. Certiorari denied. Reported below: 25 Mass. App. 960, 519 N. E. 2d 775.

No. 88–225. SHAVER *v.* F. W. WOOLWORTH CO. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 1361.

No. 88–227. FERGUSON *v.* NORFOLK SOUTHERN CORP. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 546.

No. 88–231. N & C PROPERTIES ET AL. *v.* PRITCHARD ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 525 So. 2d 1346.

No. 88–233. KERPELMAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 73 Md. App. 764.

No. 88–262. DEERMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 684.

No. 88–270. FOSTER ET UX. *v.* MILLIKEN. Ct. App. Ky. Certiorari denied.

No. 88–275. WHITE INDUSTRIES, INC., ET AL. *v.* CESSNA AIRCRAFT CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1497.

No. 88–289. CANNON *v.* ROWEN ET VIR. C. A. 9th Cir. Certiorari denied.

No. 88–292. REINHARD ET AL. *v.* CONNER. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 2d 384.

No. 88–303. WEST COAST TRUCK LINES, INC. *v.* ARCATA COMMUNITY RECYCLING CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1239.

No. 88–312. LEDBETTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 708.

No. 88–341. GILLIES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 851 F. 2d 492.

No. 88–5002. EASTHAM *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 88–5003. PIROVOLOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 844 F. 2d 415.

No. 88–5008. LYNCH *v.* SEYBERT NICHOLAS PRINTING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 835.

No. 88–5010. MARSHALL *v.* AMERICAN MOTORIST INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 395.

No. 88–5012. CARPENTER *v.* REED. C. A. 10th Cir. Certiorari denied.

No. 88–5013. HAEDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 1478.

No. 88–5016. FEASTER *v.* MIKSCH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 846 F. 2d 21.

No. 88–5018. WREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 338.

No. 88–5019. DOMBY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 842.

No. 88–5020. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 880.

No. 88–5021. WASHINGTON *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 750.

No. 88–5023. SEAU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 690.

No. 88–5025. TOWNES *v.* THOMPSON, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 88–5026. SHEWCHUN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 503.

No. 88–5027. PRENZLER *v.* ORANGE COUNTY BOARD OF SUPERVISORS. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1294.

No. 88-5028. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 88-5029. WEST *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1389.

No. 88-5030. WITHERSPOON, INDIVIDUALLY, AND AS MOTHER AND NEXT FRIEND ON BEHALF OF GAINES, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 803.

No. 88-5036. BYRD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88-5037. COSTANZO *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 88-5038. KINNARD *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-5039. JEFFERS *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied.

No. 88-5045. PATTERSON *v.* KELLEY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 835.

No. 88-5046. DOZIER *v.* DEPARTMENT OF EDUCATION. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 841.

No. 88-5047. ENGLERT *v.* SMALL BUSINESS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 848 F. 2d 1245.

No. 88-5051. GREENO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-5056. TRIPATI *v.* BRIMMER. C. A. 10th Cir. Certiorari denied.

No. 88-5058. RODRIGUEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 161 Ill. App. 3d 1158, 526 N. E. 2d 1147.

No. 88-5059. SOCEY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 453, 846 F. 2d 1439.

No. 88–5060. FORNINO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 223 N. J. Super. 531, 539 A. 2d 301.

No. 88–5063. FAIRCHILDE *v.* MOYLAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5065. INGRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 75.

No. 88–5067. DUNCAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 498.

No. 88–5068. DICKENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 88–5069. LINDQUIST *v.* KELLEY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 835.

No. 88–5072. BARRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 843 F. 2d 1576.

No. 88–5076. CAUSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 839.

No. 88–5079. SHANNON *v.* KLINCAR, CHAIRMAN, ILLINOIS PRISON REVIEW BOARD, ET AL. C. A. 7th Cir. Certiorari denied.

No. 88–5080. NIETO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 1243.

No. 88–5081. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 886.

No. 88–5083. MCKIBBON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 749 S. W. 2d 83.

No. 88–5085. MARTIN *v.* CUNNINGHAM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 476.

No. 88–5086. MARTINEZ *v.* NEW MEXICO. Dist. Ct. N. M., 9th Jud. Dist. Certiorari denied.

No. 88–5087. GOWIN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 158 Ill. App. 3d 1105, 525 N. E. 2d 601.

No. 88–5090. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1281.

No. 88–5093. RICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1295.

No. 88–5094. LITTLEFIELD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 840 F. 2d 143.

No. 88–5095. CHAVEZ *v.* TAYLOR, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 184.

No. 88–5096. BROWN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 599.

No. 88–5097. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–5100. BEASLEY *v.* HEDRICK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 841 F. 2d 1122.

No. 88–5101. IBEKWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 186.

No. 88–5102. NICOLAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 88–5103. BIRTH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–5105. BURY *v.* HERRINGTON, SECRETARY OF ENERGY. C. A. D. C. Cir. Certiorari denied.

No. 88–5106. LOGARUSIC *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1467.

No. 88–5108. HUTCH *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 69 Haw. 667.

No. 88–5109. KUSEK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 2d 942.

No. 88–5110. BRYCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 361.

No. 88–5111. WASHINGTON *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 443.

No. 88–5116. WOOLSTRUM *v.* OREGON STATE BOARD OF PAROLE. Ct. App. Ore. Certiorari denied. Reported below: 89 Ore. App. 600, 750 P. 2d 509.

No. 88–5117. NOTTINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1388.

No. 88–5118. SIMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 2d 1461.

No. 88–5119. SWINSON *v.* UNITED STATES PAROLE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 606.

No. 88–5120. TAYLOR *v.* DESMOND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1015.

No. 88–5121. SYKES *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 88–5122. RICHTER *v.* INTERNAL REVENUE SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 1315.

No. 88–5123. PRANTIL *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 314.

No. 88–5124. NASH *v.* MAYFIELD. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 72.

No. 88–5129. KELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 603.

No. 88–5130. AMOS *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 849 F. 2d 1070.

No. 88–5132. COUTURE *v.* LOPES, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–5134. BURROWS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 165 Ill. App. 3d 1166, 536 N. E. 2d 1021.

No. 88–5137. KOPLOW *v.* CITY OF PORTLAND, MAINE, ET AL. Sup. Jud. Ct. Me. Certiorari denied.

No. 88–5139. CROSS *v.* SAN MATEO COUNTY TRANSIT DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 198 Cal. App. 3d 576, 243 Cal. Rptr. 799.

No. 88–5142. RIVERA-MEDINA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 845 F. 2d 12.

No. 88–5144. WHITESHIELD *v.* TOOMBS ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5145. SAMAD *v.* ZIMMERMAN, SUPERINTENDENT, STATE INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 88–5146. JOHNSON *v.* IRBY. Sup. Ct. Ala. Certiorari denied.

No. 88–5149. SPENCER *v.* DANVILLE POLICE DEPARTMENT. C. A. 7th Cir. Certiorari denied.

No. 88–5150. TURNER *v.* HOFFMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5153. SANCHEZ *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 755 P. 2d 245.

No. 88–5154. PRENZLER *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 502.

No. 88–5155. CITRON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 333.

No. 88–5156. BEACH *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 88–5161. DOTSON *v.* BOHTE ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–5163. ASHBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 74.

No. 88–5170. MATTHEWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 1243.

No. 88–5171. NUBINE *v.* TEXAS BOARD OF CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 750.

No. 88–5172. MARTIN *v.* TYSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 1451.

No. 88–5175. PALELLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 977.

No. 88–5177. JAMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 75.

No. 88–5181. MARTIN *v.* GRAMLEY ET AL. C. A. 7th Cir. Certiorari denied.

No. 88–5183. AGUAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 995.

No. 88–5184. SHAMLIN *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 23 Ark. App. 39, 743 S. W. 2d 1.

No. 88–5185. PRATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 1239.

No. 88–5186. OUIMETTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 798 F. 2d 47.

No. 88–5187. HENDERSON *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 466.

No. 88–5191. CULVERHOUSE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 755 S. W. 2d 856.

No. 88–5192. LITCHFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 754.

No. 88–5195. WATSON *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 89.

No. 88–5196. WATSON *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 2d 1074.

No. 88–5200. DOPICO-FERNANDEZ *v.* GRAND UNION SUPERMARKET ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 841 F. 2d 11.

No. 88–5201. CONNER *v.* BOWEN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 279.

No. 88–5202. GLENNA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5204. SZAREWICZ *v.* GARDNER. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 184.

No. 88–5205. OAKLEY *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 193.

No. 88–5206. STRADER *v.* DOE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 186.

No. 88–5207. ERVIN *v.* BOWEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–5208. FIXEL *v.* WHITLEY, WARDEN. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 857, 809 P. 2d 603.

No. 88–5209. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–5210. SAVARESE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 852 F. 2d 563.

No. 88–5212. RILEY *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 142 Wis. 2d 947, 419 N. W. 2d 575.

No. 88–5214. LECHIARA *v.* SOUTHERN OHIO COAL CO. Cir. Ct. W. Va., Marion County. Certiorari denied.

No. 88–5217. JOHNSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–5218. BONDZIE *v.* LIVELY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 835 F. 2d 873.

No. 88–5219. REDDING *v.* ALLEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5220. GALBERTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 983.

No. 88–5221. LEPISCOPO *v.* TRAUB. Sup. Ct. N. M. Certiorari denied.

No. 88–5224. HARRIATT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 601.

No. 88–5225. AIMONE *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 87.

No. 88–5226. HOWARD *v.* JOHNSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1291.

No. 88–5227. LEVISTON *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 843 F. 2d 302.

No. 88–5229. BROWN *v.* BOEING CO. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 501.

No. 88–5232. ABDUL MATIYN *v.* EDWIN GOULD SERVICES FOR CHILDREN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 835.

No. 88–5233. KRAMER *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1291.

No. 88–5236. BATTLE *v.* O'KEEFE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 330.

No. 88–5238. FRANCOIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 839.

No. 88–5242. BEACH *v.* HUMPHREYS, SUPERINTENDENT, HOCKING CORRECTIONAL FACILITY, NELSONVILLE, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 325.

No. 88–5243. EVANS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 88–5244. VALENZUELA *v.* GOLDSMITH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 2d 1130.

No. 88–5245. SMITH *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 735.

No. 88–5248. POWELL *v.* FULCOMER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 88–5251. NICHOLS *v.* CITY OF ERIE POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5256. WADE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 2d 398.

No. 88–5258. THOMPSON *v.* HOUSEWRIGHT, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 856.

No. 88–5259. MAULICK *v.* TAYLOR. Sup. Ct. Va. Certiorari denied.

No. 88–5261. CITRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1149.

No. 88–5264. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 526 So. 2d 77.

No. 88–5275. DE YOUNG *v.* CAMPBELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5278. YARBROUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1522.

No. 88–5280. SZEMBORSKI *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE. Ct. App. Wis. Certiorari denied. Reported below: 143 Wis. 2d 897, 422 N. W. 2d 463.

No. 88–5284. SPINELLI *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–5285. RICHARDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 439.

No. 88–5288. ALCAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 329.

No. 88–5296. GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5302. LUMBAR *v.* UNITED STATES; and
No. 88–5324. GOODSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 537.

No. 88–5303. LARKINS *v.* ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5304. LUN WOON TAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 1477.

No. 88–5306. LANDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1203.

No. 88–5309. PENNINGTON *v.* GOSSELIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 193.

No. 88–5320. HERRMANN *v.* THORNBURGH, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 101.

No. 88–5321. GONZALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–5327. GABRIEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–5337. BLACKSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 74.

No. 88–5350. KLEIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 850 F. 2d 404.

No. 88–5356. WALLACE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 923.

No. 88–5358. VENCE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 927.

No. 88–5361. TARANTINO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 398, 846 F. 2d 1384.

No. 88–5375. HALL ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 164 Ill. App. 3d 770, 518 N. E. 2d 275.

No. 88–5376. ELLERBE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 545 A. 2d 1197.

No. 88–5379. HEFNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 731.

No. 88–5380. ZUKOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 851 F. 2d 174.

No. 88–5398. GIBSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 1240.

No. 87–1646. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgments of conviction. Reported below: 160 Ill. App. 3d 315, 513 N. E. 2d 468.

No. 87–1660. ILLINOIS *v.* MARINEZ ET UX. App. Ct. Ill., 3d Dist. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 160 Ill. App. 3d 349, 513 N. E. 2d 607.

No. 87–1869. ARCTIC SLOPE REGIONAL CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Motion of Alaska Federation of Natives for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 265 U. S. App. D. C. 390, 832 F. 2d 158.

No. 87–1962. UNTERMEYER *v.* VALHI, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 841 F. 2d 25.

No. 87–2082. MACARTHUR CO. ET AL. *v.* JOHNS-MANVILLE CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 837 F. 2d 89.

No. 88–5199. GRAVES *v.* BIDNET, INC. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 836 F. 2d 1342.

No. 87–1968. BELLO ET AL. *v.* WALKER ET AL. C. A. 3d Cir. Motion of Pacific Legal Foundation for leave to file a brief as

amicus curiae granted. Certiorari denied. Reported below: 840 F. 2d 1124.

No. 87–1972. BOUNDS, COMMISSIONER, NORTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. *v.* SMITH ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 841 F. 2d 77.

No. 87–1975. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 162 Ill. App. 3d 1169, 528 N. E. 2d 1115.

No. 87–1997. BLINDER, ROBINSON & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 267 U. S. App. D. C. 96, 837 F. 2d 1099.

No. 87–2085. ARKANSAS STATE BOARD OF EDUCATION ET AL. *v.* LITTLE ROCK SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 839 F. 2d 1296.

No. 87–2003. ILLINOIS *v.* HERNANDEZ; and
No. 87–2004. ILLINOIS *v.* CRUZ. Sup. Ct. Ill. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: No. 87–2003, 121 Ill. 2d 293, 521 N. E. 2d 25; No. 87–2004, 121 Ill. 2d 321, 521 N. E. 2d 18.

No. 87–2080. DUCKWORTH ET AL. *v.* MAURICIO. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 840 F. 2d 454.

No. 87–2102. INDIANA *v.* JONES. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 88–147. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WATERHOUSE. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 522 So. 2d 341.

No. 88–196. FLORIDA *v.* POTTS. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 526 So. 2d 63.

No. 88–201. FLORIDA *v.* CASO. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 524 So. 2d 422.

No. 87–2016. BRANDT *v.* BRANDT. Ct. App. Minn. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 87–2093. INDIANA HOSPITAL ET AL. *v.* MILLER. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 843 F. 2d 139.

No. 87–7238. MARTIN *v.* SHUGHART ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 846 F. 2d 72.

No. 87–2025. PEREZ *v.* SCRIPPS-HOWARD BROADCASTING CO. ET AL. Sup. Ct. Ohio. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 35 Ohio St. 3d 215, 520 N. E. 2d 198.

No. 87–2027. COLORADO *v.* WESTERN PAVING CONSTRUCTION CO. C. A. 10th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 841 F. 2d 1025.

No. 87–2083. MOZART CO. *v.* MERCEDES-BENZ OF NORTH AMERICA, INC. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 833 F. 2d 1342.

No. 87–2094. TAUB *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 842 F. 2d 912.

No. 87–2096. OAHU GAS SERVICE, INC. *v.* PACIFIC RESOURCES, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 838 F. 2d 360.

No. 87–2123. DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES *v.* MID-FLORIDA GROWERS, INC., ET AL. Sup. Ct. Fla. Motion of Lykes Bros., Inc., et al. for leave to file a brief as *amici*

curiae granted. Certiorari denied. Reported below: 521 So. 2d 101.

No. 87-6745. THOMPSON *v.* LOUISIANA. Sup. Ct. La.;
No. 87-6830. COKER *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 87-6956. HAMILTON *v.* ALABAMA. Sup. Ct. Ala.;
No. 87-6962. CONE *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 87-6979. WALLS *v.* MISSOURI. Sup. Ct. Mo.;
No. 87-6981. MURRAY *v.* MISSOURI. Sup. Ct. Mo.;
No. 87-7018. HARDING *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir.;
No. 87-7047. REMETA *v.* FLORIDA. Sup. Ct. Fla.;
No. 87-7088. JONES *v.* ALABAMA. Sup. Ct. Ala.;
No. 87-7117. ANDREWS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 87-7145. BLANKENSHIP *v.* GEORGIA. Sup. Ct. Ga.;
No. 87-7158. CORRELL *v.* FLORIDA. Sup. Ct. Fla.;
No. 87-7190. BATTLE *v.* MISSOURI. Ct. App. Mo., Eastern Dist.;
No. 87-7217. JACKSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 87-7235. WHITE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;
No. 87-7264. CADE *v.* ALABAMA. Sup. Ct. Ala.;
No. 87-7265. PUIATTI *v.* FLORIDA. Sup. Ct. Fla.;
No. 87-7335. WALDROP *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 87-7352. HARDWICK *v.* FLORIDA. Sup. Ct. Fla.;
No. 88-271. POYNER *v.* BAIR, WARDEN. Sup. Ct. Va.;
No. 88-272. POYNER *v.* BAIR, WARDEN. Sup. Ct. Va.;
No. 88-273. POYNER *v.* BAIR, WARDEN. Sup. Ct. Va.;
No. 88-5007. O'DELL *v.* VIRGINIA. Sup. Ct. Va.;
No. 88-5009. JONES *v.* MISSOURI. Sup. Ct. Mo.;
No. 88-5032. RUIZ *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-5034. MINCEY *v.* GEORGIA. Sup. Ct. Ga.;
No. 88-5049. JENKINS *v.* OHIO. Ct. App. Ohio, Cuyahoga County;
No. 88-5052. THOMPKINS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88-5066. BUEHL *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 88-5075. DAUGHERTY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.;
No. 88-5091. HOVEY *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-5107. HOWARD *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-5112. KIMBLE *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-5114. MAK *v.* WASHINGTON. Sup. Ct. Wash.;

No. 88–5138. FLEENOR *v.* INDIANA. Sup. Ct. Ind.;
No. 88–5147. MIDDLETON *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 88–5178. STEPHENS *v.* KEMP, WARDEN. C. A. 11th Cir.;
No. 88–5190. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla.; and
No. 88–5194. FREE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 87–6745, 516 So. 2d 349; No. 87–6830, 746 S. W. 2d 167; No. 87–6956, 520 So. 2d 167; No. 87–6962, 747 S. W. 2d 353; No. 87–6979, 744 S. W. 2d 791; No. 87–6981, 744 S. W. 2d 762; No. 87–7018, 834 F. 2d 853; No. 87–7047, 522 So. 2d 825; No. 87–7088, 520 So. 2d 553; No. 87–7117, 744 S. W. 2d 40; No. 87–7145, 258 Ga. 43, 365 S. E. 2d 265; No. 87–7158, 523 So. 2d 562; No. 87–7190, 745 S. W. 2d 730; No. 87–7217, 522 So. 2d 802; No. 87–7235, 523 So. 2d 140; No. 87–7264, 521 So. 2d 85; No. 87–7265, 521 So. 2d 1106; No. 87–7335, 523 So. 2d 475; No. 87–7352, 521 So. 2d 1071; No. 88–5007, 234 Va. 672, 364 S. E. 2d 491; No. 88–5009, 749 S. W. 2d 356; No. 88–5032, 44 Cal. 3d 589, 749 P. 2d 854; No. 88–5049, 42 Ohio App. 3d 97, 536 N. E. 2d 667; No. 88–5052, 121 Ill. 2d 401, 521 N. E. 2d 38; No. 88–5066, 510 Pa. 363, 508 A. 2d 1167; No. 88–5075, 839 F. 2d 1426; No. 88–5091, 44 Cal. 3d 543, 749 P. 2d 776; No. 88–5107, 44 Cal. 3d 375, 749 P. 2d 279; No. 88–5112, 44 Cal. 3d 480, 749 P. 2d 803; No. 88–5138, 514 N. E. 2d 80; No. 88–5147, 295 S. C. 318, 368 S. E. 2d 457; No. 88–5178, 846 F. 2d 642; No. 88–5194, 122 Ill. 2d 367, 522 N. E. 2d 1184.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–6983. MUNOZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 87–6984. SHARP *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 707 S. W. 2d 611.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari.

Even if I did not hold this view, I would grant the petition to resolve the question whether the Eighth and Fourteenth Amendments preclude the introduction of evidence of unadjudicated criminal conduct at the sentencing phase of a capital case. As I recently argued in *Williams* v. *Lynaugh*, 484 U. S. 935 (1987), and *Devier* v. *Kemp*, 484 U. S. 948 (1987), the admission of such evidence cannot be reconciled with the heightened need for reliability in capital cases.

Petitioner Michael Eugene Sharp was convicted of murder and sentenced to death. At the penalty phase, the State, over defense counsel's objections, introduced the testimony of Detective Jerry Smith. Smith testified that petitioner, while in custody, had told him where to find the body of Blanca Arreola, a missing Texas woman. Smith stated that he did not know the cause of Arreola's death. He testified that petitioner had not been indicted for her death and that he did not expect that he would be. The prosecutor's closing statement repeatedly referred to Arreola's murder as evidence of petitioner's future dangerousness. I am troubled that once again a jury faced unproved but highly prejudicial allegations of criminal conduct in a capital sentencing proceeding. I would grant certiorari.

No. 87–6987. LIPHAM *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 808, 364 S. E. 2d 840.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case.

But even if I did not hold this view, I would still grant the petition and vacate the death sentence. Imposing the death penalty on petitioner is squarely inconsistent with this Court's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), where we held constitutionally unacceptable precisely the sorts of jury arguments employed by the Georgia prosecutor here.

Petitioner was convicted of murder, rape, armed robbery, and burglary, and was sentenced to death for the murder. In his opening statement at the sentencing phase, the prosecutor told the jury it had reached the phase of the proceedings where "'you make the decision as to the punishment.'" Pet. for Cert. 5. But then he continued:

> "'But how did we get to right here? You got here because the district attorney, that's me, as the agent of the State[,] made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can choose not to impose the death penalty if you want to, for any reason or no reason whatsoever. But that decision seeking the death penalty was already made. *So don't feel like it is yours and have it weigh too heavily on you because that was my decision.*'" *Id.*, at 5–6 (emphasis added).

In his closing remarks, the prosecutor again informed the jury that "'[y]ou are simply one more step in the procedure.'" He concluded by asserting that by comparison with the victim's suffering, the jury's decision was easy: "'To infer or to interfere with justice by saying that your verdict of a proper punishment for William Anthony Lipham is only a life sentence is a joke. A very sad joke.'" *Id.*, at 8.

Allowing petitioner's death sentence to stand cannot possibly be squared with *Caldwell*. In that case, we overturned the death sentence in a case in which the prosecutor had noted to the jury that "'the decision you render is automatically reviewable by the Supreme Court.'" We stated there that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U. S., at 328–329. The rationale for that holding was that jurors charged with deciding whether capital punish-

ment should be imposed should recognize that theirs is a "'truly awesome responsibility'" and "'act with due regard for the consequences of their decision . . . .'" *Id.*, at 329–330 (quoting *McGautha* v. *California*, 402 U. S. 183, 208 (1971)). Dissipating this all-important sense of responsibility, we wrote, could easily result in the jury's deciding to "'send a message' of extreme disapproval for the defendant's acts" without ever having determined that a death sentence was in order. 472 U. S., at 331–332.

The prosecutor's statement here—admonishing the jurors not to "'feel like it is you[r] [decision]'" and urging them not to "'have it weigh too heavily on you because that was my decision'"—is designed for only one reason: to dissipate the jury's sense of personal responsibility for this most awesome of decisions. See, *e. g.*, *Tucker* v. *Kemp*, 802 F. 2d 1293 (CA11 1986) (en banc) (concluding that a "prosecutorial expertise" argument was impermissible under *Caldwell* where the prosecutor suggested that others, including the prosecutor and the police, bore partial responsibility for imposition of the death penalty), cert. denied, 480 U. S. 911 (1987).

Nor am I persuaded by the State's argument that petitioner is barred on direct appeal from raising his *Caldwell* claim either because of his failure to object at trial or because of his failure to object with more specificity on appeal below. In sanctioning the prosecutor's statement that deciding whether to execute petitioner should not "'weigh too heavily on you,'" the judge committed what can only be deemed a plain error. And in his brief to the Georgia Supreme Court, petitioner—though not complaining specifically that *Caldwell* had been violated—sought reversal generally because of the "inflammatory and prejudicial" argumentation of the prosecutor, a description which richly applies to the remarks quoted above.

I therefore dissent.

No. 87–7054. CHOU *v.* UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 87–7076. JURAS *v.* AMAN COLLECTION SERVICE, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 829 F. 2d 739.

No. 88–321. DANIELS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 87–7094. BROWN *v.* COVINGTON & BURLING ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 87–7208. BROWN *v.* LURYE ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 87–7098. JOHNSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 521 So. 2d 1018.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary and freakish when it is imposed by a judge in the face of a jury determination that the appropriate penalty is life imprisonment. See *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., concurring in part and dissenting in part). Therefore, I would grant the petition for writ of certiorari and vacate petitioner's death sentence for the reasons I expressed in *Jones* v. *Alabama*, 470 U. S. 1062, 1063 (1985) (MARSHALL, J., dissenting).

In this case, after a full hearing, the jury determined that life imprisonment, not death, was the punishment which petitioner deserved. Nevertheless, following Alabama law which allows him wide discretion in death sentences, the trial judge overrode the jury's determination and sentenced petitioner to death. I continue to believe that "[i]t approaches the most literal sense of the word 'arbitrary' to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task." *Jones* v. *Alabama*, *supra*, at 1065.

No. 87–7101. MANN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 749 P. 2d 1151.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I would grant the petition in order to resolve the question whether inflammatory and prejudicial photographs of the victim's body introduced during the guilt phase of a capital trial, and subsequently reincorporated during the sentencing phase, violate the accused's constitutional right to a reliable sentencing determination. The Court granted certiorari on a very similar question last Term in *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988), but did not decide it because the Court found that the petitioner in that case, who was 15 years old at the time of the offense, could not be subjected to the death penalty under the Eighth and Fourteenth Amendments. See *id.*, at 838, n. 48 (plurality opinion).

The petitioner here, an adult, was convicted of first-degree murder and sentenced to death for his role in the same murder which gave rise to *Thompson*, *supra*. During the guilt phase of the petitioner's trial, the prosecution introduced two color photographs of the victim's body that were taken after the body had been retrieved from a river one month after the murder. These photographs were reincorporated by the prosecution during the sentencing phase of the trial. On direct appeal, the Oklahoma Court of Criminal Appeals found that the trial court erred in admitting the photographs due to their "gruesome" and "inordinately grisley *[sic]*" nature. 749 P. 2d 1151, 1156 (1988). The court concluded, however, that the error was harmless because "the case against appellant was sufficient" without the photographs and thus the court could "not find this evidence affected the jury's verdict." *Ibid.*

Significantly, the court never considered whether the introduction of the photographic evidence violated the petitioner's "constitutional rights by virtue of its being considered at the penalty phase" of his trial. *Thompson*, *supra*, at 838, n. 48. The state court's analysis is therefore fatally flawed in that it did not accord

any weight whatsoever to "the qualitative difference of death from all other punishments." *California* v. *Ramos*, 463 U. S. 992, 998 (1983). As to the specific claim, moreover, the petitioner argues convincingly that the photographic evidence created an impermissible risk that his death sentence was based on considerations that are "totally irrelevant to the sentencing process," *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983), because it focused the jury's attention on the postmortem decomposition of the victim's body rather than on "the character of the [defendant] and the circumstances of the crime." *Id.*, at 879. Indeed, photographic evidence of this sort seems no less inflammatory or prejudicial than the victim impact statements deemed inadmissible in *Booth* v. *Maryland*, 482 U. S. 496 (1987).

The introduction in capital trials of ghastly photographs of the victim presents substantial and recurring issues of constitutional dimension, see, *e. g.*, *Tucker* v. *Kemp*, 480 U. S. 911 (1987) (BRENNAN, J., dissenting from denial of certiorari), that warrant plenary review by the Court. I dissent.

No. 87-7116. HALE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 750 P. 2d 130.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case. But even if I believed that the death penalty could be constitutionally imposed under certain circumstances, I would grant the petition and vacate petitioner's death sentence for the same reasons that I expressed in *Brecheen* v. *Oklahoma*, 485 U. S. 909 (1988) (MARSHALL, J., dissenting from denial of certiorari).

Petitioner was convicted for the murder-kidnaping of the son of a prominent local banking family. Pretrial publicity was exten-

sive. All members of the jury had read or heard of the murder-kidnaping. Some jurors knew petitioner's family and some were acquainted with the victim's family. Six members admitted that they had formed opinions concerning the case. I do not doubt that their representations that they could set aside their opinions and listen to the evidence were sincere. But under the totality of the circumstances, I can only conclude that petitioner Hale, like the petitioner in *Brecheen*, was denied his constitutional right to a fair trial and to impartial sentencing because of Oklahoma's strong presumption against venue changes.

No. 87–7199. LEE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 82, 365 S. E. 2d 99.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari.

Even if I did not hold this view, I would grant the petition to establish clearly the minimal due process requirements for state change of venue standards. As I recently argued in *Brecheen* v. *Oklahoma*, 485 U. S. 909 (1988) (MARSHALL, J., dissenting from denial of certiorari), and *Hale* v. *Oklahoma*, *ante*, p. 878 (MARSHALL, J., dissenting from denial of certiorari), a defendant's interest in a fundamentally fair trial outweighs the State's interest in holding that trial in a particular district. It is time that this Court consider the constitutional limits on change of venue standards and assist state efforts to ensure jury impartiality. I would grant certiorari.

No. 87–7303. DOE *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. Ct. App. N. Y. Motion of petitioner to seal portions of the petition for writ of certiorari granted. Certiorari denied. Reported below: 71 N. Y. 2d 48, 518 N. E. 2d 536.

No. 88–5. MCCALL *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 6th Cir. Motion of American Diabetes Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

JUSTICE BLACKMUN would grant certiorari. Reported below: 844 F. 2d 294.

No. 88–22. VALLIER ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (SOUTHERN PACIFIC TRANSPORTATION CO., REAL PARTY IN INTEREST). C. A. 9th Cir. Petition for writ of certiorari and/or mandamus denied.

No. 88–72. PINNEY DOCK & TRANSPORT CO. *v.* NORFOLK & WESTERN RAILWAY CO. ET AL. C. A. 6th Cir. Motion of C. D. Ambrosia Trucking Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 838 F. 2d 1445.

No. 88–137 (A–95). GRACEY *v.* DAY ET AL. C. A. 3d Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied. Certiorari denied. Reported below: 849 F. 2d 601.

Rehearing Denied

No. 86–1944. KWOUN ET AL. *v.* SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION ET AL., 486 U. S. 1022;

No. 87–6801. DAWNS *v.* CANON U. S. A., INC., 486 U. S. 1045;

No. 87–6933. WILLIAMS *v.* PLANNED PARENTHOOD ASSOCIATION OF THE ATLANTA AREA, INC., ET AL., 487 U. S. 1221; and

No. 87–7038. KINSEY *v.* UNITED STATES, 487 U. S. 1223. Petitions for rehearing denied.

No. 87–6759. GRAVES *v.* BROWN, 486 U. S. 1045. Motion for leave to file petition for rehearing denied.

OCTOBER 5, 1988

Dismissals Under Rule 53

No. 88–354. UNITED STATES DEPARTMENT OF THE AIR FORCE, SCOTT AIR FORCE BASE, ILLINOIS *v.* FEDERAL LABOR RELATIONS AUTHORITY. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 838 F. 2d 229.

No. 88–355. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 4th Cir.

Certiorari dismissed under this Court's Rule 53. Reported below: 833 F. 2d 1129.

No. 88–356. UNITED STATES DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD *v.* FEDERAL LABOR RELATIONS AUTHORITY. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 840 F. 2d 1131.

OCTOBER 6, 1988

Dismissals Under Rule 53

No. 88–283. PARADYNE CORP. *v.* M/A-COM, INC., ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 849 F. 2d 606.

No. 88–243. SHEFTELMAN ET AL. *v.* STANDARD METALS CORP. ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 817 F. 2d 625 and 839 F. 2d 1383.

OCTOBER 11, 1988

Affirmed on Appeal

No. 88–295. LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND *v.* J. A. JONES CONSTRUCTION CO. ET AL. Appeal from C. A. 9th Cir. Motion of Foundation for Fair Contracting for leave to file a brief as *amicus curiae* granted. Judgment affirmed. Reported below: 846 F. 2d 1213.

Appeals Dismissed

No. 88–76. CROCKER NATIONAL BANK ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. THE CHIEF JUSTICE would note probable jurisdiction and set case for oral argument. Reported below: 44 Cal. 3d 839, 750 P. 2d 324.

No. 88–179. JONATHAN CLUB *v.* CALIFORNIA COASTAL COMMISSION. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 88–253. PRITCHARD ET UX. *v.* BOARD OF COMMISSIONERS OF CALVERT COUNTY, MARYLAND, ET AL. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 312 Md. 522, 540 A. 2d 1139.

No. 88–298. MARKET STREET MISSION *v.* BUREAU OF ROOMING AND BOARDING HOUSE STANDARDS, NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 110 N. J. 335, 541 A. 2d 668.

No. 88–219. MANNHEIM BOOKS, INC. *v.* COUNTY OF COOK, ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 122 Ill. 2d 123, 522 N. E. 2d 73.

No. 88–258. RAMPP ET AL. *v.* GLECO ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 845 F. 2d 1014.

No. 88–377. FRAYCHINEAUD *v.* CITY OF NEW ORLEANS. Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 519 So. 2d 412.

No. 88–405. DITMAR *v.* NEEDHAM HARPER WORLDWIDE, INC., ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 848 F. 2d 189.

Certiorari Granted—Vacated and Remanded

No. 87–1929. FORTNEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Berkovitz* v. *United States*, 486 U. S. 531 (1988). Reported below: 841 F. 2d 1122.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

Petitioners in this case were injured by an explosion at an Army munitions plant. They sued the United States under the Federal Tort Claims Act, 28 U. S. C. § 2671 *et seq.*, alleging, *inter alia*, that the explosion was caused by the Army's failure to observe a provision in its safety manual, AMCR 385–100 § 20.4 (1970) (§ 20.4), Pet. for Cert. 4, proscribing the use of certain types of containers for storage of hazardous materials. After a bench

trial, the District Court entered judgment for the Government, 659 F. Supp. 127 (WD Va. 1987); the Court of Appeals affirmed in a brief *per curiam* opinion. 841 F. 2d 1122 (CA4 1988). The Court grants the petition for certiorari, vacates the judgment, and remands the case for further consideration in light of our decision last Term in *Berkovitz* v. *United States*, 486 U. S. 531 (1988).

In *Berkovitz*, we held that an agency's violation of "a specific mandatory directive"—as opposed to the permissible exercise of policy discretion—is not sheltered within the discretionary function exception to the Federal Tort Claims Act waiver of sovereign immunity, 28 U. S. C. § 2680(a). *Berkovitz*, *supra*, at 544. The apparent purpose of today's remand is to allow the Fourth Circuit to determine whether § 20.4 is indeed a "specific mandatory directive." In the circumstances of this case, however, that determination cannot make any difference. To be sure, both the District Court and the Fourth Circuit held—erroneously, as *Berkovitz* later established—that the discretionary function exception encompassed violations of mandatory Government regulations. See App. to Pet. for Cert. 18A–19A (District Court); *id.*, at 4A, n. 1 (Court of Appeals). But the District Court also found as an alternative ground, after hearing the testimony of three expert witnesses, that the Army's use of "nonconductive" containers at the plant did not violate § 20.4 at all. *Id.*, at 19A. The Fourth Circuit explicitly affirmed this finding *after* petitioners requested a clarification of the District Court's decision on the issue. *Id.*, at 4A, n. 1. Quite obviously, a *Berkovitz* inquiry into the mandatory or discretionary nature of a provision that has in any event not been violated is fruitless.

Petitioners argue in their reply that a different provision of the safety manual, AMCR 385–100 § 12.33(g) (1970) (§ 12.33), which requires use of a sprinkler system with particular characteristics, was also violated. It is not clear from the papers before us that this contention, which was addressed in neither the District Court's opinion nor the Fourth Circuit's opinion, and which is not reflected by any mention of § 12.33 in petitioners' Memorandum of Clarification Concerning Waivers of Army Safety Regulations filed with the Fourth Circuit, see App. to Pet. for Cert. 24A–26A, was even preserved on appeal. Assuming, however, that it was preserved, it was not properly presented in the petition for certiorari. The petition states that violation of § 12.33 was part of petitioners' "theory below," Pet. for Cert. 12, and reproduces the text

of § 12.33 in the preliminary section entitled "Statutes and Regulations Involved," *id.*, at 5. In the body of the petition, however, addressed to the "Reasons for Granting the Writ," not a single mention of § 12.33 is to be found, and a section entitled "The Mandatory Regulation At Issue Herein" discusses *only* § 20.4. See *id.*, at 23–24. If this was not an explicit acknowledgment that the § 12.33 claim had subsequently been abandoned, it was at least a plain failure to present that claim to this Court. If the Court's remand rests upon § 12.33 rather than § 20.4, I think it a mischievous departure from this Court's Rule that only issues presented in the petition will be considered, Rule 21.1(a), and our requirement that the issues be presented clearly, *Berkemer* v. *McCarty*, 468 U. S. 420, 443, n. 38 (1984).

I would deny the petition for certiorari.

No. 88–5215. FOSTER *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maynard* v. *Cartwright*, 486 U. S. 356 (1988).

Miscellaneous Orders

No. A–170 (88–155). TEXAS *v.* JOHNSON. Ct. Crim. App. Tex. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, granted, and it is ordered that the mandate of the Court of Criminal Appeals of Texas, case No. 372–86, is recalled and stayed pending this Court's action on the petition for writ of certiorari. In the event the petition for writ of certiorari is denied, this order terminates automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court.

No. A–176. FORT *v.* NATIONAL AMERICAN INSURANCE CO. ET AL. Super. Ct. Cal., County of Los Angeles. Application for stay and other relief, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–242. METROMEDIA, INC., ET AL. *v.* APRIL ENTERPRISES, INC. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the judgment of the Court of Appeal of California, Second Appellate District, case No. B022890, entered June 9, 1988, is stayed pending the timely filing and disposition of a petition for

writ of certiorari. In the event the petition for writ of certiorari is denied, this order terminates automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the bond presently in force remaining in effect. JUSTICE STEVENS took no part in the consideration or decision of this order.

No. D–686. IN RE DISBARMENT OF WARREN. Disbarment entered. [For earlier order herein, see 485 U. S. 973.]

No. D–691. IN RE DISBARMENT OF NEWHOUSE. Disbarment entered. [For earlier order herein, see 485 U. S. 984.]

No. D–712. IN RE DISBARMENT OF BRILL. Disbarment entered. [For earlier order herein, see 486 U. S. 1030.]

No. D–714. IN RE DISBARMENT OF WATKINS. Disbarment entered. [For earlier order herein, see 486 U. S. 1052.]

No. D–718. IN RE DISBARMENT OF MORALES. Disbarment entered. [For earlier order herein, see 487 U. S. 1202.]

No. D–733. IN RE DISBARMENT OF BUSSEY. It is ordered that Robert N. Bussey, of St. Petersburg, 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.

No. D–734. IN RE DISBARMENT OF NEWMAN. It is ordered that Marvin A. Newman, of Monticello, 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.

No. D–735. IN RE DISBARMENT OF STOLL. It is ordered that Peter Richard Stoll, 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.

No. D–736. IN RE DISBARMENT OF CHESSON. It is ordered that Calvin W. Chesson, of Charlotte, N. C., 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. 86–492. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP., 487 U. S. 500. Motion of respondent to retax costs granted.

No. 86–1856. NORTHWEST CENTRAL PIPELINE CORP. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Sup. Ct. Kan. [Probable jurisdiction noted, 486 U. S. 1021.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–1879. NATIONAL TREASURY EMPLOYEES UNION ET AL. *v.* VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE. C. A. 5th Cir. [Certiorari granted, 485 U. S. 903.] Motion of petitioners for leave to file a reply brief out of time denied.

No. 87–56. OWENS ET AL. *v.* OKURE. C. A. 2d Cir. [Certiorari granted, 485 U. S. 958.] Motion of petitioners for leave to file a reply brief out of time denied.

No. 87–470. FORT WAYNE BOOKS, INC. *v.* INDIANA ET AL. Sup. Ct. Ind. [Certiorari granted, 485 U. S. 933.] Motion of Burke H. Mendenhall for leave to intervene denied.

No. 87–1622. BRENDALE *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.;

No. 87–1697. WILKINSON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.; and

No. 87–1711. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL. C. A. 9th Cir. [Certiorari granted, 487 U. S. 1204.] Motion of petitioner Brendale for divided argument and for additional time for oral argument denied.

No. 87–1703. ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL. *v.* METHOW VALLEY CITIZENS COUNCIL ET AL.; and

No. 87–1704. MARSH, SECRETARY OF THE ARMY, ET AL. *v.* OREGON NATURAL RESOURCES COUNCIL ET AL. C. A. 9th Cir. [Certiorari granted, 487 U. S. 1217.] Motion of respondents Oregon Natural Resources Council et al. for divided argument denied.

No. 87–5666. HIGH *v.* ZANT, WARDEN. C. A. 11th Cir. [Certiorari granted, 487 U. S. 1233.] Motion of West Virginia Council of Churches for leave to file a brief as *amicus curiae* granted.

No. 87–6026. WILKINS *v.* MISSOURI. Sup. Ct. Mo. [Certiorari granted, 487 U. S. 1233.] Motion of West Virginia Council of Churches for leave to file a brief as *amicus curiae* granted.

No. 88–148. SOUTHERN NATURAL GAS CO. *v.* FRITZ ET AL. Sup. Ct. Miss. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–5088. IN RE HURT. C. A. 4th Cir. Petition for writ of common-law certiorari and/or mandamus denied.

No. 88–5197. IN RE AARON, AKA KURAN. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 87–329. THE FLORIDA STAR *v.* B. J. F. Appeal from Dist. Ct. App. Fla., 1st Dist. Probable jurisdiction noted. Reported below: 499 So. 2d 883.

Certiorari Granted

No. 87–1428. LORANCE ET AL. *v.* AT&T TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 827 F. 2d 163.

No. 88–23. LAURO LINES S. R. L. *v.* CHASSER ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 844 F. 2d 50.

No. 87–1661. ASARCO INC. ET AL. *v.* KADISH ET AL. Sup. Ct. Ariz. Motions of Alaska Miners Association et al. and Clinton Campbell Contractor, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 155 Ariz. 484, 747 P. 2d 1183.

No. 87–5765. STANFORD *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.* Reported below: 734 S. W. 2d 781.

No. 87–7023. HARDIN *v.* STRAUB. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 836 F. 2d 549.

---

*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 906.]

No. 88–64. MISSOURI ET AL. *v.* JENKINS, BY HER FRIEND, AGYEI, ET AL. C. A. 8th Cir. Certiorari granted limited to Questions 1 and 4 presented by the petition. Reported below: 838 F. 2d 260.

No. 88–305. SOUTH CAROLINA *v.* GATHERS. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 295 S. C. 476, 369 S. E. 2d 140.

No. 88–317. DUCKWORTH *v.* EAGAN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 843 F. 2d 1554.

Certiorari Denied. (See also Nos. 88–258, 88–377, 88–405, and 88–5088, *supra.*)

No. 87–2039. FAHMY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–2057. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 810 F. 2d 996.

No. 87–2067. BANKSTON ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL.; and

No. 88–246. BACHE ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 283.

No. 87–2068. ALABAMA POWER CO. ET AL. *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.; and

No. 88–61. NATIONAL COAL ASSN. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 267 U. S. App. D. C. 274, 838 F. 2d 1224.

No. 87–2114. RODRIGUEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 2d 22.

No. 87–7082. PROCTER *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 1251.

No. 87–7125. STEELE *v.* FELIX CHEVROLET ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–7144. CARTER *v.* TURNER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1026.

No. 87-7165. BASTIDAS *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1287.

No. 87-7270. VAUGHN *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 770.

No. 88-14. TOLEDO *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 270 and 26 M. J. 104.

No. 88-24. CAMPO *v.* NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 843 F. 2d 96.

No. 88-25. CELOTEX CORP. ET AL. *v.* GRIMES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 815.

No. 88-27. RUSCO INDUSTRIES, INC. *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 270.

No. 88-39. GARCIA ET AL. *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 1411.

No. 88-50. JENKINS ET AL. *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 838 F. 2d 260.

No. 88-52. BUFFALO WIRE WORKS CO., INC. *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 834.

No. 88-53. BOEING CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 1213.

No. 88-58. FULTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 88-63. DEPARTMENT OF PUBLIC SAFETY, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS *v.* FLEMING. C. A. 9th Cir. Certiorari denied. Reported below: 837 F. 2d 401.

No. 88-70. DEKLEWA ET AL., DBA JOHN DEKLEWA & SONS *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 88-306. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, LOCAL 3, AFL-CIO *v.*

NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 843 F. 2d 770.

No. 88–73. KIRK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 660.

No. 88–74. INGERSOLL MILLING MACHINE CO. ET AL. *v.* HYDRIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1020.

No. 88–89. GOLDEN PACIFIC BANCORP. *v.* CLARKE, COMPTROLLER OF THE CURRENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 267 U. S. App. D. C. 86, 837 F. 2d 509.

No. 88–106. WYATT *v.* JOUFLAS ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–118. GO AIR, INC. *v.* ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 306, 841 F. 2d 428.

No. 88–122. COUNTY LINE JOINT VENTURE *v.* CITY OF GRAND PRAIRIE, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 839 F. 2d 1142.

No. 88–183. TORRES ET AL. *v.* J. F. ENTERPRISES, INC., ET AL.; and ARNOLD *v.* OPFER. Ct. App. Ohio, Wood County. Certiorari denied.

No. 88–248. RUBLOFF, INC. *v.* SMITH. Ct. App. Ga. Certiorari denied. Reported below: 187 Ga. App. 317, 370 S. E. 2d 159.

No. 88–249. STITT SPARK PLUG CO. *v.* CHAMPION SPARK PLUG CO. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 1253.

No. 88–251. SIDMAN *v.* SUPREME COURT OF FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 88–254. ANGLICKER *v.* MILLER. C. A. 2d Cir. Certiorari denied. Reported below: 848 F. 2d 1312.

No. 88–257. RZEPKA *v.* JACOBSEN. C. A. 7th Cir. Certiorari denied. Reported below: 852 F. 2d 570.

No. 88–259. ALTON PACKAGING CORP. *v.* POLLUTION CONTROL BOARD ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 162 Ill. App. 3d 731, 516 N. E. 2d 275.

No. 88–264. VOGT *v.* ABISH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1288.

No. 88–265. BADGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 1476.

No. 88–267. KELLEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 88–268. WILLIAMS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 305, 369 S. E. 2d 232.

No. 88–269. STOCKTON *v.* LANSIQUOT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1545.

No. 88–277. SEAWINDS LTD. *v.* NEDLLOYD LINES, B. V., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 586.

No. 88–279. ANTRIM ET AL. *v.* BURLINGTON NORTHERN INC. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 2d 375.

No. 88–281. SHEEHAN ET AL. *v.* PUROLATOR, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 839 F. 2d 99.

No. 88–282. ALTER ET AL. *v.* SCHROEDER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 841 F. 2d 770.

No. 88–285. PACINDAT MUTUAL PROTECTION & INDEMNITY ASSN., LTD. *v.* TRAVELERS INDEMNITY CO. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 187.

No. 88–286. FLYNN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 14 Conn. App. 10, 539 A. 2d 1005.

No. 88–288. BECNEL ET AL. *v.* DUPUIS ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–290. CANNON *v.* ROWEN ET VIR. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 88–294. GUYS & DOLLS BILLIARDS, INC. *v.* MCHALE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 71.

No. 88–300. NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. *v.* MINNESOTA STATE ETHICAL PRACTICES BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1027.

No. 88–301. GILL *v.* MERCY HOSPITAL ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 199 Cal. App. 3d 889, 245 Cal. Rptr. 304.

No. 88–307. MORTGAGE MART, INC. *v.* RECHNITZER, TRUSTEE IN BANKRUPTCY, ET AL.; and BERGER *v.* DAVIS, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 597 (first case); 848 F. 2d 1242 (second case).

No. 88–308. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 848 F. 2d 1560.

No. 88–311. EMPIRE LUMBER CO. *v.* WASHINGTON WATER POWER CO. ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 114 Idaho 191, 755 P. 2d 1229.

No. 88–314. JACKSON *v.* ST. JOSEPH STATE HOSPITAL. C. A. 8th Cir. Certiorari denied. Reported below: 840 F. 2d 1387.

No. 88–316. PARKS *v.* PARKS. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 747 S. W. 2d 279.

No. 88–319. THORNBURY TOWNSHIP ET AL. *v.* W. D. D., INC. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 170.

No. 88–343. MURPHY, GUARDIAN OF PRANGE *v.* BENSON, GUARDIAN AD LITEM OF PRANGE. Sup. Ct. Ill. Certiorari denied. Reported below: 121 Ill. 2d 570, 527 N. E. 2d 303.

No. 88–358. THOMPSON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 842.

No. 88–360. BYRON *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1467.

No. 88–361. LUCAS *v.* PHILADELPHIA NAVAL SHIPYARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 919.

No. 88–362. WILSON ET AL. *v.* KUENZI ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 751 S. W. 2d 741.

No. 88–366. LEVIN ET AL. *v.* PARRILLO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1016.

No. 88–370. MATLOCK *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 88–378. BOLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 477.

No. 88–379. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–383. DILLON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 922.

No. 88–388. FAIRNESS IN MEDIA *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 273, 851 F. 2d 1500.

No. 88–397. KAUSHIVA *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–398. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 848 F. 2d 436.

No. 88–407. VANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 851 F. 2d 166.

No. 88–409. FIRST NATIONAL BANK, LEXINGTON, TENNESSEE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 740.

No. 88–425. LEVY *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 199 Cal. App. 3d 1334, 245 Cal. Rptr. 576.

No. 88–431. COMMUNITY FEDERAL SAVINGS & LOAN ASSN. *v.* DIRECTOR OF REVENUE, STATE OF MISSOURI, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 752 S. W. 2d 794.

No. 88–439. LEONETTI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88–440. NEWSOME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 1474.

No. 88–442. RIVERA-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 573.

No. 88–5017. JENKINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–5040. LENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 603.

No. 88–5044. LEVASSEUR ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 846 F. 2d 786.

No. 88–5048. BALAWAJDER *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 88–5053. SPENCER *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. C. A. 7th Cir. Certiorari denied.

No. 88–5055. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 74.

No. 88–5057. PAREZ *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 88–5064. FAIRCHILDE *v.* ERICKSON, AKA SCHULLER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 600.

No. 88–5073. GALLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 74.

No. 88–5078. DOE, A MINOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 842 F. 2d 244.

No. 88–5115. MIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 1029.

No. 88–5127. AQEEL *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 88–5128. LEWIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 1276.

No. 88–5133. FALKNER *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–5203. WALKER *v.* MARYLAND PUBLIC DEFENDER OFFICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 75.

No. 88–5230. CALDWELL *v.* BUREAU OF FEDERAL PRISONS. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1289.

No. 88–5234. FLYNN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 88–5235. JAMES *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–5250. SHERAZEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1220.

No. 88–5253. STREATER *v.* WILLIAMS, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS. C. A. D. C. Cir. Certiorari denied.

No. 88–5257. WOOD *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 208 Conn. 125, 545 A. 2d 1026.

No. 88–5260. FERENC *v.* INTERNAL REVENUE SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1324.

No. 88–5265. FLEEGLE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 74 Md. App. 743.

No. 88–5268. KITCHEN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 517 N. E. 2d 1268.

No. 88–5269. BELL *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 88–5272. HINES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 165 Ill. App. 3d 289, 518 N. E. 2d 1362.

No. 88–5277. WORLEY *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 369 S. E. 2d 706.

No. 88–5282. DE YOUNG *v.* DE KOSTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5283. DE YOUNG *v.* O'BRIEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5287. BURRELL *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–5289. KOEHLER *v.* REES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5290. HINES *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 88–5291. CUTLER *v.* MUNICIPALITY OF ANCHORAGE, ALASKA. Ct. App. Alaska. Certiorari denied.

No. 88–5292. CHATMAN *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5293. CHERRY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 88–5294. EMPEY *v.* TEXAS BOARD OF PARDONS AND PAROLES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1020.

No. 88–5295. LIPSMAN *v.* MASON. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 88–5298. T. B. *v.* IOWA DEPARTMENT OF HUMAN SERVICES ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 432 N. W. 2d 166.

No. 88–5299. GARZA *v.* GRAMMER, ASSISTANT DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1083.

No. 88–5301. JUPIN *v.* STETZER ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5308. SZAREWICZ *v.* JOYCE ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5311. ROGERS *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 88–5313. NASH *v.* ERVIN. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 72.

No. 88–5316. TWITTY *v.* MAASS. C. A. 9th Cir. Certiorari denied.

No. 88–5317. POLLOCK *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 656.

No. 88–5329. CASAMENTO *v.* NORTHERN VIRGINIA MENTAL HEALTH INSTITUTE. Cir. Ct. Va., Fairfax County. Certiorari denied.

No. 88–5331. SHEFFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 851 F. 2d 362.

No. 88–5333. MCCLAIN *v.* CAPUTO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 602.

No. 88–5335. FISHER *v.* RIDDICK, JUDGE, MADISON COUNTY, ALABAMA, PROBATE COURT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 1478.

No. 88–5338. GRAVES *v.* THURMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5340. HEMPHILL *v.* DAILY GAZETTE CO., INC., ET AL. Cir. Ct. W. Va., Kanawha County. Certiorari denied.

No. 88–5341. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 136 App. Div. 2d 1, 525 N. Y. S. 2d 618.

No. 88–5348. BELL *v.* FREEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5351. DAVIS *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied.

No. 88–5357. PERALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 358.

No. 88–5359. PLYLER ET AL. *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 208.

No. 88–5371. LANGLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 848 F. 2d 152.

No. 88–5374. JONES *v.* HABERLAIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 191.

No. 88–5385. PAYNE *v.* ROBINSON, WARDEN. Sup. Ct. Conn. Certiorari denied. Reported below: 207 Conn. 565, 541 A. 2d 504.

No. 88–5389. OCHOA-OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 573.

No. 88–5395. BERMUDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 572.

No. 88–5426. DALOIA *v.* ROSE, ASSISTANT UNITED STATES ATTORNEY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 74.

No. 88–5436. MANN *v.* ADAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 589.

No. 88–5500. FREIWALD *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 190.

No. 87–1565. TEXAS *v.* MODGLING. Ct. Crim. App. Tex. Certiorari denied. JUSTICE WHITE and JUSTICE KENNEDY would grant certiorari.

No. 87–1649. BOYLE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 161 Ill. App. 3d 1054, 514 N. E. 2d 1169.

No. 87–1853. LAURITZEN ET UX., INDIVIDUALLY AND DBA LAURITZEN FARMS *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 835 F. 2d 1529.

No. 87–1907. YOUNG *v.* LANGLEY ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 840 F. 2d 19.

No. 87–2037. KAHN *v.* AVNET, INC. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 841 F. 2d 1116.

No. 87–2047. FEASTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 843 F. 2d 1392.

No. 87–7111. GRUENHOLZ ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 837 F. 2d 1404.

No. 88–93. UNION PACIFIC RAILROAD CO. ET AL. *v.* MORITZ, TRUSTEE OF IOWA RAILROAD CO. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 840 F. 2d 535.

No. 88–195. KREISHER *v.* MOBIL OIL CORP. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 198 Cal. App. 3d 389, 243 Cal. Rptr. 662.

No. 88–338. ROBINSON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 14 Conn. App. 40, 539 A. 2d 606.

No. 88–339. STAMLER ET AL. *v.* ZAMBONI. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 847 F. 2d 73.

No. 87–1800. ROBERTSON, EXECUTOR OF THE WILL OF HAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

This case concerns the deductibility, under §§ 170 and 2055 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 170 and 2055, of a testamentary disposition to a nonprofit cemetery, which enjoys tax-exempt status under § 501(c)(13) of the Code. The Solicitor General concedes that such a donation is deductible for federal income tax purposes, but he resists deductibility for federal estate tax purposes. Whether this distinction is legally sound is, I feel, an issue deserving plenary consideration by this Court.

I therefore dissent and would grant the petition for a writ of certiorari. I adhere to the reasons set forth by JUSTICE O'CONNOR in her opinion (which Justice Powell and I joined) dissenting from the denial of certiorari in *Mellon Bank, N. A.* v. *United States*, 475 U. S. 1032 (1986).

No. 87–1864. CLEVELAND NEWSPAPER GUILD, LOCAL 1, ET AL. *v.* PLAIN DEALER PUBLISHING CO. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 839 F. 2d 1147.

No. 87–1877. HARTENSTINE *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO, NORTH DESERT

DISTRICT (BLUE CROSS OF SOUTHERN CALIFORNIA ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 196 Cal. App. 3d 206, 241 Cal. Rptr. 756.

No. 87–7118. ASHFORD *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87–7119. STEWART *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87–7136. EMERSON *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87–7137. ORANGE *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87–7174. GREEN *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 88–5074. HENDRICKS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5131. HAWKINS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 88–5198. LANDRY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 88–5300. BARBER *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 88–5310. PARKUS *v.* MISSOURI. Sup. Ct. Mo.;

No. 88–5314. WADE *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5330. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5383. ROJEM *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 88–5393. MERCER *v.* ARMONTROUT, WARDEN. C. A. 8th Cir.; and

No. 88–5440. COLEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 87–7118, 121 Ill. 2d 55, 520 N. E. 2d 332; No. 87–7119, 121 Ill. 2d 93, 520 N. E. 2d 348; No. 87–7136, 122 Ill. 2d 411, 522 N. E. 2d 1109; No. 87–7137, 121 Ill. 2d 364, 521 N. E. 2d 69; No. 87–7174, 321 N. C. 594, 365 S. E. 2d 587; No. 88–5074, 44 Cal. 3d 635, 749 P. 2d 836; No. 88–5131, 844 F. 2d 1132; No. 88–5198, 844 F. 2d 1117; No. 88–5300, 753 S. W. 2d 659; No. 88–5310, 753 S. W. 2d 881; No. 88–5314, 44 Cal. 3d 975, 750 P. 2d 794; No. 88–5330, 44 Cal. 3d 883, 751 P. 2d 395; No. 88–5383, 753 P. 2d 359; No. 88–5393, 844 F. 2d 582; No. 88–5440, 37 Ohio St. 3d 286, 525 N. E. 2d 792.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–60. OHIO POWER CO. *v.* THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 267 U. S. App. D. C. 274, 838 F. 2d 1224.

No. 88–182. GENERAL ELECTRIC CO. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 848 F. 2d 190.

No. 88–5135. TORRES-ARBOLEDO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 524 So. 2d 403.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88–5276. MCKENZIE *v.* MCCORMICK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 842 F. 2d 1525.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case. But even if I believed that the death penalty could be constitutionally imposed under certain circumstances, I would grant the petition and vacate petitioner's death sentence for the reasons I expressed in *McKenzie* v. *Montana*, 449 U. S. 1050 (1980) (MARSHALL, J., dissenting from denial of certiorari).

No. 88–5281. WILLIAMS *v.* BARWICK. C. A. 11th Cir. Certiorari before judgment denied.

No. 88–5315. WILSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 123 Ill. 2d 113, 526 N. E. 2d 335.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

For the reasons stated in *Lego* v. *Illinois*, *post* this page (MARSHALL, J., dissenting), I would grant the petition in order to resolve the question whether a state court, when recognizing a new federal constitutional rule governing criminal procedure, is bound by the retroactivity principles fashioned by this Court, and if so, whether the principle of retroactivity announced in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), applies to a state-court decision recognizing such a rule, notwithstanding the state court's pre-*Griffith* determination that, under the retroactivity decisions of this Court then in force, the new rule would be given prospective application only. I dissent.

No. 88–5319. LEGO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 116 Ill. 2d 323, 507 N. E. 2d 800.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I would grant the petition in order to resolve the question whether a state court, when recognizing a new federal constitutional rule governing criminal procedure, is bound by the retroactivity principles fashioned by this Court, and if so, whether the principle of retroactivity announced in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), applies to a state-court decision recognizing such a rule, notwithstanding the state court's pre-*Griffith* determination that, under the retroactivity decisions of this Court then in force, the new rule would be given prospective application only.

II

In March 1984, the petitioner was tried in state court for murder. During *voir dire*, the petitioner proposed that the trial court ask the venirepersons whether they "believe[d] in the presumption of innocence as it applies to a person charged with a crime." The trial court refused. The petitioner was subsequently convicted and, after a death penalty hearing, sentenced to death. In his direct appeal to the Illinois Supreme Court, the petitioner argued that the trial court's refusal to ask the proposed question violated *People* v. *Zehr*, 103 Ill. 2d 472, 469 N. E. 2d 1062 (1984), which was issued approximately six months after the petitioner's trial concluded. *Zehr* held that a criminal defendant is deprived of his right to "a fair and impartial jury" by a trial court's refusal to question prospective jurors on their view on the presumption of innocence. *Id.*, at 477, 469 N. E. 2d, at 1064.

The Illinois Supreme Court rejected the petitioner's claim, noting that in *People* v. *Britz*, 112 Ill. 2d 314, 493 N. E. 2d 575 (1986), it had held that *Zehr* would not be applied retroactively because it "'represented a change in Illinois law.'" 116 Ill. 2d 323, 338, 507 N. E. 2d 800, 805 (1987) (quoting *Britz*, *supra*, at 319, 493 N. E. 2d, at 577). Justice Simon dissented, finding that *Britz* could not be squared with this Court's subsequent decision in *Griffith*. In *Griffith*, the Court held that decisions announcing new constitutional rules governing criminal procedure are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U. S., at 328. In so doing, the Court explicitly abandoned the "clear break" exception, under which a new constitutional rule would not be applied retroactively if it represented a substantial departure from past precedent or accepted practice. *Ibid.*

As noted above, the Illinois Supreme Court's *Britz* decision is based on this now-discredited "clear break" exception, but the state court nonetheless insisted on applying it in the petitioner's case for reasons not made clear until *People* v. *Harris*, 123 Ill. 2d 113, 526 N. E. 2d 335 (1988), cert. denied *sub nom. Wilson* v. *Illinois*, *ante*, at 902. There, the state court explained: "*Griffith* was *not* the law on retroactivity at the time this court decided *Britz*. We do not read *Griffith* as requiring us to recon-

sider our earlier holding in *Britz*." *Harris*, *supra*, at 130, 526 N. E. 2d, at 341 (emphasis in original). In other words, the state court believes that it need not apply *Griffith*'s retroactivity rule retroactively.

The difficulty with this view, in my judgment, is that it appears to contradict the very premise of the *Griffith* decision, namely, that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U. S., at 322. Not the least, it "creates the . . . problem of not treating similarly situated defendants the same." *Id.*, at 327.

I am unpersuaded by the respondent's contention that the Illinois Supreme Court was free to ignore this Court's retroactivity principles because *Zehr* was a ruling on state, rather than federal, law. This assertion is belied by the fact that, in *Harris*, the state court understood itself to be bound by federal retroactivity precedents. 123 Ill. 2d, at 129, 526 N. E. 2d, at 341 ("[A]t the time *Britz* was decided this court correctly followed the applicable law on retroactivity as articulated by the United States Supreme Court").* And, as explained in *People* v. *Erickson*, 117 Ill. 2d 271, 513 N. E. 2d 367 (1987), the state court looks to this Court's retroactivity precedents *only* when the rule announced is of federal constitutional dimension. See *id.*, at 289, 513 N. E. 2d, at 374 ("Because *Griffith* addresses a rule which pertains to a constitutional right and the defendant herein seeks retroactive application of a rule which pertains to a statutory right, we do not deem *Griffith* controlling"). It is proper to assume, therefore, that *Zehr* recognizes a federal right.

In any event, this Court typically retains a role when the state court "has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984). Indeed, where it appears, as it does here, that the "state court has proceeded on an incorrect perception of federal law," this Court has stepped in and "reviewed the federal question on which the state-law determination appears to have been premised." *Ibid.* Thus, even if *Zehr* is premised

*Indeed, the only question for the state court in *Harris* was whether the applicable retroactivity precedent for a post-*Griffith* claim based on *Zehr* is *Griffith* itself or a series of cases beginning with *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and culminating with *United States* v. *Johnson*, 457 U. S. 537 (1982).

on state law, the Court may consider the retroactivity of that decision because the Illinois Supreme Court looked solely to our precedents in making its retroactivity determination.

Because the instant case and *People* v. *Harris*, *supra*, raise a substantial issue of federal retroactivity law, I would grant the petitions for certiorari in both cases. I dissent.

Rehearing Denied

No. 87–6489. HOWARD *v.* CITY OF FORT MYERS, FLORIDA, ET AL., 486 U. S. 1044. Petition for rehearing denied.

No. 87–1149. REAGIN *v.* TERRY ET AL., 485 U. S. 906 and 1015. Motion of petitioner for leave to file second petition for rehearing denied.

OCTOBER 13, 1988

Miscellaneous Order

No. A–289. BELL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

OCTOBER 17, 1988

Vacated and Remanded After Probable Jurisdiction Noted

No. 86–1034. VIRGINIA *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL. C. A. 4th Cir. [Probable jurisdiction noted, 479 U. S. 1082; questions certified, 484 U. S. 383.] Judgment vacated and case remanded for further consideration in light of *Virginia* v. *American Booksellers Assn., Inc.*, 236 Va. 168, 372 S. E. 2d 618 (1988).

Certiorari Granted—Reversed. (See No. 88–139, *ante*, p. 1.)

Miscellaneous Orders

No. D–710. IN RE DISBARMENT OF FORD. Disbarment entered. [For earlier order herein, see 486 U. S. 1030.]

No. D–715. IN RE DISBARMENT OF YOUTS. Disbarment entered. [For earlier order herein, see 486 U. S. 1052.]

No. D–737. IN RE DISBARMENT OF WEATHERLY. It is ordered that Gerald Weatherly, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–738. IN RE DISBARMENT OF BURKE. It is ordered that Jerome Joseph Burke, Jr., of West Hempstead, 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.

No. D–739. IN RE DISBARMENT OF BENJAMIN. Motion of Ronald R. Benjamin to be suspended from the practice of law in this Court for six months, *nunc pro tunc*, denied. It is ordered that Ronald R. Benjamin, of Binghamton, 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.

No. 87–201. MANSELL *v.* MANSELL. Ct. App. Cal., 5th App. Dist. [Probable jurisdiction noted, 487 U. S. 1217.] Motion of the Solicitor General for leave to file a brief as *amicus curiae* out of time granted.

No. 87–1245. TEXAS MONTHLY, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL. Ct. App. Tex., 3d Dist. [Probable jurisdiction noted, 485 U. S. 958.] Motion of appellant for leave to file a reply brief out of time denied.

No. 87–1383. UNITED STATES *v.* HALPER. D. C. S. D. N. Y. [Probable jurisdiction noted, 486 U. S. 1053.] John G. Roberts, Jr., Esq., of Alexandria, Va., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 87–1868. MEAD CORP. *v.* TILLEY ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 815.] Motion of respondents to substitute Richard H. Wall, Executor of the Estate of David H. Wall, in place of David H. Wall, deceased, denied.

No. 87–5765. STANFORD *v.* KENTUCKY. Sup. Ct. Ky. The order of October 11, 1988 [*ante*, p. 887], granting the petition for writ of certiorari is amended to read as follows: Motion of peti-

tioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question VIII presented by the petition and case set for oral argument in tandem with No. 87–6026, *Wilkins* v. *Missouri* [certiorari granted, 487 U. S. 1233], in place of No. 87–5666, *High* v. *Zant*, *Warden* [certiorari granted, 487 U. S. 1233].

No. 88–348. NEW ORLEANS PUBLIC SERVICE INC. *v.* COUNCIL OF THE CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–5270. IN RE DENNIS. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 88–389. PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO *v.* BETTS. Appeal from C. A. 6th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 848 F. 2d 692.

Certiorari Granted

No. 88–10. HARTE-HANKS COMMUNICATIONS, INC. *v.* CONNAUGHTON. C. A. 6th Cir. Certiorari granted. Reported below: 842 F. 2d 825.

No. 88–155. TEXAS *v.* JOHNSON. Ct. Crim. App. Tex. Certiorari granted. Reported below: 755 S. W. 2d 92.

No. 88–40. UNITED STATES *v.* ZOLIN ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 809 F. 2d 1411, 842 F. 2d 1135, and 850 F. 2d 610.

Certiorari Denied

No. 87–2006. ILLINOIS *v.* MADISON. Sup. Ct. Ill. Certiorari denied. Reported below: 121 Ill. 2d 195, 520 N. E. 2d 374.

No. 87–2111. EASTER HOUSE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 78.

No. 87–7203. BURTON *v.* EVANS. C. A. 8th Cir. Certiorari denied.

No. 87–7226. GIBBONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1293.

No. 87–7244. AARON *v.* SULLIVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 87-7254. MURPHY *v.* HEDRICK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 845 F. 2d 83.

No. 87-7282. MACIOCE *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 197 Cal. App. 3d 262, 242 Cal. Rptr. 771.

No. 88-121. BARNETTE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 753.

No. 88-146. MATOS *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 88-158. PHOENIX CANADA OIL CO. LTD. *v.* TEXACO PETROLEUM CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 842 F. 2d 1466.

No. 88-169. MORISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 844 F. 2d 1057.

No. 88-173. LINQUIST *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 839 F. 2d 1321.

No. 88-205. CAMPBELL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 1374.

No. 88-255. GARRETT *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 559.

No. 88-313. HALLMARK CARDS, INC., ET AL. *v.* HARTFORD HOUSE, LTD., DBA BLUE MOUNTAIN ARTS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 846 F. 2d 1268.

No. 88-329. BODNAR ET AL. *v.* SYNPOL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 190.

No. 88-330. AMERICAN CYANAMID CO. *v.* ABBOT, A MINOR, WHO SUES BY HER MOTHER AND NEXT FRIEND, ABBOT. C. A. 4th Cir. Certiorari denied. Reported below: 844 F. 2d 1108.

No. 88-331. LANE ET AL. *v.* DAVENPORT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 844 F. 2d 1310.

No. 88-332. REED *v.* MANNHALT. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 576.

No. 88–335. FLIP SIDE PRODUCTIONS, INC., ET AL. *v.* JAM PRODUCTIONS, LTD., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 2d 1024.

No. 88–337. PIERCE COUNTY DISTRICT COURT PROBATION OFFICE ET AL. *v.* ELLIOTT ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–344. OSCAR *v.* CLOVERVALE FOODS PROCESSING, INC. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 88–346. MINIZZA ET AL. *v.* STONE CONTAINER CORP., CORRUGATED CONTAINER DIVISION, EAST PLANT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 842 F. 2d 1456.

No. 88–351. DRINKWATER *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 1st Cir. Certiorari denied. Reported below: 846 F. 2d 821.

No. 88–359. BUTTON ET UX. *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 584.

No. 88–363. FOURNIER ET UX. *v.* PETROLEUM HELICOPTERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1020.

No. 88–365. RIVARD ET AL. *v.* CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 122 Ill. 2d 303, 522 N. E. 2d 1195.

No. 88–368. KOCH *v.* CITY OF HUTCHINSON, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 847 F. 2d 1436.

No. 88–430. DRASEN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 731.

No. 88–457. NELSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 852 F. 2d 706.

No. 88–471. MARTIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 1239.

No. 88–475. DE IZAGUIRRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 851 F. 2d 363.

No. 88–498. SCARFO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 1015.

No. 88–501. LEIGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 88–509. GIACALONE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 470.

No. 88–5004. HILL *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1291.

No. 88–5104. HARDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1229.

No. 88–5160. SITTING HOLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 856.

No. 88–5222. GACHO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 122 Ill. 2d 221, 522 N. E. 2d 1146.

No. 88–5266. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 186.

No. 88–5344. BOBO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 37 Ohio St. 3d 177, 524 N. E. 2d 489.

No. 88–5352. BOWENS *v.* SNOW, CHAIRMAN, GEORGIA BOARD OF PARDONS AND PAROLES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 930.

No. 88–5364. SULLIVAN ET UX. *v.* CRAWFORD ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–5365. SZEMBORSKI *v.* BONANZA INVESTMENT CO. Ct. App. Wis. Certiorari denied.

No. 88–5366. TAYLOR *v.* BUNGE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 498.

No. 88–5367. ROSS *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 2d 1470.

No. 88–5369. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88–5370. SIMMONS *v.* VOGLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 606.

No. 88–5372. JONES *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 62.

No. 88–5386. SINDRAM *v.* TAYLOR. Ct. App. D. C. Certiorari denied.

No. 88–5387. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 691.

No. 88–5401. COWLING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 198.

No. 88–5402. OPPEL *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 851 F. 2d 34.

No. 88–5405. IDDEEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 359.

No. 88–5409. PACHECO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–5413. PEPPARD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 2d 1072.

No. 88–5417. BRUNOT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 929.

No. 88–5423. KELLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 850 F. 2d 212.

No. 88–5427. COLLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1290.

No. 88–5431. WISSEH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 75.

No. 88–5444. LARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1419.

No. 88–5453. RODRIGUEZ-QUINONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 930.

No. 88–5456. HURTADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1020.

No. 88–5457. BAUER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 88–5458. DUTY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 2d 1470.

No. 88–5460. SERVIDIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 923.

No. 88–5463. LITTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 610.

No. 88–5466. PARKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 569.

No. 88–5476. MADAMBA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1090.

No. 88–5484. MADRID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1090.

No. 88–5485. SCATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 75.

No. 88–5490. GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 607.

No. 88–5494. RODRIGUEZ-DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1290.

No. 88–5499. SANDOVAL VARGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 854 F. 2d 1132.

No. 88–5502. LOCKE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 527 So. 2d 1347.

No. 87–1942. FLORIDA *v.* BROWN. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 521 So. 2d 110.

No. 88–345. FLORIDA *v.* BELCHER. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 520 So. 2d 303.

No. 87-6703. METHENY *v.* HAMBY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 672.

JUSTICE WHITE, dissenting.

This case and one other in which the Court denies certiorari today—*Bryant* v. *United States*, No. 87-7322, *post*, p. 916—present the question whether violations of the Interstate Agreement on Detainers (IAD) are cognizable in federal habeas corpus proceedings.

I

The IAD question is one that has divided the Courts of Appeals. Most of the Circuits have held that violations of the IAD, without more, do not make out a claim for relief under either 28 U. S. C. § 2254 or § 2255.[1] In this case, the Sixth Circuit found that petitioner could not obtain habeas relief for an IAD violation in a proceeding brought under § 2254; in the other case disposed of today, *Bryant*, *supra*, the Fourth Circuit reached a similar conclusion with respect to a § 2255 action. This majority position among the Courts of Appeals, however, has been rejected by at least two Circuits, with a third also somewhat in disagreement.[2] This issue has been presented to the Court for its consideration on several occasions in the past; the Court has, unfortunately, refused to resolve this persistent conflict among the lower federal courts. See, *e. g.*, *Haskins* v. *Virginia*, 484 U. S. 1037 (1988) (WHITE, J., dissenting); *Kerr* v. *Finkbeiner*, 474 U. S. 929 (1985) (WHITE, J., dissenting).

Once again, I dissent from this Court's denial of review on this question. There is nothing to commend having habeas corpus

[1] The majority rule, holding that IAD violations, without more, do not state a claim for habeas relief, has been adopted by the Fourth and Sixth Circuits (as illustrated by these two cases) as well as the First Circuit, *Fasano* v. *Hall*, 615 F. 2d 555, 558, cert. denied, 449 U. S. 867 (1980); the Second, *Edwards* v. *United States*, 564 F. 2d 652, 654 (1977); the Eighth, *Shigemura* v. *United States*, 726 F. 2d 380, 381 (1984); the Tenth, *Greathouse* v. *United States*, 655 F. 2d 1032, 1034 (1981), cert. denied, 455 U. S. 926 (1982); and the Eleventh, *Seymore* v. *Alabama*, 846 F. 2d 1355, 1356-1357 (1988).

[2] The Seventh Circuit has held that violations of the IAD are cognizable in federal habeas proceedings, *Webb* v. *Keohane*, 804 F. 2d 413, 414 (1986), as has the Third Circuit, *United States* v. *Williams*, 615 F. 2d 585, 590-591 (1980). The Ninth Circuit has found that certain IAD violations are cognizable in federal habeas, while others are not. Compare *Carlson* v. *Hong*, 707 F. 2d 367, 368 (1983), with *Cody* v. *Morris*, 623 F. 2d 101, 102 (1980).

available in some Circuits and not in others. I would grant certiorari in this case to resolve the split of authority among the Courts of Appeals.

II

These two IAD cases, however, are not the only two presenting conflicts among the courts over the interpretation of federal statutes (or constitutional provisions), on which the Court has denied review already this Term. In 14 other cases this Term, the Court has declined to review judgments which created or exacerbated existing splits in authority among the state and/or federal courts. See, *e. g.*, *Texas* v. *Modgling*, *ante*, p. 898; *Boyle* v. *Illinois*, *ante*, p. 898; *Lauritzen* v. *McLaughlin*, *ante*, p. 898; *Cleveland Newspaper Guild* v. *Plain Dealer Publishing Co.*, *ante*, p. 899; *Hartenstine* v. *Superior Court*, *ante*, p. 899; *Young* v. *Langley*, *ante*, p. 898; *Kahn* v. *Avnet, Inc.*, *ante*, p. 898; *Feaster* v. *United States*, *ante*, p. 898; *Gruenholz* v. *United States*, *ante*, p. 898; *Union Pacific R. Co.* v. *Moritz*, *ante*, p. 899; *Kreisher* v. *Mobil Oil Corp.*, *ante*, p. 899; *Robinson* v. *Connecticut*, *ante*, p. 899; *Stamler* v. *Zamboni*, *ante*, p. 899; and *Torres-Arboledo* v. *Florida*, *ante*, p. 901.

I noted my dissent from the denial of review in all of these cases. Most of them present questions of the proper interpretation of federal statutes and a few involve questions of constitutional interpretation. These questions concern issues that have divided the Courts of Appeals (or, in some instances, the state courts), and require our attention when it is so apparent that some persons are being protected or being sanctioned by the federal law and others are not.

I also note that the Court granted certiorari (or noted probable jurisdiction) so far this Term in at least 12 cases which, like these, raise questions of federal statutory interpretation that had divided the lower courts. See, *e. g.*, *Lorance* v. *AT&T Technologies, Inc.*, *ante*, p. 887; *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, *ante*, p. 815; *California* v. *ARC America Corp.*, *ante*, p. 814; *Federal Savings & Loan Insurance Corp.* v. *Ticktin*, *ante*, p. 815; *Mead Corp.* v. *Tilley*, *ante*, p. 815; *Neitzke* v. *Williams*, *ante*, p. 816; *Finley* v. *United States*, *ante*, p. 815; *Hardin* v. *Straub*, *ante*, p. 887; *Lauro Lines s. r. l.* v.

Chasser, *ante*, p. 887; *Massachusetts* v. *Morash*, *ante*, p. 815; *Missouri* v. *Jenkins*, *ante*, p. 888; and *Duckworth* v. *Eagan*, *ante*, p. 888. It is not immediately apparent to me—as it must not be to litigants in the cases in which certiorari was denied, or to judges in the federal and state court systems—why the Court granted certiorari in these 12 cases, but not in the previously listed 16 in which I have dissented or am dissenting from the denial of review.

This is not to say that review should not have been granted in the 12 cases that will be reviewed. To the contrary: where cases present issues over which the federal and state courts have divided, this Court has a special obligation to intercede and provide some definitive resolution of the issues. Cf. this Court's Rule 17. Rather, my point is that this Court is only fulfilling this role with respect to some of the cases brought here on review, and not others—and the method by which it distinguishes between the two is elusive, to say the least. This is the principal reason why I have dissented from so many of the Court's decisions to deny certiorari in the past: almost 200 times in the past three Terms.

As I see it, the reason the Court grants review in some of these cases, but does not do so in many others, is the limitation placed on the Court's docket by its resources: its finite ability to hear arguments and issue decisions in only a given number of cases in each Term. The Court would rather give prompt attention to all cases in which it grants review than grant review in a larger number of cases in any Term than it can hear in a single Term, for to do the latter would necessarily afford only delayed review in every case in which plenary consideration is granted. That may well be a justifiable course of action, but it does tend to conceal the fact that many cases that deserve review are being denied review.

It is also clear that, so far this Term, the Court has limited its argument intake to a modest number. In our first two conferences this Term, we denied review in 1,074 cases, and granted review in 32.[3] We thus granted review in 2.8% of the petitions acted upon. Should we continue to grant review at this rate for the rest of the Term, and if the applications for review acted upon this Term total 4,650 (3% more than last Term), we will have

[3] Of the cases in which review was denied, 460 were "paid" cases while 614 were brought *in forma pauperis*. Among the granted cases, 29 were "paid" and 3 were *in forma pauperis*.

granted review in only 130 cases—considerably less than the 170 cases we have been deciding each Term (which would likely be disposed of in approximately 150 hours of argument time and 150 opinions).

No. 87–7311. POINDEXTER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 36 Ohio St. 3d 1, 520 N. E. 2d 568.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I believe the Court should reserve judgment on this petition pending our disposition of *Dugger* v. *Adams* No. 87–121, cert. granted, 485 U. S. 933 (1988). The petitioner here, like the petitioner in *Adams*, claims that a jury instruction stressing the preliminary nature of the jury's decision so minimized the jury's sense of responsibility for its decision and so increased the likelihood of a recommendation of death as to be unconstitutional under *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), despite the accuracy of the instruction. Notwithstanding the similarity of the petitioners' claims, the Court denies certiorari in the instant case without waiting to consider what light the *Adams* case will shed on the issues here. Because I consider such haste inappropriate, particularly when a man's life hangs in the balance, I dissent.

No. 87–7322. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari for the reasons set forth in his dissent in No. 87–6703, *Metheny* v. *Hamby, Warden, et al.*, *supra*. Reported below: 846 F. 2d 74.

No. 88–115. UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSN. (BERMUDA) LTD. ET AL. *v.* STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING. C. A. 11th Cir. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 838 F. 2d 1576.

No. 88–153. TEXACO PETROLEUM CO. ET AL. *v.* PHOENIX CANADA OIL CO. LTD. C. A. 3d Cir. Motion of Rule of Law Commit-

tee for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 842 F. 2d 1466.

No. 88–191. UNITED GAS PIPE LINE CO. *v.* LOUISIANA POWER & LIGHT CO. ET AL. Ct. App. La., 4th Cir. Motion of Interstate Natural Gas Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 517 So. 2d 145.

No. 88–220. VIELLE *v.* BAISLEY. Ct. App. Colo. Motion of Blackfeet Tribe of the Blackfeet Reservation in Montana for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 749 P. 2d 446.

No. 88–247. PRUDENTIAL-BACHE SECURITIES, INC. *v.* FINN ET UX. Dist. Ct. App. Fla., 4th Dist. Motion of respondents for award of attorney's fees and costs denied. Certiorari denied. Reported below: 523 So. 2d 617.

No. 88–274. WILSON *v.* HARELSON ET AL. C. A. 9th Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 854 F. 2d 1141.

No. 88–5173. SPREITZER *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88–5193. ENOCH *v.* ILLINOIS. Sup. Ct. Ill.; and
No. 88–5432. ODLE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 88–5173, 123 Ill. 2d 1, 525 N. E. 2d 30; No. 88–5193, 122 Ill. 2d 176, 522 N. E. 2d 1124; No. 88–5432, 45 Cal. 3d 386, 754 P. 2d 184.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

OCTOBER 18, 1988

Miscellaneous Order

No. 65, Orig. TEXAS *v.* NEW MEXICO. It is ordered that D. Monte Pascoe, Esq., of Denver, Colo., be appointed Special Master in place of Charles J. Meyers, deceased.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subse-

quent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, *ante*, p. 808.]

OCTOBER 19, 1988

Dismissal Under Rule 53

No. 87–163. UNITED STATES ARMY CORPS OF ENGINEERS ET AL. *v.* AMERON, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 485 U. S. 958.] Writ of certiorari dismissed under this Court's Rule 53.

Miscellaneous Order

No. A–317. ARMONTROUT, WARDEN *v.* MERCER. Application of the Attorney General of Missouri for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

OCTOBER 25, 1988

Miscellaneous Order

No. A–305 (88–5687). EDWARDS *v.* SCROGGY, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE SCALIA took no part in the consideration or decision of this application.

OCTOBER 28, 1988

Miscellaneous Order

No. A–319. WOODS *v.* FLORIDA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

OCTOBER 31, 1988

Appeals Dismissed

No. 87–2058. CORNHUSKER CHRISTIAN CHILDRENS HOME, INC. *v.* DEPARTMENT OF SOCIAL SERVICES OF NEBRASKA ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 227 Neb. 94, 416 N. W. 2d 551.

No. 88–177. VECO INTERNATIONAL, INC., ET AL. *v.* ALASKA PUBLIC OFFICES COMMISSION. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. Reported below: 753 P. 2d 703.

No. 88–228. ST. HILAIRE *v.* MAINE. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 543 A. 2d 824.

No. 88–320. KAMMER *v.* YOUNG. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 73 Md. App. 565, 535 A. 2d 936.

No. 88–413. BOVINO *v.* MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–5439. IKENI *v.* CALIFORNIA SUPERIOR COURT OF FRESNO COUNTY ET AL. Appeal from Ct. App. Cal., 5th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–5464. BULLER ET AL. *v.* HURLEY STATE BANK. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 428 N. W. 2d 545.

No. 88–381. GEEVER ET UX. *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 122 Ill. 2d 313, 522 N. E. 2d 1200.

Vacated and Remanded After Certiorari Granted

No. 87–1467. EXXON CO., U. S. A. *v.* BANQUE DE PARIS ET DES PAYS-BAS. C. A. 5th Cir. [Certiorari granted, 485 U. S. 1020.] Judgment vacated and case remanded for further consideration in light of *Kerr Construction Co.* v. *Plains National Bank*, 753 S. W. 2d 181 (Tex. App. 1987).

Certiorari Granted—Reversed. (See No. 88–161, *ante*, p. 9.)

Certiorari Granted—Vacated and Remanded

No. 88–28. ONWUASOANYA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the proceedings arising out of petitioner's Rule 41(3) motion as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 38–39 (1950). Reported below: 265 U. S. App. D. C. 224, 830 F. 2d 372.

No. 88–41. BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES ET AL. *v.* AKINS ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312 (1988). Reported below: 840 F. 2d 1371.

Miscellaneous Orders

No. A–253. ROGGIO *v.* UNITED STATES. Application for release pending appeal, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion for allowance of fees and disbursements on behalf of the late Charles J. Meyers, Special Master, granted, and the allocation for total services and disbursements set forth in the motion approved. This amount is to be paid equally by the parties. JUSTICE STEVENS took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 917.]

No. 112, Orig. WYOMING *v.* OKLAHOMA. Motion of defendant to dismiss the complaint denied. Defendant is allowed 30 days within which to file an answer. [For earlier order herein, see 487 U. S. 1231.]

No. 87–201. MANSELL *v.* MANSELL. Ct. App. Cal., 5th App. Dist. [Probable jurisdiction noted, 487 U. S. 1217.] Motion of Women's Equity Action League et al. for leave to file a brief as *amici curiae* granted.

No. 87–1855. GILHOOL, SECRETARY OF EDUCATION OF PENNSYLVANIA *v.* MUTH ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion of respondent Russell A. Muth for leave to proceed further herein *in forma pauperis* granted.

No. 87–1939. BARNARD, CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS *v.* THORSTENN ET AL.; and

No. 87–2008. VIRGIN ISLANDS BAR ASSN. *v.* THORSTENN ET AL. C. A. 3d Cir. [Certiorari granted, 487 U. S. 1232.] Motion of Paul Hoffman et al. for leave to file a brief as *amici curiae* granted.

No. 87–2066. W. S. KIRKPATRICK & CO., INC., ET AL. *v.* ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL. C. A. 3d Cir.; and

No. 88–399. HAMMOND *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 88–317. DUCKWORTH *v.* EAGAN. C. A. 7th Cir. [Certiorari granted, *ante*, p. 888.] Motion for appointment of counsel

granted, and it is ordered that Howard B. Eisenberg, Esq., of Carbondale, Ill., be appointed to serve as counsel for respondent in this case.

No. 88–5412. FOY ET VIR *v.* NORTHEAST SUBURBAN LIFE. Ct. App. Ohio, Hamilton County. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until November 21, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5416. CHRISTIAN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 21, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5480. WEIGANG *v.* PEARL RIVER COUNTY BOARD OF SUPERVISORS ET AL. Appeal from Cir. Ct. Pearl River County, Miss. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until November 21, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5487. IN RE BALAWAJDER. Petition for writ of mandamus denied.

No. 88–5318. IN RE YOUNGS-SETTLE;
No. 88–5354. IN RE DOUGLASS; and
No. 88–5400. IN RE RADVAN-ZIEMNOWICZ. Petitions for writs of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87–2127. AMERICAN FOREIGN SERVICE ASSN. ET AL. *v.* GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 688 F. Supp. 671.

Certiorari Granted

No. 88–411. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GIARRATANO ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 847 F. 2d 1118.

Certiorari Denied. (See also Nos. 88–320, 88–413, 88–5439, and 88–5464, *supra.*)

No. 87–1350. O. N. E. SHIPPING, LTD. *v.* FLOTA MERCANTE GRANCOLOMBIANA, S. A., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 830 F. 2d 449.

No. 87–7129. SCARTZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 876.

No. 87–7143. COSENTINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 2d 30.

No. 87–7159. CLAWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 909.

No. 87–7168. WOLF ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 839 F. 2d 1387.

No. 87–7170. WHITTINGTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 523 So. 2d 966.

No. 87–7223. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 837 F. 2d 415.

No. 87–7228. DAILEY *v.* WEST VIRGINIA DEPARTMENT OF WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1290.

No. 87–7243. LEMERON *v.* POWERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1291.

No. 87–7276. BAGLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 837 F. 2d 371.

No. 87–7284. MARTIN *v.* MORRIS. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

No. 87–7347. SOSA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 843 F. 2d 155.

No. 88–12. MORTON ET UX. *v.* GARDNER, EXECUTIVE DIRECTOR, DEPARTMENT OF NATURAL RESOURCES OF FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 513 So. 2d 725.

No. 88–20. BRADSHAW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 871.

No. 88–37. CARLIN COMMUNICATIONS, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 837 F. 2d 546.

No. 88–120. VANCASPEL ET AL. *v.* CORWIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 194.

No. 88–168. KANSAS *v.* CLOTHIER. Sup. Ct. Kan. Certiorari denied. Reported below: 243 Kan. 81, 753 P. 2d 1267.

No. 88–170. BENGIVENGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 593.

No. 88–189. BELL ATLANTIC *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 436, 846 F. 2d 1422.

No. 88–197. ITHACA INDUSTRIES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 116.

No. 88–202. HERRERA-DIAZ, A MINOR, BY AND THROUGH HIS GUARDIAN, HERRERA-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 1534.

No. 88–210. MURPHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 248.

No. 88–215. HOHRI ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 779.

No. 88–218. PIERSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 166 Ill. App. 3d 558, 519 N. E. 2d 1185.

No. 88–237. NOEL *v.* DEPARTMENT OF SANITATION OF CITY OF NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 88–244. OLITSKY *v.* SPENCER GIFTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 123.

No. 88–245. CLARIDGE HOTEL & CASINO *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 846 F. 2d 180.

No. 88–252. HARTNESS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 158.

No. 88–256. WINTER *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 851 F. 2d 1056.

No. 88–304. MAYON *v.* SOUTHERN PACIFIC TRANSPORTATION CO. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 1122.

No. 88–323. RAKOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1018.

No. 88–324. HASTINGS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 847 F. 2d 920.

No. 88–364. LACHMAN ET UX., ON BEHALF OF LACHMAN, A MINOR *v.* ILLINOIS STATE BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 852 F. 2d 290.

No. 88–369. DRAKE PUBLISHERS, INC., DBA HIGH SOCIETY MAGAZINE *v.* SAMAD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1015.

No. 88–376. NELSON *v.* NELSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF NELSON. Sup. Ct. Ill. Certiorari denied. Reported below: 122 Ill. 2d 343, 522 N. E. 2d 1214.

No. 88–382. WALKER *v.* ENDELL, DIRECTOR OF ALASKA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 850 F. 2d 470.

No. 88–384. LAGOS *v.* MODESTO CITY SCHOOLS DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 347.

No. 88–386. YELLOW BUS LINES, INC., ET AL. *v.* DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 639, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 103, 839 F. 2d 782.

No. 88–391. KRAJEWSKI, INDIVIDUALLY AND IN HIS CAPACITY AS JUDGE OF THE LAKE COUNTY COURT, DIVISION III *v.* KUROWSKI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 767.

No. 88–392. STEPHENSON *v.* PAINE, WEBBER, JACKSON & CURTIS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 839 F. 2d 1095.

No. 88–393. TEAM, INC., ET AL. *v.* OVERSTREET ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 1476.

No. 88–403. AMERICAN BOARD OF ENDODONTICS ET AL. *v.* LANIER. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 901.

No. 88–404. DAVIS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 855, 809 P. 2d 601.

No. 88–408. MIDDLE SOUTH UTILITIES, INC., ET AL. *v.* ISQUITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 186.

No. 88–414. CLUETT, PEABODY & CO., INC. *v.* LHLC CORP. C. A. 7th Cir. Certiorari denied. Reported below: 842 F. 2d 928.

No. 88–416. BENSON *v.* BEARB ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 359.

No. 88–417. TEXAS EXTRUSION CORP. ET AL. *v.* LOCKHEED CORP. C. A. 5th Cir. Certiorari denied. Reported below: 844 F. 2d 1142.

No. 88–418. SHANKS ET AL. *v.* ESTES PARK BANK. Ct. App. Colo. Certiorari denied.

No. 88–419. GRABNER *v.* CONTI. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 918.

No. 88–422. RADO *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 14 Conn. App. 322, 541 A. 2d 124.

No. 88–426. AUBURN NATIONAL BANK OF AUBURN *v.* SANDA ET AL. Ct. App. Ind. Certiorari denied. Reported below: 514 N. E. 2d 309.

No. 88–432. GABRIEL ELECTRONICS, INC. *v.* ANDREW CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 819.

No. 88–433. TERRYDALE LIQUIDATING TRUST *v.* BARNESS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 846 F. 2d 845.

No. 88–435. GEEAR *v.* BOULDER COMMUNITY HOSPITAL. C. A. 10th Cir. Certiorari denied. Reported below: 844 F. 2d 764.

No. 88–438. DOZIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 701.

No. 88–444. LOTT *v.* FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 742 S. W. 2d 730.

No. 88–445. BROAD ET UX. *v.* CONWAY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1467.

No. 88–455. DE WIEST *v.* TARLETON STATE UNIVERSITY. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1021.

No. 88–460. PAYNE *v.* GANNON. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 88–466. TRINSEY *v.* STATE ETHICS COMMISSION OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–476. DELUMEN *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied.

No. 88–531. SOLEM, WARDEN, ET AL. *v.* VOSBURG. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 763.

No. 88–546. MORDEROSIAN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1292.

No. 88–547. WATTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 134.

No. 88–551. ANGIULO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 847 F. 2d 956.

No. 88–562. COLE *v.* WELLS. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 189.

No. 88–563. KRAMER *v.* DEPARTMENT OF COMMERCE. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1293.

No. 88–566. THAME *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 846 F. 2d 200.

No. 88–574. STRAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1383.

No. 88–5005. JAMES *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88–5022. TURNER *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 165.

No. 88–5071. HOLZER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 822.

No. 88–5092. HOFFMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 367 Pa. Super. 79, 532 A. 2d 463.

No. 88–5099. FORD *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 677.

No. 88–5143. ROBINSON *v.* WILLIAMS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 73.

No. 88–5164. JOHN LEWIS S. *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 199 Cal. App. 3d 441, 245 Cal. Rptr. 17.

No. 88–5211. SMITH *v.* ORR, SECRETARY, DEPARTMENT OF THE AIR FORCE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5249. PUNCHARD *v.* UNITED STATES DISTRICT COURT. C. A. 10th Cir. Certiorari denied.

No. 88–5273. REDDY *v.* COOMBE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 846 F. 2d 866.

No. 88–5274. CATTOUSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 846 F. 2d 144.

No. 88–5322. GLIGORIJEVIC *v.* KEAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–5325. FAIRCHILDE *v.* EARNST ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 182.

No. 88–5326. FAIRCHILDE *v.* HODEL, SECRETARY OF THE INTERIOR. C. A. 3d Cir. Certiorari denied.

No. 88–5360. SHINN *v.* UNITED STATES DEPARTMENT OF THE ARMY. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 184.

No. 88–5368. STEBBINS *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 88–5377. FERENC *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 88–5378. COLLIER *v.* JONES. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 338.

No. 88–5388. WILSON *v.* MANN, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–5390. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 607.

No. 88–5391. LINKOUS *v.* OLINGER. Cir. Ct. Va., Montgomery County. Certiorari denied.

No. 88–5394. KALTENBACH *v.* STALDER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 88–5396. GILMORE *v.* KANSAS PAROLE BOARD. Sup. Ct. Kan. Certiorari denied. Reported below: 243 Kan. 173, 756 P. 2d 410.

No. 88–5399. O'DELL *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied.

No. 88–5408. DELGADILLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5410. KROHE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 162 Ill. App. 3d 1172, 528 N. E. 2d 1117.

No. 88–5411. JOHNSON *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 88–5418. BUTCHER *v.* JOHNSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5419. SMITH *v.* SUMNER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 502.

No. 88–5422. NEAL *v.* CITY OF DAYTON, OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 88–5424. JOHNSON *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 605.

No. 88–5430. PRENZLER *v.* SUPERIOR COURT OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5433. SCRUGGS *v.* MOELLERING ET AL. C. A. 7th Cir. Certiorari denied.

No. 88–5434. SKATZES *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 1474.

No. 88–5441. DOLENC *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5448. ARMSTEAD *v.* MAYS. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 838.

No. 88–5449. BROWN *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1325.

No. 88–5451. THOMPSON *v.* SOUTHEASTERN TOYOTA DISTRIBUTORS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 754.

No. 88–5452. MAY *v.* WARNER AMEX CABLE COMMUNICATIONS. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 192.

No. 88–5455. HARSTON *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 191.

No. 88–5467. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–5469. HOLMES, AKA RICHARDS, ET AL. *v.* HARDY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 852 F. 2d 151.

No. 88–5471. JOHNSON *v.* TEXAS DEPARTMENT OF CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1419.

No. 88–5472. COLLINS ET VIR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 854 F. 2d 1327.

No. 88–5474. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 848 F. 2d 906.

No. 88–5477. SMITH *v.* BARRETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 186.

No. 88–5479. SOHMER *v.* FREEMAN, SUPERINTENDENT, STATE CORRECTION INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5482. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1393.

No. 88–5493. STEPHENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 1212.

No. 88–5501. CASTANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 927.

No. 88–5503. GENSLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 239, 527 N. E. 2d 1209.

No. 88–5511. BIGG *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1294.

No. 88–5518. FERRELL *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTION, CHILLICOTHE, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 331.

No. 88–5525. KUNTZE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 149.

No. 88–5527. LEISURE *v.* UNITED STATES;
No. 88–5528. LEISURE *v.* UNITED STATES; and
No. 88–5529. LEISURE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 1347.

No. 88–5533. ANDERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–5535. APODACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 843 F. 2d 421.

No. 88–5537. BOGGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1290.

No. 88–5541. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 183.

No. 88–5553. BUSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 924.

No. 88–5554. BIRDSELL *v.* SCHMIDT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 839.

No. 88–5564. FLEMING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 151.

No. 88–5567. SCHARDAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1457.

No. 88–5571. ORCHARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 1315.

No. 88–5585. WHITTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 195.

No. 88–5587. ZAVALA-SERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 864.

No. 88–5637. BARBER *v.* COOPER, SUPERINTENDENT, SHADOW MOUNTAIN CORRECTIONAL FACILITY, CANON CITY, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–1908. NOVAK *v.* MUTUAL OF OMAHA INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 397.

JUSTICE WHITE, dissenting.

A question presented in this case is whether a district court's finding of a likelihood of confusion in a trademark infringement matter under § 43(a) of the Lanham Trade-Mark Act, 60 Stat. 441, 15 U. S. C. § 1125(a), is reviewable under the "clearly erroneous" standard, as a finding of fact, or *de novo*, as a conclusion of law. I have noted before that federal courts disagree over this question. See *Euroquilt, Inc.* v. *Scandia Down Corp.*, 475 U. S. 1147 (1986) (WHITE, J., dissenting from denial of certiorari); *Elby's Big Boy of Steubenville, Inc.* v. *Frisch's Restaurants, Inc.*, 459 U. S. 916 (1982) (same). I would grant certiorari to resolve the conflict.

No. 87–1951. MICHIGAN *v.* BROWER. Ct. App. Mich. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 164 Mich. App. 242, 416 N. W. 2d 397.

No. 88–242. COOLEY *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 269 U. S. App. D. C. 136, 843 F. 2d 1464.

No. 88–340. PERUMAL ET AL. *v.* SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 198 Cal. App. 3d 64, 243 Cal. Rptr. 545.

No. 88–371. VERMONT *v.* PRESTON. Sup. Ct. Vt. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 150 Vt. 511, 555 A. 2d 360.

No. 88–387. ALCAN ALUMINIO DO BRASIL, S. A. *v.* HERNANDEZ. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 525 So. 2d 892.

No. 88–427. HARMON ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 88–441. KOZAKIEWICZ ET AL. *v.* BORING ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 853 F. 2d 916.

No. 88–5519. SALINAS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to file portions of petition for writ of certiorari under seal granted. Certiorari denied. Reported below: 853 F. 2d 924.

No. 88–5001. DUNCAN *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 88–5162. LITTLE *v.* TEXAS. Ct. Crim. App. Tex.;
No. 88–5342. LIGHTBOURNE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.;
No. 88–5382. MELTON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5406. HOLIDAY *v.* GEORGIA. Sup. Ct. Ga.;
No. 88–5420. HARRELL *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 88–5443. SMITH *v.* INDIANA. Sup. Ct. Ind.;
No. 88–5445. DYER *v.* CALIFORNIA. Sup. Ct. Cal.; and
No. 88–5446. COLE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 88–5162, 758 S. W. 2d 551; No. 88–5342, 829 F. 2d 1012; No. 88–5382, 44 Cal. 3d 713, 750 P. 2d 741; No. 88–5406, 258 Ga. 393, 369 S. E. 2d 241; No. 88–5420, 526 So. 2d 646; No. 88–5443, 516 N. E. 2d 1055; No. 88–5445, 45 Cal. 3d 26, 753 P. 2d 1; No. 88–5446, 525 So. 2d 365.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 87–2097. CARDIN *v.* MARYLAND, *ante*, p. 827. Petition for rehearing denied.

No. 87–5734. SINDRAM *v.* READING, 484 U. S. 1013. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

NOVEMBER 2, 1988

Dismissal Under Rule 53

No. 88–5498. QUINCY *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 852 F. 2d 1290.

Certiorari Denied

No. 88–5815 (A–359). FRANKLIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 860 F. 2d 165.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

NOVEMBER 7, 1988

Dismissal Under Rule 53

No. 87–451. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR WESTSIDE FEDERAL SAVINGS & LOAN ASSN. *v.* STEVENSON ASSOCIATES ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 811 F. 2d 1209.

Affirmed on Appeal. (See No. 87–1961, *ante*, p. 15.)

Appeals Dismissed

No. 88–461. KIMBER PETROLEUM CORP. *v.* DAGGETT, ACTING COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL

PROTECTION. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 110 N. J. 69, 539 A. 2d 1181.

No. 88–477. MONASTERO ET AL. *v.* NEBRASKA. Appeal from Sup. Ct. Neb. dismissed for want of jurisdiction. Reported below: 228 Neb. 818, 424 N. W. 2d 837.

No. 88–478. STERNER ET AL. *v.* JONES ET AL. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–363. DAUGHERTY *v.* FLORIDA ET AL.; and

No. A–366. DAUGHERTY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Applications for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE STEVENS would grant the applications.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN joins as to Part II, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the stay of execution.

II

Even were I not of the foregoing view, I would vote to grant Mr. Daugherty's applications for a stay of execution and hold his case pending our decision in *Adams* v. *Dugger*, No. 87–121, cert. granted, 485 U. S. 933 (1988). I reach this conclusion not only because of the similarity of the claims raised by Adams and Daugherty, but also because I do not see a basis for distinguishing Daugherty's case from others that we already have agreed to hold for *Adams*.

In September of this year, we granted a stay of execution in *Preston* v. *Florida*, 487 U. S. 1265, on the assumption that we would hold Preston's case pending decision in *Adams*. In *Preston*, the prosecutor and trial judge had made statements empha-

sizing that the jury's sentence was merely advisory and that the judge remained responsible for the sentence ultimately imposed. Since we granted the stay without knowing the precise nature of those remarks (neither party quoted them to us), we do not know whether the statements made at Daugherty's sentencing hearing were any different from those made at Preston's. Given this uncertainty, we are hardly in a position to deny Daugherty's application for a stay on the ground that Preston's *Caldwell* claim, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), was more substantial than Daugherty's.

In this case, the prosecutor told that jury that its verdict was "advisory," that the trial judge had the "final say" as to the sentence, and that the judge "is the last person who will consider what the penalty is going to be" and thus serves as a "buffer" to make sure that mistakes do not occur. Application 17. Several cases that we have held for *Adams* present facts strikingly similar to these. In *Ford* v. *Dugger*, No. 88–5582, for example, the judge told the jury several times that its sentence was "advisory" and "not binding on the court." Pet. for Cert. in No. 88–5582, p. 11. In *Spisak* v. *Ohio*, No. 88–5169, the judge stated that the jury's recommendation was "just that, a recommendation," and that "the final decision is placed by law upon the court." Pet. for Cert. in No. 88–5169, p. 15. The jury in *Grossman* v. *Florida*, No. 88–5136, learned from the prosecutor that the "judge is the one" who makes the sentencing decision and "ultimately passes sentence," that the jury's "recommendation to him is that only, a recommendation," and that "the judge will do that" (that is, impose the sentence of death), Pet. for Cert. in No. 88–5136, p. 10; in response, the judge told the jury: "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." *Id.*, at 11. Finally, in *Harich* v. *Dugger*, No. 88–5216, the judge told the jury that its verdict was merely a "recommendation to the Court," that the court "pronounces whatever sentence it sees fit," that "the penalty is for the court to decide," and that the "final decision as to . . . punishment . . . rests solely upon the judge." Brief in Opposition in No. 88–5216, p. 3. I am unable to conclude that the jury in Daugherty's case received a message significantly different from that received by the juries in *Ford*, *Spisak*, *Grossman*, and *Harich*.

The difference between those four cases and this one is that a warrant has been issued for Mr. Daugherty's execution whereas

none had been issued in those other cases. I hope, however, that this does not count for us as a relevant difference. We held *Ford*, *Spisak*, *Grossman*, and *Harich* for a reason; we held them because our decision in *Adams* might shed new light on, or destroy altogether, the conclusions of the courts below. We did not refuse to hold them because their results were unlikely to change after *Adams*. I should think that, where the question is whether a man lives or dies, we should be if anything more willing to allow that a pending case might shed new light on his case.

In any event, *Preston*, like this case, involved an application for a stay—and we granted it.

No. D–699. IN RE DISBARMENT OF HOPKINS. Disbarment entered. [For earlier order herein, see 485 U. S. 1002.]

No. D–726. IN RE DISBARMENT OF CHOWANIEC. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–727. IN RE DISBARMENT OF BLUMTHAL. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–740. IN RE DISBARMENT OF SMITH. It is ordered that Russell B. Smith III, of Houston, Tex., 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. 87–1022. BOARD OF ESTIMATE OF CITY OF NEW YORK ET AL. *v.* MORRIS ET AL.; and

No. 87–1112. PONTERIO *v.* MORRIS ET AL. C. A. 2d Cir. [Probable jurisdiction noted, 485 U. S. 986.] Motion of appellant Frank V. Ponterio for divided argument and for additional time for oral argument denied.

No. 87–1437. BLANTON ET AL. *v.* CITY OF NORTH LAS VEGAS, NEVADA. Sup. Ct. Nev. [Certiorari granted, 487 U. S. 1203.] Motion of City of Las Vegas, Nev., for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 87–1614. MARTIN ET AL. *v.* WILKS ET AL.;

No. 87–1639. PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL. *v.* WILKS ET AL.; and

No. 87–1668. ARRINGTON ET AL. *v.* WILKS ET AL. C. A. 11th Cir. [Certiorari granted, 487 U. S. 1204.] Motion of petitioners for leave to file a reply brief out of time granted.

No. 87–1622. BRENDALE *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.;

No. 87–1697. WILKINSON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.; and

No. 87–1711. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL. C. A. 9th Cir. [Certiorari granted, 487 U. S. 1204.] Motion of petitioner Philip Brendale for reconsideration of order denying motion for additional time for oral argument and for divided argument [*ante*, p. 886] denied.

No. 87–1848. CITY OF DALLAS ET AL. *v.* STANGLIN, INDIVIDUALLY AND DBA TWILIGHT SKATING RINK. Ct. App. Tex., 5th Dist. [Certiorari granted, *ante*, p. 815.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 87–1882. NEITZKE ET AL. *v.* WILLIAMS. C. A. 7th Cir. [Certiorari granted, *ante*, p. 816.] Motion for appointment of counsel granted, and it is ordered that George A. Rutherglen, Esq., of Charlottesville, Va., be appointed to serve as counsel for respondent in this case.

No. 88–5054. SULLIVAN *v.* SULLIVAN, *ante*, p. 812. Motion of appellant for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 88–5526. BETKA *v.* A–T INDUSTRIES, INC., ET AL. Appeal from Ct. App. Ore. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until November 28, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5563. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 28, 1988, within which to pay

the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5546. IN RE MITCHELL. Petition for writ of mandamus denied.

No. 88–5397. IN RE MCDONALD;
No. 88–5428. IN RE MCDONALD; and
No. 88–5429. IN RE MCDONALD. Petitions for writs of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87–6997. CARELLA *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., Los Angeles County. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.*

Certiorari Granted

No. 88–293. COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. *v.* REID. C. A. D. C. Cir. Certiorari granted. Reported below: 270 U. S. App. D. C. 26, 846 F. 2d 1485.

No. 87–1729. CAPLIN & DRYSDALE, CHARTERED *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted and case set for oral argument in tandem with No. 88–454, *United States* v. *Monsanto*, *infra*. Reported below: 837 F. 2d 637.

No. 87–2084. JETT *v.* DALLAS INDEPENDENT SCHOOL DISTRICT; and
No. 88–214. DALLAS INDEPENDENT SCHOOL DISTRICT *v.* JETT. C. A. 5th Cir. Certiorari granted in No. 87–2084 limited to Question 1 presented by the petition. Certiorari granted in No. 88–214. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 798 F. 2d 748 and 837 F. 2d 1244.

---

*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 964.]

No. 88–357. MALENG, KING COUNTY PROSECUTING ATTORNEY, ET AL. *v.* COOK. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 847 F. 2d 616.

No. 88–454. UNITED STATES *v.* MONSANTO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument in tandem with No. 87–1729, *Caplin & Drysdale, Chartered* v. *United States*, *supra*. Reported below: 852 F. 2d 1400.

Certiorari Denied. (See also No. 88–478, *supra*.)

No. 87–2099. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 844 F. 2d 304.

No. 87–6947. MINER *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 909, 519 N. E. 2d 301.

No. 87–7150. PROWS *v.* KASTNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 138.

No. 87–7189. WOHLFORD ET UX. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1293.

No. 87–7263. EVANS *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 87–7272. TINGLING *v.* UNITED STATES; and
No. 88–5042. ARCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 840 F. 2d 567.

No. 87–7334. SILVA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 846 F. 2d 352.

No. 88–81. VOGE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 844 F. 2d 776.

No. 88–94. KENTUCKY WEST VIRGINIA GAS CO. ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 837 F. 2d 600.

No. 88–131. WASHINGTON *v.* HOOPER. Ct. App. Wash. Certiorari denied. Reported below: 50 Wash. App. 1072.

No. 88–160. CRONK *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 2d 1034.

No. 88–235. WOLFE *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 290, 835 F. 2d 354.

No. 88–241. NATIONAL GYPSUM CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 366, 846 F. 2d 79.

No. 88–261. ARONS *v.* NEW JERSEY BOARD OF EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 842 F. 2d 58.

No. 88–296. SHOSTAK *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1288.

No. 88–443. TAYLOR ET VIR *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 88–448. WILLIAMS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 187 Ga. App. 409, 370 S. E. 2d 497.

No. 88–450. DUDOSH, ADMINISTRATOR OF THE ESTATE OF DUDOSH *v.* WARG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 917.

No. 88–453. RUSKIN HARDWARE, INC., ET AL. *v.* FLEMING COS., INC. C. A. 8th Cir. Certiorari denied. Reported below: 849 F. 2d 352.

No. 88–456. MANCE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 244.

No. 88–465. HURON VALLEY HOSPITAL, INC., ET AL. *v.* CITY OF PONTIAC ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 262.

No. 88–469. RICHARDSON *v.* PEOPLES NATURAL GAS CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 602.

No. 88–470. MELIN ET UX. *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 428 N. W. 2d 227.

No. 88–474. NEVILLE *v.* MOLLEN, PRESIDING JUSTICE, APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 835.

No. 88–480. HAMMOCK ET AL. *v.* PLUNKETT, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1027.

No. 88–482. HOWELL ET AL. *v.* UNITED STATES FIRE INSURANCE CO. Ct. App. Ga. Certiorari denied. Reported below: 185 Ga. App. 154, 363 S. E. 2d 560.

No. 88–490. CROSS *v.* STATE INSURANCE FUND OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 837 F. 2d 1086.

No. 88–529. YOUNGBERG, DBA MAKI *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1293.

No. 88–552. ARKO *v.* UNITED STATES DEPARTMENT OF THE AIR FORCE ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–561. SAVINOVICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 834.

No. 88–570. BROOKSIDE VENEERS, LTD. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 786.

No. 88–583. TEXARKANA TRAWLERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 297.

No. 88–584. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1420.

No. 88–591. VANDERWEYST ET AL. *v.* FIRST STATE BANK OF BENSON ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 425 N. W. 2d 803.

No. 88–600. RAMOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 185.

No. 88–601. CONWAY ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 187.

No. 88–620. BADDOUR, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 193.

No. 88–634. KRUGMAN *v.* PALMER COLLEGE OF CHIROPRACTIC ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 422 N. W. 2d 470.

No. 88–5031. QUINTANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 88–5089. GAITAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 839.

No. 88–5151. WHALEY *v.* RODRIGUEZ, CHAIRMAN, NEW YORK BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 840 F. 2d 1046.

No. 88–5166. WASHINGTON *v.* ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE OF NORTHERN INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 710.

No. 88–5267. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1383.

No. 88–5286. ALLEN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 847 F. 2d 138.

No. 88–5349. ANDERSON *v.* DEPARTMENT OF DEFENSE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–5470. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 526 So. 2d 903.

No. 88–5483. GILLEY *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 88–5488. DE YOUNG *v.* NELSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1083.

No. 88–5489. DE YOUNG *v.* O'BRIEN. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1086.

No. 88–5491. CROSS *v.* MORGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 193.

No. 88–5496. YOUNGS *v.* LAWYERS SURETY CORP. ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–5497. FLEMING *v.* DEAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5504. CIROCCO *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1293.

No. 88–5505. HOLLEY *v.* BULL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 851 F. 2d 356.

No. 88–5506. FOLIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 851 F. 2d 357.

No. 88–5507. BRADSHAW *v.* ZOOLOGICAL SOCIETY OF SAN DIEGO. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 791.

No. 88–5512. NOLL *v.* TURNER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5513. HARRIS *v.* PATUXENT INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 605.

No. 88–5514. BRATTON *v.* MONROE COUNTY ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–5515. GREEN *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 894.

No. 88–5531. REDMAN *v.* MICHIGAN STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 327.

No. 88–5540. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 315, 368 S. E. 2d 481.

No. 88–5543. ERNST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1324.

No. 88–5552. SAFARI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 891.

No. 88–5566. TRIPLETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 864.

No. 88–5595. ULMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–5596. CROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 1319.

No. 88–5604. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 853 F. 2d 249.

No. 88–5608. BREWER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 1319.

No. 88–5613. BERGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 921.

No. 88–5618. MANDELL ET UX. *v.* UNITED STATES ARMY. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1467.

No. 88–5626. RANKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 922.

No. 88–5627. SPENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 1319.

No. 88–5634. KENDRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 492.

No. 88–5638. LIVINGSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1479.

No. 88–82. STARRETT CITY ASSOCIATES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 840 F. 2d 1096.

No. 88–162. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 844 F. 2d 304.

No. 88–229. DOW JONES & CO., INC., ET AL. *v.* SIMON ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 842 F. 2d 603.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), we held that an order restraining the news media from reporting or

commenting on public judicial proceedings was a prior restraint on speech and that the State had not in that case overcome the high barriers to the use of a prior restraint. *Id.*, at 570. The restraining order in this case is directed against the participants in the trial, not against the media, but it is likewise challenged by various news agencies as an unconstitutional prior restraint.

This case arises out of the trial of several criminal defendants, including Representative Mario Biaggi and former Bronx Borough President Stanley Simon, on federal racketeering charges based on their involvement with Wedtech, a South Bronx military contractor. On April 23, 1987, at the request of the defendants, the District Court entered an order restraining the prosecutors, defendants, and defense counsel from making extrajudicial statements to the press. The Government initially concurred in the order but eventually joined with petitioners, the news agencies, in seeking to have the order vacated. On July 10, 1987, the District Court modified its order to allow the parties to state, without elaboration, matters of public record and to explain, without characterization, the substance of any motion or step in the proceedings. Otherwise, however, the court continued the order in force.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed the July 10 order. After finding that petitioners had standing to complain, the court stated that "there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not." *In re Application of Dow Jones & Co.*, 842 F. 2d 603, 609 (1988). Because only the news agencies opposed the restraining order, the court concluded that a prior restraint had not been imposed. The court then held that the restraining order was justified because there was a "reasonable likelihood" that pretrial publicity would otherwise have prejudiced the defendants' rights to a fair trial. *Id.*, at 610.

By so holding, the Second Circuit joined the Ninth Circuit, which had previously refused to treat as a prior restraint a restraining order directed against the parties and challenged only by the media. Compare *Radio & Television News Assn.* v. *United States District Court*, 781 F. 2d 1443, 1446 (CA9 1986) (order challenged by media), with *Levine* v. *United States District Court*, 764

F. 2d 590, 595 (CA9 1985) (order challenged by trial participants), cert. denied, 476 U. S. 1158 (1986). That approach conflicts directly with the approach taken by the Sixth Circuit, which held in *CBS Inc.* v. *Young*, 522 F. 2d 234, 239 (1975), that "the conclusion is inevitable that [such a restraining order] constitutes a prior direct restraint upon freedom of expression." Moreover, the Second Circuit's adoption of a "reasonable likelihood" standard conflicts with the Sixth Circuit's "clear and present danger" standard. *Id.*, at 238. Because of the importance of this issue and the conflicting resolutions given it by the Courts of Appeals, I would grant the petition for certiorari.

No. 88–263. GENERAL MOTORS CORP. *v.* GLENN ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 841 F. 2d 1567.

No. 88–452. TENNECO OIL CO. *v.* KERN OIL & REFINING CO. C. A. 9th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 840 F. 2d 730.

No. 88–5011. JEFFRIES *v.* WASHINGTON. Sup. Ct. Wash.;
No. 88–5336. GONZALEZ *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5461. CAMPBELL *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir.;
No. 88–5544. CLEMMONS *v.* MISSOURI. Sup. Ct. Mo.; and
No. 88–5593. HEISHMAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 88–5011, 110 Wash. 2d 326, 752 P. 2d 1338; No. 88–5461, 829 F. 2d 1453; No. 88–5544, 753 S. W. 2d 901; No. 88–5593, 45 Cal. 3d 147, 753 P. 2d 629.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–5347. PATILLO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 255, 368 S. E. 2d 493.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Even if I did not hold this view, I would still grant the petition for certiorari. Petitioner was convicted of malice murder in connection with the death of a teenaged woman. The record in this case shows that at petitioner's sentencing hearing, the State's only witness against him was a prisoner by the name of David Chatman. Chatman related to the jury highly damning statements which he asserted petitioner had made to him. These included petitioner's alleged assertion that "he hated women," that "he just had nothing in him but hatred," and that he had harbored a desire to obtain revenge towards women ever since early childhood.

After petitioner was sentenced to death, however, Chatman wrote a series of letters to Georgia prosecutors claiming that he had been promised that his probation would be reinstated if he testified—and threatening to renege on his testimony against petitioner if the State did not live up to its end of the alleged agreement. The prosecution told petitioner's counsel about Chatman's claims, and acknowledged for the first time that while the State had not promised to recommend that Chatman's parole be reinstated, the prosecution had promised to inform the judge who had revoked Chatman's probation of his cooperation.

Based upon this information, petitioner moved for a new trial. The trial court and the Georgia Supreme Court both denied his motion, however. The State Supreme Court concluded that the prosecution's failure to disclose its deal with Chatman was error under *Giglio* v. *United States*, 405 U. S. 150 (1972). However, it concluded that the prosecution's failure so to inform petitioner's counsel was harmless error. In support of this conclusion, it noted that the prosecutors' agreement with Chatman was modest and was "of a non-promising nature"; it also noted that Chatman had been otherwise impeached by the revelation at the penalty

phase of his own criminal record. 258 Ga. 255, 261, 368 S. E. 2d 493, 497–498 (1988).

I believe this factual record raises grave questions about whether the Georgia Supreme Court has correctly applied this Court's standards for finding harmless-error standards in capital cases, as outlined most recently in *Satterwhite* v. *Texas*, 486 U. S. 249 (1988). In *Satterwhite*, handed down shortly after the Georgia Supreme Court's decision in this case, we emphasized again the importance of avoiding error in capital cases; we stated that the proper standard of review is "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.*, at 258–259 (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). I believe it is far from clear that Georgia has satisfied this daunting standard, and therefore I would grant this petition.

Rehearing Denied

No. 87–6807. WICKS *v.* UNITED STATES, *ante*, p. 831;

No. 87–7005. MARTIN *v.* SHANK ET AL., *ante*, p. 833;

No. 87–7033. YOUNG *v.* ALABAMA, *ante*, p. 834;

No. 87–7097. JOHNS *v.* BOSTWICK (three cases), *ante*, p. 836;

No. 87–7135. IN RE PHILLIPS ET AL., *ante*, p. 814;

No. 87–7188. MONTGOMERY *v.* INDIANA, *ante*, p. 840;

No. 87–7190. BATTLE *v.* MISSOURI, *ante*, p. 871;

No. 87–7212. SPENCER *v.* ILLINOIS, *ante*, p. 841;

No. 87–7227. FAISON *v.* NESBITT, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ET AL., *ante*, p. 841;

No. 87–7237. SMITH *v.* FLORIDA, *ante*, p. 842;

No. 87–7316. LAWRENCE *v.* OAO CORP., *ante*, p. 845;

No. 88–137. GRACEY *v.* DAY ET AL., *ante*, p. 880;

No. 88–5084. MARTIN *v.* MARYLAND STATE BOARD OF LAW EXAMINERS ET AL., *ante*, p. 804;

No. 88–5140. IN RE RADVAN-ZIEMNOWICZ, *ante*, p. 814;

No. 88–5146. JOHNSON *v.* IRBY, *ante*, p. 862;

No. 88–5171. NUBINE *v.* TEXAS BOARD OF CORRECTIONS ET AL., *ante*, p. 863;

No. 88–5313. NASH *v.* ERVIN, *ante*, p. 897; and

No. 88–5323. GAUNCE *v.* ST. PAUL MERCURY INSURANCE CO. ET AL., *ante*, p. 804. Petitions for rehearing denied.

No. 87-7238. MARTIN *v.* SHUGHART ET AL., *ante*, p. 870. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

NOVEMBER 14, 1988

Dismissal Under Rule 53

No. 88-34. ROVEDA ET UX. *v.* HUGHES AIRCRAFT CO. ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 844 F. 2d 792.

Appeals Dismissed

No. 88-534. SHOULDERS ET AL. *v.* MCCRACKEN COUNTY, KENTUCKY, ET AL. Appeal from Sup. Ct. Ky. Motion of appellees for award of costs denied. Appeal dismissed for want of substantial federal question.

No. 88-560. MITAN *v.* MITAN. Appeal from Ct. App. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88-5510. BARTA *v.* TEXAS. Appeal from 227th Jud. Dist. Ct. Tex., Bexar County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88-5549. MARTIN *v.* C. ITOH & CO. (AMERICA), INC., ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 519 Pa. 666, 548 A. 2d 256.

No. 88-5642. ROWE *v.* DEPARTMENT OF THE ARMY. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88-5643. ROWE *v.* DEPARTMENT OF THE ARMY. Appeal from C. A. D. C. Cir. 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. 86-1593. SHELL OIL CO. *v.* DEPARTMENT OF REVENUE OF FLORIDA. Appeal from Sup. Ct. Fla. Judgment vacated and

case remanded for further consideration in light of *Shell Oil Co.* v. *Iowa Dept. of Revenue*, *ante*, p. 19. Reported below: 496 So. 2d 789.

Miscellaneous Orders

No. — — ——. BRATHWAITE *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY; and

No. — — ——. IOWA SOUTHERN UTILITIES CO. ET AL. *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. — — ——. VALLES *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 808. Motion of petitioner for reconsideration of order denying leave to file petition for writ of certiorari out of time denied.

No. — — ——. KUNTZ ET AL. *v.* SHAWMUT BANK OF BOSTON ET AL. Treating the petition for writ of mandamus as a motion to direct the Clerk to file petition for writ of certiorari out of time, motion denied.

No. A–332 (88–567). MONACO *v.* UNITED STATES. C. A. 9th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–346. HOWELL *v.* HOMECRAFT LAND DEVELOPMENT ET AL. Sup. Ct. Tex. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–361. MARCOS ET UX. *v.* UNITED STATES. C. A. 2d Cir. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. The order heretofore entered by JUSTICE MARSHALL on November 8, 1988, is vacated.

No. D–728. IN RE DISBARMENT OF LORENZ. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–741. IN RE DISBARMENT OF WEINBERG. It is ordered that Samuel Weinberg, of Roslyn Harbor, 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.

No. 87–201. MANSELL *v.* MANSELL. Ct. App. Cal., 5th App. Dist. [Probable jurisdiction noted, 487 U. S. 1217.] Motion of

American Retirees Association for leave to file a brief as *amicus curiae* denied. Motion of Retired Officers Association et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 87–1818. BADHAM ET AL. *v.* EU, SECRETARY OF STATE OF CALIFORNIA, ET AL., *ante*, p. 804. Petition for rehearing granted. Request to proceed upon the papers already filed in this case granted. Appellees are allowed 30 days within which to file supplemental motions to dismiss or affirm.

No. 87–7023. HARDIN *v.* STRAUB. C. A. 6th Cir. [Certiorari granted, *ante*, p. 887.] Motion of petitioner for appointment of counsel granted, and it is ordered that Douglas R. Mullkoff, Esq., of Ann Arbor, Mich., be appointed as counsel for petitioner in this case.

No. 88–535. LOCAL FREIGHT DRIVERS, LOCAL 208, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* ROZAY'S TRANSFER. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–556. BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., ET AL. *v.* KELCO DISPOSAL, INC., ET AL. C. A. 2d Cir. Motion of Motor Vehicle Manufacturers Association of the United States et al. for leave to file a brief as *amici curiae* granted.

No. 88–5403. HAYES *v.* WESTERN WEIGHING AND INSPECTION BUREAU. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 5, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5570. IN RE PHILLIPS. Ct. Crim. App. Okla. Petition for writ of common-law certiorari denied.

No. 88–5569. IN RE SMITH. Petition for writ of mandamus denied.

No. 88–5640. IN RE SHEFFIELD. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 88–449. HEALY ET AL. *v.* THE BEER INSTITUTE ET AL.; and

No. 88–513. WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC. *v.* THE BEER INSTITUTE ET AL. Appeals from C. A. 2d Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 849 F. 2d 753.

Certiorari Granted

No. 88–192. MCKESSON CORP. *v.* DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL. Sup. Ct. Fla.; and

No. 88–325. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL. Sup. Ct. Ark. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 88–192, 524 So. 2d 1000; No. 88–325, 295 Ark. 43, 746 S. W. 2d 377.

No. 88–385. RODRIGUEZ DE QUIJAS ET AL. *v.* SHEARSON/AMERICAN EXPRESS, INC. C. A. 5th Cir. Certiorari granted. Reported below: 845 F. 2d 1296.

Certiorari Denied. (See also Nos. 88–560, 88–5510, 88–5549, 88–5642, 88–5643, and 88–5570, *supra.*)

No. 88–280. MCCARTHY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 2d 1441.

No. 88–299. SMITH ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 844 F. 2d 195.

No. 88–302. GORDON, SPECIAL DEPUTY STATE INSURANCE COMMISSIONER OF MARYLAND *v.* UNITED STATES DEPARTMENT OF THE TREASURY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 272.

No. 88–315. NATIONAL-SOUTHWIRE ALUMINUM CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 835.

No. 88–327. ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, ET AL. *v.* CHISOM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 839 F. 2d 1056.

No. 88–328. TERRITORIAL COURT OF THE VIRGIN ISLANDS *v.* RICHARDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 847 F. 2d 108.

No. 88–347. CONN *v.* CONN. Sup. Ct. Ind. Certiorari denied. Reported below: 526 N. E. 2d 958.

No. 88–373. BOLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–375. MURRAY *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 2d 988.

No. 88–483. NORTHROP *v.* LEASE FINANCING CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 919.

No. 88–484. CONNECTICUT ET AL. *v.* COUNSEL. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 731.

No. 88–485. TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY ET AL. *v.* WOOLEYHAN ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 544 A. 2d 266.

No. 88–486. DIAMOND *v.* REYNOLDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 917.

No. 88–497. WELLS REAL ESTATE, INC. *v.* GREATER LOWELL BOARD OF REALTORS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 850 F. 2d 803.

No. 88–499. SHIELDS *v.* PRODUCTION FINISHING CORP. ET AL. Ct. App. Mich. Certiorari denied. Reported below: 158 Mich. App. 479, 405 N. W. 2d 171.

No. 88–503. LEGO SYSTEMS, INC., ET AL. *v.* TYCO INDUSTRIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 921.

No. 88–506. ALPHA BETA CO. ET AL. *v.* NAHM. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–507. WILLIAMS ET AL. *v.* LYNG, SECRETARY OF AGRICULTURE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 1335.

No. 88–508. BRYSON ET AL. *v.* CITY OF DERIDDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 1239.

No. 88–510. SMITH ET UX. *v.* NICKLOS DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 598.

No. 88–511. MICHIGAN *v.* EVANS. Recorder's Court, City of Detroit, Mich. Certiorari denied.

No. 88–516. LIBERTY NATIONAL BANK & TRUST CO. *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 427 N. W. 2d 307.

No. 88–523. JEWEL FOOD STORES *v.* MERK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 761.

No. 88–524. COXSEY *v.* EMPLOYERS MUTUAL CASUALTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 77.

No. 88–538. BROWN ET AL. *v.* 1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–540. VANNELLI *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. Ct. App. Minn. Certiorari denied.

No. 88–569. DIGGS *v.* HARRIS HOSPITAL-METHODIST, INC. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 270.

No. 88–615. SILVERMAN ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 327, 845 F. 2d 1072.

No. 88–619. DONNELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 922.

No. 88–635. DEMACO CORP. ET AL. *v.* F. VON LANGSDORFF LICENSING LTD. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 851 F. 2d 1387.

No. 88–649. CRAVENS *v.* WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 791.

No. 88–667. SIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 1564.

No. 88–5179. GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 58.

No. 88–5334. WATKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 923.

No. 88–5339. BITCHERI *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 844 F. 2d 786.

No. 88–5454. MUZA *v.* BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 858.

No. 88–5462. KRISHNAN *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied.

No. 88–5508. SATTERFIELD *v.* ALLSBROOK, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 690.

No. 88–5509. SHOCKEY *v.* TATE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 927.

No. 88–5517. DAVIS *v.* CITY OF SAN RAMON POLICE DEPARTMENT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–5520. PARRES *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 530 So. 2d 310.

No. 88–5521. WATTS *v.* BUNNELL, SUPERINTENDENT, CALIFORNIA CORRECTIONAL CENTER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5523. GIBSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 519 So. 2d 1382.

No. 88–5530. BOLLMAN *v.* SMITH. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 745.

No. 88–5532. MAXWELL *v.* GENERAL MOTORS CORP. Ct. App. Ga. Certiorari denied.

No. 88–5534. LoCONTE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 847 F. 2d 745.

No. 88–5538. DAVIS, AKA ABDUL-AKBAR *v.* PROCTOR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 182.

No. 88–5539. HAYES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 88–5542. LeGRAND *v.* WARD ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–5545. PALMER *v.* BELMONT COUNTY CHILDREN SERVICES. Ct. App. Ohio, Belmont County. Certiorari denied.

No. 88–5547. SMITH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1388.

No. 88–5548. SZAREWICZ *v.* PENNSYLVANIA SUPREME COURT. C. A. 3d Cir. Certiorari denied.

No. 88–5551. SILVAGGIO *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 88–5559. WHITE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 322 N. C. 770, 370 S. E. 2d 390.

No. 88–5562. DE YOUNG *v.* O'KEEFE. C. A. 8th Cir. Certiorari denied.

No. 88–5592. DRABICK *v.* DRABICK. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 200 Cal. App. 3d 185, 245 Cal. Rptr. 840.

No. 88–5597. MAHDAVI *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 199.

No. 88–5605. GABRIEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 187.

No. 88–5606. IVERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 361.

No. 88–5609. HINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 198.

No. 88–5612. JONES *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–5620. PRUETT *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 88–5645. PANICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1468.

No. 88–5646. JOYCE, AKA SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–5648. RASCO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 2d 501.

No. 88–5659. WARD *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 195.

No. 88–5661. MCDEVITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 603.

No. 88–5662. BOWIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–5664. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 854 F. 2d 1318.

No. 88–5669. CALDERON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–5676. HERNANDEZ-GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 148.

No. 88–5680. WARE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 931.

No. 88–5683. JUDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 863.

No. 88–5688. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 863.

No. 88–5820. DAUGHERTY *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 533 So. 2d 287.

No. 87–1469. HORNSBY, ADJUTANT GENERAL OF THE ALABAMA NATIONAL GUARD, ET AL. *v.* STINSON. C. A. 11th Cir.

Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 821 F. 2d 1537.

No. 87-1495. TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* LEON COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 827 F. 2d 1436.

No. 88-198. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 165 Ill. App. 3d 1162, 536 N. E. 2d 1019.

No. 88-372. LEWIS ET AL. *v.* BRUNI. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 847 F. 2d 561.

No. 88-395. ELLINGSWORTH, WARDEN, ET AL. *v.* REYNOLDS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 843 F. 2d 712.

No. 88-627. TAYLOR *v.* TAYLOR WINE CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 847 F. 2d 836.

No. 88-5404. WOUGAMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 844 F. 2d 1347.

No. 88-5481. JULIUS *v.* JOHNSON, WARDEN. C. A. 11th Cir.;
No. 88-5522. MITCHELL *v.* FLORIDA. Sup. Ct. Fla.; and
No. 88-5550. THOMPSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 88-5481, 840 F. 2d 1533 and 854 F. 2d 400; No. 88-5522, 527 So. 2d 179; No. 88-5550, 45 Cal. 3d 86, 753 P. 2d 37.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Granted. (See No. 87–1818, *supra.*)

Rehearing Denied

No. 87–1743. OMNI U. S. A., INC. *v.* UNITED STATES, *ante*, p. 817;

No. 87–1944. POLYAK *v.* HULEN ET AL., *ante*, p. 802;

No. 87–7325. FILIPAS *v.* WORKMEN'S COMPENSATION OF THE INDUSTRIAL COMMISSION OF OHIO ET AL., *ante*, p. 846;

No. 88–113. POLYAK *v.* HAMILTON, JUDGE, CIRCUIT COURT OF LAWRENCE COUNTY, TENNESSEE, *ante*, p. 803;

No. 88–165. ROMANN *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., *ante*, p. 854; and

No. 88–5147. MIDDLETON *v.* SOUTH CAROLINA, *ante*, p. 872. Petitions for rehearing denied.

No. 85–1524. HUBBARD BROADCASTING, INC. *v.* SOUTHERN SATELLITE SYSTEMS, INC., ET AL., 479 U. S. 1005 and 1070. Motion of petitioner for leave to file second petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

NOVEMBER 17, 1988

Miscellaneous Order

No. A–400. ARMONTROUT, WARDEN *v.* SMITH. Application of the Attorney General of Missouri for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

NOVEMBER 28, 1988

Appeals Dismissed

No. 88–537. PRICE *v.* CITY OF SAN MARCOS, TEXAS, ET AL. Appeal from Ct. App. Tex., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 744 S. W. 2d 349.

No. 88–571. COSSETT ET UX. *v.* MERCHANTS & MECHANICS FEDERAL SAVINGS & LOAN ASSN. ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 835 F. 2d 877. Reported below: 69 Haw. 663.

No. 88–575. BURT *v.* MAUI ARCHITECTURAL GROUP, INC., ET AL. Appeal from Sup. Ct. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 69 Haw. 663.

No. 88–609. POLYAK *v.* BUFORD EVANS & SONS. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 848 F. 2d 189.

No. 88–5589. PRIOVOLOS *v.* HEART OF CEDAR LANE, INC., ET AL. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 226 N. J. Super. 509, 545 A. 2d 180.

No. 88–5660. TEDDERS *v.* LORD ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 848 F. 2d 194.

Vacated and Remanded on Appeal

No. 88–5228. CHISHOLM *v.* KANSAS. Appeal from Sup. Ct. Kan. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Coy* v. *Iowa*, 487 U. S. 1012 (1988). Reported below: 243 Kan. 270, 755 P. 2d 547.

Miscellaneous Orders

No. — — ——. BMT COMMODITY CORP. ET AL. *v.* UNITED STATES. Motion for leave to file a supplement to the petition for writ of certiorari under seal granted.

No. — — ——. FRIEDMAN *v.* KATZ ET AL. Motion for leave to file portions of the appendix to the petition for writ of certiorari under seal denied.

No. — — ——. LAUPOT *v.* BERLEY ET AL. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. A–340 (88–5828). DUNKINS *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–384 (88–90). CHABAD *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 816.] Application for recall and stay of the mandate of the United States Court of Appeals for the Third Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application.

No. D–724. IN RE DISBARMENT OF STORTS. Disbarment entered. [For earlier order herein, see 487 U. S. 1248.]

No. D–729. IN RE DISBARMENT OF BONGIORNO. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–742. IN RE DISBARMENT OF FREDERICK. It is ordered that Helen Rice Frederick, of Carson, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–743. IN RE DISBARMENT OF CARTER. It is ordered that Joseph R. Carter, Jr., 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.

No. D–744. IN RE DISBARMENT OF HECHT. It is ordered that Samuel J. Hecht, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–745. IN RE DISBARMENT OF DENKER. It is ordered that Barry Howard Denker, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–746. IN RE DISBARMENT OF LINDQUIST. It is ordered that John Leroy Lindquist, of Coral Springs, 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.

No. 87–6997. CARELLA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. The order entered November 7, 1988 [*ante*, p. 940], is amended to read as follows: Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted limited to Questions I, II, III, IV, V, and VII presented by the jurisdictional statement.

No. 87–5840. MCNAMARA *v.* COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction postponed, 485 U. S. 1005.] Motion of Christian R. Van Deusen for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 88–5188. BENNETT *v.* CORROON & BLACK CORP. ET AL., *ante*, p. 812. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 88–5580. WEHRINGER *v.* NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until December 19, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5615. IN RE CLARK; and

No. 88–5652. IN RE REIDT. Petitions for writs of mandamus denied.

No. 88–5524. IN RE KERPA, AKA LAWSON. Petition for writ of mandamus and/or certiorari denied.

No. 88–5622. IN RE SCRUGGS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 87–1589. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL.; and

No. 87–1888. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour and thirty minutes allotted for oral argument. Reported below: No. 87–1589, 831 F. 2d 1231; No. 87–1888, 845 F. 2d 420.

Certiorari Denied. (See also Nos. 88–537, 88–571, 88–575, 88–609, 88–5589, 88–5660, and 88–5524, *supra.*)

No. 87–2086. BOONE ET AL. *v.* REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 2d 886.

No. 87–7273. VEST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 842 F. 2d 1319.

No. 88–7. WEST PENN POWER CO. *v.* ENGLE ET AL., TDBA ENGLE'S HOLIDAY HARBOR. Super. Ct. Pa. Certiorari denied. Reported below: 366 Pa. Super. 104, 530 A. 2d 913.

No. 88–16. STEPHENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–47. CAMPBELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 782.

No. 88–95. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1009.

No. 88–217. INTERSTATE COMMERCE COMMISSION *v.* PITTSBURGH & LAKE ERIE RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 420.

No. 88–239. EAGLE-PICHER INDUSTRIES, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 846 F. 2d 888.

No. 88–342. SUNSHINE HEALTH SYSTEMS, INC. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1097.

No. 88–350. ANDERSON ET VIR *v.* NORTH DAKOTA; and DAGLEY ET UX. *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari de-

nied. Reported below: 427 N. W. 2d 316 (first case); 430 N. W. 2d 63 (second case).

No. 88–352. HUMPHREY, UNITED STATES SENATOR, ET AL. *v.* BRADY, SECRETARY, DEPARTMENT OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 270 U. S. App. D. C. 154, 848 F. 2d 211.

No. 88–367. RUGGIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 503.

No. 88–374. RUGGIERO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 846 F. 2d 117.

No. 88–380. BOSTON *v.* NELSON. Int. Ct. App. Haw. Certiorari denied. Reported below: 7 Haw. App. 659, 807 P. 2d 48.

No. 88–394. ANSELL ET AL. *v.* SHANNON. Sup. Ct. Colo. Certiorari denied.

No. 88–400. LOCAL 17 OF THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 307, 528 N. E. 2d 1195.

No. 88–401. FIORILLA *v.* UNITED STATES; and
No. 88–467. FIORILLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 172.

No. 88–406. COLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF EISENHUT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 1290.

No. 88–459. ANDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 845 F. 2d 206.

No. 88–464. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 2d 1277.

No. 88–468. CHARLTON *v.* ENTERPRISE LEASING CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 501.

No. 88–518. CHANG AN-LO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 851 F. 2d 547.

No. 88–522. NEW YORK HOTEL TRADES COUNCIL & HOTEL ASSOCIATION OF NEW YORK CITY, INC., PENSION FUND ET AL.

v. PARK SOUTH HOTEL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 851 F. 2d 578.

No. 88–526. MOODY *v.* EMPIRE LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 2d 902.

No. 88–528. WILKES *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 443.

No. 88–536. SCULLIN *v.* MARSTEN. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 88–543. HARRIS *v.* SAMSON, DEPUTY DISTRICT ATTORNEY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 474.

No. 88–544. HARDEN *v.* PAUL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 2d 1091.

No. 88–545. HILL-DUNNING *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 260.

No. 88–555. MYERS, GUARDIAN AD LITEM *v.* LEWIS; and
No. 88–683. LEWIS *v.* LEWIS. Ct. App. Mich. Certiorari denied.

No. 88–565. COWHERD, SECRETARY, KENTUCKY CABINET FOR HUMAN RESOURCES *v.* DOE, BY HIS MOTHER AND NEXT FRIEND, DOE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 1386.

No. 88–572. BARBIZON CORP. *v.* ILGWU NATIONAL RETIREMENT FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 627.

No. 88–573. PHILLIPS *v.* TOTCO, DIVISION OF BAKER INTERNATIONAL CORP., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 1319.

No. 88–578. PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., ET AL. *v.* HUGHES. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 876.

No. 88–579. ONEIDA MOTOR FREIGHT, INC. *v.* UNITED JERSEY BANK. C. A. 3d Cir. Certiorari denied. Reported below: 848 F. 2d 414.

No. 88–580. WEAVER *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 1315.

No. 88–582. FICAROTTA *v.* RENNA, COMMISSIONER, DEPARTMENT OF COMMUNITY AFFAIRS OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1118.

No. 88–585. PALMA ET AL. *v.* ADLER. Sup. Ct. R. I. Certiorari denied. Reported below: 544 A. 2d 576.

No. 88–586. STUART ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 1st Cir. Certiorari denied. Reported below: 849 F. 2d 1534.

No. 88–587. MCNULTY *v.* W. S. LIBBEY CO. C. A. 1st Cir. Certiorari denied.

No. 88–588. HOUSTON *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 850 F. 2d 692.

No. 88–590. MAURER *v.* CALIFORNIA BOARD OF PRISON TERMS. Sup. Ct. Cal. Certiorari denied.

No. 88–592. PYROTRONICS CORP. *v.* PYRODYNE CORP. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 1398.

No. 88–594. FOUR STAR CORP. *v.* BOTT ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 2d 202.

No. 88–595. OFFSHORE EXPRESS, INC. *v.* JOHNSON. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1347.

No. 88–598. RAKOVICH *v.* WADE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 850 F. 2d 1180.

No. 88–610. HURVITZ *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 198.

No. 88–638. LAFFERTY *v.* CITY OF COOTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 855.

No. 88–642. POINDEXTER ET UX. *v.* TOWN OF ROCKY MOUNT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 606.

No. 88–644. CALCO, LTD., ET AL. *v.* WATER TECHNOLOGIES CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 850 F. 2d 660.

No. 88–691. PETROLEUM OPERATION SUPPORT SERVICE, INC., ET AL. *v.* GRINTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 1006.

No. 88–693. SIMMONS *v.* BURNS, COMMISSIONER, CONNECTICUT DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 305.

No. 88–711. INTERSTATE COMMERCE COMMISSION *v.* UNITED TRANSPORTATION UNION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 848 F. 2d 856.

No. 88–724. PEAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 856 F. 2d 825.

No. 88–5015. HAGGENJOS *v.* BROGLIN, SUPERINTENDENT, WESTVILLE CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 196.

No. 88–5168. RANSOM *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 844 F. 2d 1326.

No. 88–5240. BARGET *v.* BARGET. Ct. Sp. App. Md. Certiorari denied. Reported below: 73 Md. App. 755.

No. 88–5252. TURNER *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1293.

No. 88–5255. RANCK *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 525 So. 2d 896.

No. 88–5263. LEYBA *v.* SULLIVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5279. REMBERT *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 301.

No. 88–5297. ESSEX *v.* VASSAR, CHAIRMAN, VIRGINIA PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 70.

No. 88–5307. WILLIAMS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 539 A. 2d 164.

No. 88–5312. MOORE *v.* PAUL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1013.

No. 88–5346. LAMBERTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 847 F. 2d 1531.

No. 88–5353. BENTLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 850 F. 2d 327.

No. 88–5407. FERKINS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 834.

No. 88–5450. PRENZLER *v.* PEKICH ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5465. FLOYD *v.* KELLOGG SALES CO. C. A. 8th Cir. Certiorari denied. Reported below: 841 F. 2d 226.

No. 88–5495. THAYER *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 539 A. 2d 206.

No. 88–5556. BROFFORD *v.* OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. Sup. Ct. Ohio. Certiorari denied. Reported below: 38 Ohio St. 3d 61, 526 N. E. 2d 309.

No. 88–5574. BROADUS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 88–5575. WOODS *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 1163.

No. 88–5576. CABEY *v.* COLLINS, SUPERINTENDENT, MOORE COUNTY PRISON, CARTHAGE, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 465.

No. 88–5577. GILSTRAP *v.* WHARTON, SUPERINTENDENT, MEN'S CORRECTIONAL INSTITUTION, HARDWICK, GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 88–5578. ROBBINS *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 606.

No. 88–5579. SMITH *v.* RAHDERT, ANDERSON & RICHARDSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–5583. LOWERY *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 200 Cal. App. 3d 1207, 246 Cal. Rptr. 443.

No. 88–5584. KERPA, AKA LAWSON *v.* VALLEY NEUROSURGICAL ASSN. ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–5588. MUNCHINSKI *v.* GOODWIN. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 919.

No. 88–5591. COLTER *v.* CITY OF ARTESIA, NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5594. MAHDAVI *v.* SHIRANI. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–5599. FORBES *v.* HENNEPIN COUNTY ATTORNEY'S OFFICE, CRIMINAL DIVISION, HENNEPIN COUNTY, MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 88–5601. CRANFORD *v.* SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5602. FRITTS *v.* ROGERS, JAIL ADMINISTRATOR, WHITE COUNTY JAIL, SEARCY, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 856.

No. 88–5607. LAYTON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 531 So. 2d 1354.

No. 88–5610. BROUSSARD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–5614. LUTHER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 373 Pa. Super. 636, 536 A. 2d 826.

No. 88–5619. MCDONALD *v.* TOBEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 195.

No. 88–5621. TUBBS *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 88–5623. WHEAT *v.* TRICKEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 88–5624. WALKER *v.* NEAL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 196.

No. 88–5631. HAYES, AKA SALAAHUDDIN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 851 F. 2d 1422.

No. 88–5632. INGRAM *v.* WILSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5633. JARRETT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88–5636. LEPAGE *v.* ARAVE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 251.

No. 88–5650. ROBINSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 375 Pa. Super. 623, 541 A. 2d 32.

No. 88–5651. WILLIAMS *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5653. PEOPLES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 527 So. 2d 169.

No. 88–5654. HARDAGE *v.* NEAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1382.

No. 88–5656. COLEMAN *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 696.

No. 88–5657. FULLER *v.* ALIVE ENTERPRISES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1419.

No. 88–5658. FERRELL *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 857.

No. 88–5663. GREEN *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 88–5677. MARTIN *v.* ZOOK ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5690. NABORS *v.* EDWARDS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 192.

No. 88–5691. STRABLE *v.* UNITED STATES TREASURY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 266.

No. 88–5696. MASSA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 854 F. 2d 315.

No. 88–5699. STILLWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 2d 1045.

No. 88–5701. SPAN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–5703. JONES *v.* OITKER ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5704. JONES *v.* BEYER, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 183.

No. 88–5706. SAINZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 1476.

No. 88–5709. MAHMOOD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 2d 181.

No. 88–5712. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 743.

No. 88–5713. COLEMAN *v.* DELAWARE ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 547 A. 2d 633.

No. 88–5714. BRANDON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 847 F. 2d 625.

No. 88–5725. YELARDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 187.

No. 88–5726. SCINTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 503.

No. 88–5728. BENAVIDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 701.

No. 88–5730. EPPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 187.

No. 88–5731. CANTU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 288.

No. 88–5737. FLYNN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 852 F. 2d 1045.

No. 88–5741. RIVERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 2d 420.

No. 88–5744. WILLIAMS-IGWONOBE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–5747. KNOWLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1290.

No. 88–5757. WHITMORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 859.

No. 88–5762. MAPLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1475.

No. 88–5766. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 690.

No. 88–5775. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 803.

No. 88–5776. RUBIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 1466.

No. 88–5778. SHERMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 930.

No. 88–5788. TIBBS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 187.

No. 88–5789. BURRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 860 F. 2d 1091.

No. 88–5790. FORDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 1363.

No. 88–5791. KRAMER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 88–5796. FELDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 154.

No. 88–5800. LEONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–2030. ANDERSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgments of conviction. Reported below: 322 N. C. 22, 366 S. E. 2d 459.

No. 88–150. IRVIN ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 845 F. 2d 126.

No. 88–176. MISSOURI *v.* PRESLEY. Ct. App. Mo., Southern Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 750 S. W. 2d 602.

No. 88–5061. NEWLAND *v.* GEORGIA. Sup. Ct. Ga.;

No. 88–5363. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5603. INGRAM *v.* KEMP, WARDEN. Super. Ct. Ga., Butts County;

No. 88–5630. HAMBLIN *v.* OHIO. Sup. Ct. Ohio; and

No. 88–5738. SIDEBOTTOM *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 88–5061, 258 Ga. 172, 366 S. E. 2d 689; No. 88–5363, 44 Cal. 3d 1127, 751 P. 2d 901; No. 88–5630, 37 Ohio St. 3d 153, 524 N. E. 2d 476; No. 88–5738, 753 S. W. 2d 915.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. D–720. IN RE DISBARMENT OF MACGUIRE, *ante*, p. 808;

No. 87–1586. CHALKO *v.* CHALKO, *ante*, p. 801;

No. 87–1707. STAUBER *v.* CLINE ET AL., *ante*, p. 817;

No. 87–1842. KALTSAS ET AL. *v.* CITY OF NORTH CHICAGO ET AL., *ante*, p. 804;

No. 87–1981. HARRIS *v.* REFINERS TRANSPORT & TERMINAL CORP. ET AL., *ante*, p. 823;

No. 87–2106. KASCHAK *v.* SUPERIOR COURT OF CALIFORNIA, KERN COUNTY (PINE MOUNTAIN CLUB PROPERTY OWNERS' ASSN., REAL PARTY IN INTEREST), *ante*, p. 827;

No. 87–2132. GJESSING ET AL. *v.* WEST INDIAN CO., LTD., ET AL., *ante*, p. 802;

No. 87–2133. LEGISLATURE OF THE VIRGIN ISLANDS *v.* WEST INDIAN CO., LTD., ET AL., *ante*, p. 802;

No. 87–6745. THOMPSON *v.* LOUISIANA, *ante*, p. 871;

No. 87–6813. WILLIAMS *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 831;

No. 87–6987. LIPHAM *v.* GEORGIA, *ante*, p. 873;

No. 87–7012. KELLY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 833;

No. 87–7039. DAVENPORT *v.* GEORGIA, *ante*, p. 834;

No. 87–7084. WOOL *v.* HINKEL ET AL.; and WOOL *v.* HORWITZ ET AL., *ante*, p. 802;

No. 87–7093. HEADLEY *v.* ZON ET AL., *ante*, p. 836;

No. 87–7098. JOHNSON *v.* ALABAMA, *ante*, p. 876;

No. 87–7117. ANDREWS *v.* TEXAS, *ante*, p. 871;

No. 87–7125. STEELE *v.* FELIX CHEVROLET ET AL., *ante*, p. 888;

No. 87–7131. SAMM *v.* SOUTHEASTERN UNIVERSITY, *ante*, p. 837;

No. 87–7156. MAY *v.* OHIO UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, *ante*, p. 838;

No. 87–7172. GLAUDE *v.* REGIONAL POSTMASTER GENERAL ET AL., *ante*, p. 839;

No. 87–7197. BROWN *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, *ante*, p. 840;

No. 87–7214. MITCHELL *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *ante*, p. 841;

No. 87–7216. MAHLERWEIN *v.* FEDERAL LAND BANK OF LOUISVILLE, *ante*, p. 803;

No. 87–7222. SAFIR *v.* INTERSTATE COMMERCE COMMISSION ET AL., *ante*, p. 841;

No. 87–7248. KLEINSCHMIDT *v.* FLORIDA COMMISSION ON HUMAN RELATIONS ET AL., *ante*, p. 842;

No. 87–7278. LOVINGOOD *v.* UNITED STATES, *ante*, p. 844;

No. 87–7293. MAHLERWEIN *v.* STITSINGER ET AL., *ante*, p. 803;

No. 87–7294. MAHLERWEIN *v.* BRUEWER ET AL., *ante*, p. 803;

No. 88–55. IN RE ROBERTS, *ante*, p. 814;

No. 88–144. SYRE *v.* PENNSYLVANIA ET AL., *ante*, p. 853;

No. 88–151. MANZO *v.* MANZO, *ante*, p. 853;
No. 88–260. IN RE DAVIS, *ante*, p. 814;
No. 88–310. IN RE MASON ET UX., *ante*, p. 814;
No. 88–5007. O'DELL *v.* VIRGINIA, *ante*, p. 871;
No. 88–5008. LYNCH *v.* SEYBERT NICHOLAS PRINTING CORP., *ante*, p. 857;
No. 88–5034. MINCEY *v.* GEORGIA, *ante*, p. 871;
No. 88–5047. ENGLERT *v.* SMALL BUSINESS ADMINISTRATION, *ante*, p. 858;
No. 88–5052. THOMPKINS *v.* ILLINOIS, *ante*, p. 871;
No. 88–5086. MARTINEZ *v.* NEW MEXICO, *ante*, p. 859;
No. 88–5161. DOTSON *v.* BOHTE ET AL., *ante*, p. 862;
No. 88–5194. FREE *v.* ILLINOIS, *ante*, p. 872; and
No. 88–5298. T. B. *v.* IOWA DEPARTMENT OF HUMAN SERVICES ET AL., *ante*, p. 896. Petitions for rehearing denied.

No. 87–6335. SIVLEY *v.* TEXAS, 487 U. S. 1201. Motion for leave to file petition for rehearing denied.

No. 87–7076. JURAS *v.* AMAN COLLECTION SERVICE, INC., ET AL., *ante*, p. 875. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 88–5199. GRAVES *v.* BIDNET, INC., *ante*, p. 868. Petition for rehearing denied. JUSTICE WHITE took no part in the consideration or decision of this petition.

DECEMBER 2, 1988

Miscellaneous Order

No. A–437. HERNANDEZ ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Application for stay of repatriation, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE MARSHALL would grant the application.

DECEMBER 5, 1988

Appeals Dismissed

No. 88–665. SUMMERS *v.* THOMPSON ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 764 S. W. 2d 182.

No. 88–5671. FIELDS *v.* TESTERMAN ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Reported below: 843 F. 2d 1391.

No. 88–5672. FIELDS *v.* MARTIN MARIETTA, INC., ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 842 F. 2d 331.

No. 88–5673. FIELDS *v.* PRUETT ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 843 F. 2d 1391.

Vacated and Remanded on Appeal

No. 88–539. POOLE ET AL. *v.* GRESHAM ET AL. Appeal from D. C. N. D. Ga. Judgment vacated and case remanded to consider the question of mootness. JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN would affirm the judgment. Reported below: 695 F. Supp. 1179.

Miscellaneous Orders

No. — – ——. SMITH *v.* MISSOURI. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by the petitioner granted. Motion of Missouri Public Defender Commission et al. to be substituted as next friends for Gerald Smith denied.

No. A–419. YONKERS RACING CORP. *v.* CITY OF YONKERS ET AL. D. C. S. D. N. Y. Application for recall, stay, and other relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied. THE CHIEF JUSTICE and JUSTICE KENNEDY would grant the application.

No. D–747. IN RE DISBARMENT OF WILLIAMS. It is ordered that Nicholas W. Williams, of Berea, Ky., 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. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master for award of interim fees and expenses granted, and allocation set forth in the motion approved. This amount is to be

paid equally by the parties. [For earlier order herein, see, *e. g.*, 485 U. S. 931.]

No. 87–826. GOLDBERG ET AL. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.; and

No. 87–1101. GTE SPRINT COMMUNICATIONS CORP. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 484 U. S. 1057.] Motion of appellants Goldberg and McTigue for leave to file a supplemental brief after argument granted.

No. 87–1661. ASARCO INC. ET AL. *v.* KADISH ET AL. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 887.] Motion of Alaska Miners Association et al. for leave to file a brief as *amici curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 87–1848. CITY OF DALLAS ET AL. *v.* STANGLIN, INDIVIDUALLY AND DBA TWILIGHT SKATING RINK. Ct. App. Tex., 5th Dist. [Certiorari granted, *ante*, p. 815.] Motion of U. S. Conference of Mayors et al. for leave to file a brief as *amici curiae* granted.

No. 88–266. OKLAHOMA TAX COMMISSION *v.* GRAHAM ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 816.] Motion of Stanley J. Alexander, Esq., to permit David Allen Miley, Esq., to present oral argument *pro hac vice* granted.

No. 88–603. ARIZONA *v.* FLINT. Ct. App. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–5686. IN RE JONES. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 88–429. PUBLIC CITIZEN *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL.; and

No. 88–494. WASHINGTON LEGAL FOUNDATION *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE SCALIA took no part in the consideration or decision of these cases. Reported below: 691 F. Supp. 483.

Certiorari Granted

No. 88–396. COLONIAL AMERICAN LIFE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari granted. Reported below: 843 F. 2d 201.

No. 88–616. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HUDSON. C. A. 11th Cir. Certiorari granted. Reported below: 839 F. 2d 1453.

No. 88–556. BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., ET AL. *v.* KELCO DISPOSAL, INC., ET AL. C. A. 2d Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 845 F. 2d 404.

Certiorari Denied. (See also Nos. 88–5672 and 88–5673, *supra.*)

No. 87–7201. FOLEY *v.* SECRETARY OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 846 F. 2d 77.

No. 87–7249. COLSTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 88–353. MASSACHUSETTS *v.* DEROSIA. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 402 Mass. 284, 522 N. E. 2d 408.

No. 88–402. MICHIGAN *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 395.

No. 88–423. MAYFAIR CONSTRUCTION CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 841 F. 2d 1576.

No. 88–424. EMERYVILLE TRUCKING, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 600.

No. 88–434. SINNOTT *v.* RADIN ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 402 Mass. 581, 524 N. E. 2d 100.

No. 88–437. LAWRENCE, DBA GRIZZLY & DALEY RANCH *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 2d 1502.

No. 88–446. CONTEMPORARY MISSION, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1293.

No. 88–473. KARSTETER *v.* GRAHAM COS., FKA SENGRA CORP. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 521 So. 2d 298.

No. 88–496. YOUNG ET AL. *v.* STANDARD OIL (INDIANA) ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 849 F. 2d 1039.

No. 88–604. FROST *v.* HAWKINS COUNTY BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 851 F. 2d 822.

No. 88–611. ROMAN *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–621. TOWN OF RYE, NEW HAMPSHIRE *v.* PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 130 N. H. 365, 540 A. 2d 1233.

No. 88–623. DORN *v.* WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 1476.

No. 88–636. BROBST *v.* DEAN WITTER REYNOLDS, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–637. CAPITAL CONTROLS CO., INC. *v.* CHLORINATORS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1292.

No. 88–641. DIANELLA SHIPPING CORP. ET AL. *v.* HERNANDEZ. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 582 and 848 F. 2d 498.

No. 88–643. ATLANTIC TELE-NETWORK CO. *v.* PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 70.

No. 88–648. ENDELL, COMMISSIONER, ALASKA DEPARTMENT OF CORRECTIONS *v.* WALKER. C. A. 9th Cir. Certiorari denied. Reported below: 850 F. 2d 470.

No. 88–650. GROGAN ET AL. *v.* PLATT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 844.

No. 88–652. HOWELL *v.* STATE BAR OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 205.

No. 88–657. CHARTER MEDICAL CORP. *v.* CARDIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 688.

No. 88–689. PERRY *v.* HOWES, WARDEN, FLORENCE CRANE WOMEN'S CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 568.

No. 88–694. A. E. C. TRADING CO., LTD. *v.* TRADEMASTERS INTERNATIONAL, INC. C. A. 7th Cir. Certiorari denied.

No. 88–696. WALLACE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 928.

No. 88–707. CONWAY *v.* FIRST TRUST COMPANY OF NORTH DAKOTA; and

No. 88–708. CONWAY *v.* FIRST TRUST COMPANY OF NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 423 N. W. 2d 795.

No. 88–735. NEVE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1419.

No. 88–751. ROWLAND *v.* ALAMEDA COUNTY PROBATION DEPARTMENT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–775. KELLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 999.

No. 88–788. LANGELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 832 F. 2d 705.

No. 88–5070. KABONGO *v.* IMMIGRATION & NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 753.

No. 88–5113. FOUNTAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 509.

No. 88–5125. TRIPATI *v.* HENMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 1160.

No. 88–5157. GLOVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 846 F. 2d 339.

No. 88–5247. PENDLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 1243.

No. 88–5262. CHALAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–5305. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 537.

No. 88–5355. GONZALES *v.* KERBY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88–5362. NIMMONS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 524 So. 2d 392.

No. 88–5384. MARSDEN *v.* MOORE, SHERIFF, CHILTON COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 847 F. 2d 1536.

No. 88–5447. HERMANSKI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 851 F. 2d 363.

No. 88–5492. WHITEHEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 849.

No. 88–5568. WATSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 224 N. J. Super. 354, 540 A. 2d 875.

No. 88–5590. SMITH *v.* SCOTT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 150.

No. 88–5641. HIX *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 38 Ohio St. 3d 129, 527 N. E. 2d 784.

No. 88–5655. FERGUSON *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 1472.

No. 88–5665. JONES *v.* CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5666. LAYTON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 534 So. 2d 400.

No. 88–5675. ALLEN *v.* CESARIO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 688.

No. 88–5678. POLLARD *v.* OWENS ILLINOIS INC. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 150.

No. 88–5682. LEVITT *v.* UNIVERSITY OF TEXAS AT EL PASO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 221.

No. 88–5689. WILLIAMS *v.* CITY OF HAZELHURST ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–5692. WAUL *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 88–5693. MCCOLPIN *v.* BROOKS. C. A. 10th Cir. Certiorari denied.

No. 88–5694. MOORE *v.* FULCOMER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–5700. ROSBERG *v.* JACOB ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 227 Neb. xxviii.

No. 88–5702. WEINREICH *v.* CAMPBELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 1066.

No. 88–5705. MASON *v.* UNITED STATES;
No. 88–5711. HANDLEY *v.* UNITED STATES;
No. 88–5719. CREEKMORE *v.* UNITED STATES;
No. 88–5724. TUCKER *v.* UNITED STATES;
No. 88–5739. WHITE *v.* UNITED STATES; and
No. 88–5740. STEELE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 678.

No. 88–5707. THORNE *v.* BAILEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 241.

No. 88–5710. ARMENTERO *v.* MAKEL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 926.

No. 88–5716. LEMBERG *v.* TSENG ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–5717. JAMES *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 565.

No. 88–5718. BALLANTYNE *v.* ERDBACHER ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 88–5720. BOWMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5721. YOUNG *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 2d 181.

No. 88–5734. FRANCIS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 88–5768. SELLNER *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 607.

No. 88–5771. METTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–5787. REGAN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–5797. MOODY *v.* BAKER. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 256.

No. 88–5798. MOODY *v.* TEXAS COURT OF CRIMINAL APPEALS. C. A. 5th Cir. Certiorari denied.

No. 88–5831. BRANNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–5845. DEPRIEST *v.* VIRGINIA. Ct. App. Va. Certiorari denied. Reported below: 4 Va. App. 577, 359 S. E. 2d 540.

No. 88–5846. LLOYD *v.* HINES ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 528 So. 2d 1187.

No. 88–5851. BILAL *v.* DAYTON HUDSON CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 859.

No. 87–211. BLACK, WARDEN *v.* ROBINSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 812 F. 2d 1084.

No. 88–564. MICHIGAN *v.* DYE. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 431 Mich. 58, 427 N. W. 501.

No. 88–668. COLORADO *v.* HARRIS. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 762 P. 2d 651.

No. 88–97. FORD MOTOR CO. *v.* BRYANT. C. A. 9th Cir. The order of October 3, 1988 [*ante*, p. 816], granting the petition for writ of certiorari is vacated. Certiorari denied. JUSTICE BLACKMUN dissents. Reported below: 844 F. 2d 602.

No. 88–318. RICHARD T. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari.

No. 88–410. UNISYS CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 845 F. 2d 965.

No. 88–577. SAMAAN *v.* NIAKAN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 199 Cal. App. 3d 716, 245 Cal. Rptr. 24.

No. 88–613. E. I. DU PONT DE NEMOURS & CO. *v.* PHILLIPS PETROLEUM CO. ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 849 F. 2d 1430.

No. 88–618. GRANITE ROCK CO. *v.* BUILDING MATERIALS & CONSTRUCTION TEAMSTERS LOCAL 216. C. A. 9th Cir. Motion of Associated General Contractors of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 851 F. 2d 1190.

No. 88–658. PANHANDLE EASTERN PIPE LINE CO. *v.* ILLINOIS EX REL. HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Motions of Interstate Natural Gas Association of America and Kansas Power & Light Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 852 F. 2d 891.

No. 88–5625. PYLES *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 88–5782. BRIDDLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 88–5625, 755 S. W. 2d 98; No. 88–5782, 742 S. W. 2d 379.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–5628. WILLIAMS *v.* PLANNED PARENTHOOD ASSOCIATION OF THE ATLANTA AREA, INC., ET AL. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 87–1853. LAURITZEN ET UX., INDIVIDUALLY AND DBA LAURITZEN FARMS *v.* MCLAUGHLIN, SECRETARY OF LABOR, *ante*, p. 898;

No. 87–1896. ROSENTHAL *v.* STATE BAR OF CALIFORNIA, *ante*, p. 805;

No. 87–7119. STEWART *v.* ILLINOIS, *ante*, p. 900;

No. 87–7223. LEWIS *v.* UNITED STATES, *ante*, p. 923;

No. 87–7322. BRYANT *v.* UNITED STATES, *ante*, p. 916;

No. 87–7345. SIMPSON *v.* UPPER PROVIDENCE TOWNSHIP POLICE DEPARTMENT ET AL., *ante*, p. 847;

No. 88–365. RIVARD ET AL. *v.* CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2, ET AL., *ante*, p. 909;

No. 88–5033. BIRGES *v.* NEVADA, *ante*, p. 804;

No. 88–5299. GARZA *v.* GRAMMER, ASSISTANT DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ADULT INSTITUTIONS, *ante*, p. 896;

No. 88–5317. POLLOCK *v.* MARSHALL, *ante*, p. 897;

No. 88–5351. DAVIS *v.* MCLAUGHLIN, SECRETARY OF LABOR, *ante*, p. 897;

No. 88–5386. SINDRAM *v.* TAYLOR, *ante*, p. 911;

No. 88–5387. WHITE *v.* UNITED STATES, *ante*, p. 911;

No. 88–5433. SCRUGGS *v.* MOELLERING ET AL., *ante*, p. 930; and

No. 88–5505. HOLLEY *v.* BULL ET AL., *ante*, p. 945. Petitions for rehearing denied.

DECEMBER 12, 1988*

Dismissal Under Rule 53

No. 88–5616. GAGNIER *v.* HARTNETT, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari dismissed under this Court's Rule 53.

---

*JUSTICE BRENNAN took no part in the consideration or decision of the orders announced on this date, with the exceptions of No. 88–5223, *Olden* v. *Kentucky*, *infra*, p. 988; No. A–468 (88–6092), *Landry* v. *Texas*, *infra*, p. 989; and No. A–474 (88–6104), *Hawkins* v. *Lynaugh, Director, Texas Department of Corrections*, *infra*, p. 989.

Affirmed on Appeal

No. 88–554. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* SMITH ET AL. Affirmed on appeal from D. C. E. D. Ark. Reported below: 687 F. Supp. 1361.

Appeals Dismissed

No. 88–671. SPRAGUE *v.* WALTER ET AL. Appeal from Sup. Ct. Pa. dismissed for want of properly presented federal question. Reported below: 518 Pa. 425, 543 A. 2d 1078.

No. 88–5761. WEHRINGER *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 135 App. Div. 2d 279, 525 N. Y. S. 2d 604.

Certiorari Granted—Reversed and Remanded. (See No. 88–5223, *ante*, p. 227.)

Certiorari Granted—Vacated and Remanded

No. 87–1720. TAYLOR *v.* PEABODY COAL CO. ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pittston Coal Group* v. *Sebben*, *ante*, p. 105. Reported below: 838 F. 2d 227.

Miscellaneous Orders

No. — — ——. SERRANO ET AL. *v.* JONES & LAUGHLIN STEEL CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. WILLIAMS *v.* ZANT, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE MARSHALL would grant the motion.

No. A–438. CARTER ET AL. *v.* MODJESKI & MASTERS. Sup. Ct. La. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. The stay entered by JUSTICE WHITE on December 1, 1988, is vacated. JUSTICE SCALIA would grant the application.

No. A–468 (88–6092). LANDRY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A–474 (88–6104). HAWKINS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE and JUSTICE WHITE would deny the application.

No. D–722. IN RE DISBARMENT OF DOHERTY. Disbarment entered. [For earlier order herein, see 487 U. S. 1248.]

No. D–725. IN RE DISBARMENT OF PAUL. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–730. IN RE DISBARMENT OF SWOFFORD. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–732. IN RE DISBARMENT OF ANTON. Disbarment entered. [For earlier order herein, see 487 U. S. 1261.]

No. D–733. IN RE DISBARMENT OF BUSSEY. Disbarment entered. [For earlier order herein, see *ante*, p. 885.]

No. D–734. IN RE DISBARMENT OF NEWMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 885.]

No. D–736. IN RE DISBARMENT OF CHESSON. Disbarment entered. [For earlier order herein, see *ante*, p. 885.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of plaintiffs for leave to file a supplemental complaint granted. [For earlier order herein, see, *e. g.*, 486 U. S. 1052.]

No. 111, Orig. DELAWARE *v.* NEW YORK. It is ordered that Thomas H. Jackson, Esq., of Charlottesville, Va., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see 486 U. S. 1030.]

No. 114, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Motion for leave to file bill of complaint denied. [For earlier order herein, see *ante*, p. 808.]

JUSTICE WHITE, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

Louisiana's complaint against Mississippi is plainly within our original jurisdiction and alleges a boundary dispute with Mississippi, the very kind of a dispute that countless times the Court has accepted and adjudicated under its original jurisdiction. Furthermore, as 28 U. S. C. § 1251(a) prescribes, the Court has exclusive jurisdiction over controversies between States. No other court may entertain Louisiana's complaint against Mississippi.

It is true that Louisiana intervened in a dispute between private parties over the ownership of land on an island in the Mississippi River, claiming that the land was in that State. That suit might settle the dispute among the parties and the State, but a judgment that the island is in Louisiana would not bind Mississippi. For that reason, I suppose, Louisiana filed a third-party complaint against Mississippi and also sought leave to file an original action in this Court. We prefer to have disputes within our original jurisdiction settled in other fora where possible. See, *e. g.*, *Arizona* v. *New Mexico*, 425 U. S. 794 (1976). But this boundary dispute between two States is exclusively our business and, as

such, may not be adjudicated in the District Court. Had Louisiana not intervened in the private action, denying leave to file would surely be indefensible. Perhaps denial of leave to file rests on the possibility that the private action will go forward with Louisiana as a party and that a judgment unfavorable to, but binding on, Louisiana will be entered. For me, however, this is no way to treat a sovereign State that wants its dispute with another State settled in this Court. I would grant leave to file.

No. 87–1269. EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. *v.* SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 485 U. S. 1004.] Motion of Libertarian National Committee for leave to file a brief as *amicus curiae* granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.*

No. 87–1661. ASARCO INC. ET AL. *v.* KADISH ET AL. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 887.] Motion of Clinton Campbell Contractor, Inc., for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.*

No. 87–1882. NEITZKE ET AL. *v.* WILLIAMS. C. A. 7th Cir. [Certiorari granted, *ante*, p. 816.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied. Respondent's suggestion of mootness rejected.

No. 87–2050. COUNTY OF ALLEGHENY ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ET AL.;
No. 88–90. CHABAD *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.; and
No. 88–96. CITY OF PITTSBURGH *v.* AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 816.] Motion of petitioners County of Allegheny et al. for divided argument denied. Motion of petitioner Chabad for divided argument granted to be divided as follows: 10 minutes to petitioner in No. 88–90 and 20 minutes to petitioners in Nos. 87–2050 and 88–96. Motion of petitioner City of Pittsburgh for divided argument denied. Motion of respondent Malik Tunador for divided argument and for additional time for oral argument denied.

---

*See also note, *supra*, p. 987.

No. 87–6997. CARELLA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. [Probable jurisdiction noted, *ante*, pp. 940 and 964.] Motion for appointment of counsel granted, and it is ordered that Christopher D. Cerf, Esq., of Washington, D. C., be appointed to serve as counsel for appellant in this case.

No. 88–660. SIMKINS INDUSTRIES, INC. *v.* SIERRA CLUB. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–5808. MACHARIA *v.* HODEL, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until January 3, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Certiorari Granted

No. 88–493. UNIVERSITY OF PENNSYLVANIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 850 F. 2d 969.

No. 88–681. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* SIERRA SUMMIT, INC. C. A. 9th Cir. Certiorari granted. Reported below: 847 F. 2d 570.

Certiorari Denied. (See also No. 88–5761, *supra.*)

No. 87–1873. DOW CHEMICAL CO. *v.* AREHART. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 335.

No. 88–451. HORRIGAN *v.* GENERAL DYNAMICS CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 848 F. 2d 321.

No. 88–462. UNITED PAPERWORKERS' INTERNATIONAL UNION, AFL–CIO, LOCAL NO. 1069 *v.* S. D. WARREN CO., A DIVISION

OF SCOTT PAPER CO. (two cases). C. A. 1st Cir. Certiorari denied. Reported below: 845 F. 2d 3 (first case); 846 F. 2d 827 (second case).

No. 88–463. COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO *v.* UNITED INTER-MOUNTAIN TELEPHONE CO. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 327.

No. 88–479. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 1456.

No. 88–481. INDUSTRIAL STEEL PRODUCTS CO., INC., ET AL. *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1330.

No. 88–488. RIDER ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 982.

No. 88–489. MCKABNEY ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1293.

No. 88–495. ROBERTS ET UX. *v.* UNITED STATES; and
No. 88–5727. BROMBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 852 F. 2d 671.

No. 88–504. COMMISSIONERS OF THE LAND OFFICE OF OKLAHOMA *v.* BUTLER. Sup. Ct. Okla. Certiorari denied. Reported below: 753 P. 2d 1334.

No. 88–633. MANSION HOUSE CENTER NORTH REDEVELOPMENT CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 524.

No. 88–640. EMPIRE BLUE CROSS & BLUE SHIELD ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1294.

No. 88–646. FIRST INTERSTATE CREDIT ALLIANCE, INC. *v.* AMERICAN BANK OF MARTIN COUNTY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 293.

No. 88–656. FRIEDMAN *v.* FERGUSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 689.

No. 88–661. SPENCER *v.* ST. PAUL FIRE & MARINE INSURANCE CO. Ct. Sp. App. Md. Certiorari denied. Reported below: 74 Md. App. 738.

No. 88-662. HOLY SPIRIT BYELORUSSIAN AUTOCEPHALIC ORTHODOX CHURCH ET AL. *v.* KENDYSH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 850 F. 2d 692.

No. 88-663. ALLSTATE INSURANCE CO. *v.* SCHON ET AL. C. A. 9th Cir. Certiorari denied.

No. 88-666. FORREST *v.* OCCIDENTAL PETROLEUM CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 88-670. LAW FIRM OF DANIEL P. FOSTER ET AL. *v.* TURNER BROADCASTING SYSTEM, INC., DBA CNN (CABLE NEWS NETWORK, INC.). C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 2d 955.

No. 88-672. TRIANGLE INDUSTRIES, INC., SUCCESSOR IN INTEREST TO CENTRAL JERSEY INDUSTRIES, INC. *v.* ZULKOWSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 852 F. 2d 73.

No. 88-675. SYNERGY GAS CORP. *v.* SASSO. C. A. 2d Cir. Certiorari denied. Reported below: 853 F. 2d 59.

No. 88-677. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP. C. A. 4th Cir. Certiorari denied. Reported below: 857 F. 2d 1468.

No. 88-678. MCGEE, ON BEHALF OF SWEET *v.* TREHARNE, LOS ANGELES PUBLIC GUARDIAN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88-679. BROWN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 531 So. 2d 64.

No. 88-680. LAI ET UX. *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 2d 301.

No. 88-682. H & H BEVERAGE DISTRIBUTORS, INC. *v.* DEPARTMENT OF REVENUE OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 165.

No. 88-690. MATSON PLASTERING, INC. *v.* PLASTERERS & SHOPHANDS LOCAL NO. 66, OPERATIVE PLASTERERS & CEMENT

MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1200.

No. 88–697. TRAHAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 229 Neb. 683, 428 N. W. 2d 619.

No. 88–705. JONES *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 107 N. M. 503, 760 P. 2d 796.

No. 88–714. O'NEIL, ATTORNEY GENERAL OF RHODE ISLAND *v.* BLACKSTONE VALLEY ELECTRIC CO. Sup. Ct. R. I. Certiorari denied. Reported below: 543 A. 2d 253.

No. 88–718. SCHUCKER *v.* ROCKWOOD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1202.

No. 88–793. PAGEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 2d 267.

No. 88–5246. MORA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 845 F. 2d 233.

No. 88–5414. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 279.

No. 88–5475. OLSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 196.

No. 88–5478. BATRA *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 1020.

No. 88–5558. FLOWERS *v.* WARDEN, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS, CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 853 F. 2d 131.

No. 88–5560. PENDLETON *v.* BUREAU OF PRISONS. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 602.

No. 88–5698. MCFARLAND *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5729. GALLAGHER *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 150 Vt. 341, 554 A. 2d 221.

No. 88–5732. HILL *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 88–5735. CURTIS *v.* ARAVE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 1475.

No. 88–5736. COX *v.* NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied.

No. 88–5743. WILLIAMS *v.* ARMONTROUT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 852 F. 2d 377.

No. 88–5752. STEPHENS *v.* SOUTH ATLANTIC CANNERS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 484.

No. 88–5765. POOLE *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–5767. SIMMONS *v.* MARSH. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 566.

No. 88–5769. O'CONNOR *v.* HECHT ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5784. WINTJEN *v.* BONACKER ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5786. TYLER ET AL. *v.* CLINE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 2d 59.

No. 88–5814. BUNNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–5819. TURNPAUGH *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 196.

No. 88–5824. GARRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 103.

No. 88–5839. MERCER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 853 F. 2d 630.

No. 88–5841. OLLETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 848 F. 2d 1193.

No. 87–1045. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* KYLE; and No. 87–1065. NATIONAL COUNCIL ON COMPENSATION INSURANCE *v.* KYLE ET AL. C. A. 6th Cir. Motion of respondent Fred Kyle for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 819 F. 2d 139.

No. 88–336. HILLS, SUPERINTENDENT, PICKAWAY CORRECTIONAL INSTITUTION *v.* FREELS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 843 F. 2d 958.

No. 88–647. WHITEHORN ET UX. *v.* MURPHY ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.* Reported below: 849 F. 2d 1479.

No. 88–674. ABADJIAN ET AL. *v.* GULF OIL CORP. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari.

Rehearing Denied

No. 87–1947. VITALE ET AL. *v.* SNAIDER ET AL., *ante*, p. 821;
No. 87–7228. DAILEY *v.* WEST VIRGINIA DEPARTMENT OF WELFARE, *ante*, p. 923;
No. 88–5360. SHINN *v.* UNITED STATES DEPARTMENT OF THE ARMY, *ante*, p. 929;
No. 88–5378. COLLIER *v.* JONES, *ante*, p. 929;
No. 88–5434. SKATZES *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, *ante*, p. 930;
No. 88–5514. BRATTON *v.* MONROE COUNTY ET AL., *ante*, p. 945;
No. 88–5551. SILVAGGIO *v.* CALIFORNIA, *ante*, p. 958; and
No. 88–5593. HEISHMAN *v.* CALIFORNIA, *ante*, p. 948. Petitions for rehearing denied.

DECEMBER 19, 1988

Certiorari Denied

No. 88–874 (A–481). MCMURTREY *v.* ARIZONA. Super. Ct. Ariz., Pima County. Application for stay of execution of sentence

---

*See also note, *supra*, p. 987.

of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JANUARY 5, 1989

Dismissal Under Rule 53

No. 88–754. JENKINS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

Miscellaneous Order

No. A–530. MERCER *v.* ARMONTROUT, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

JANUARY 6, 1989

Dismissal Under Rule 53

No. 87–1943. MINNESOTA NEWSPAPER ASSN., INC. *v.* POSTMASTER GENERAL OF THE UNITED STATES ET AL. D. C. Minn. [Probable jurisdiction noted, *ante*, p. 815.] Appeal dismissed under this Court's Rule 53.

JANUARY 9, 1989

Appeals Dismissed

No. 88–734. SAGAN *v.* PENNSYLVANIA PUBLIC TELEVISION NETWORK ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Reported below: 518 Pa. 564, 544 A. 2d 1309.

No. 88–5837. RHOADES *v.* IDAHO. Appeal from Dist. Ct. Idaho, 7th Jud. Dist., Bonneville County, dismissed for want of jurisdiction.

No. 88–759. CLARK *v.* FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 528 So. 2d 369.

No. 88–804. DAVIS *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 759 P. 2d 1033.

No. 88–852. HOOKER ET UX. *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. Reported below: 855 F. 2d 861.

No. 88–896. POLYAK *v.* HULEN ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 849 F. 2d 609.

No. 88–5425. LYERLA *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 424 N. W. 2d 908.

No. 88–5852. BETKA *v.* CITY OF WEST LINN, OREGON, ET AL. (two cases). Appeals from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied.

No. 88–5785. O'LEARY *v.* YARMOSKY. Appeal from App. Ct. Mass. dismissed for want of substantial federal question. Reported below: 26 Mass. App. 1101, 522 N. E. 2d 1018.

Certiorari Granted—Vacated and Remanded

No. 87–1630. RELIANCE INSURANCE CO. *v.* GLADOS, INC. C. A. 11th Cir. Motion of respondent to award attorney's fees denied. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Beech Aircraft Corp.* v. *Rainey*, *ante*, p. 153. Reported below: 831 F. 2d 1068.

Miscellaneous Orders

No. — — ——. SERRANO ET AL. *v.* JONES & LAUGHLIN STEEL CO. ET AL., *ante*, p. 988. Motion for reconsideration of order denying leave to file petition for writ of certiorari out of time denied.

No. A–447 (88–760). KEYSTONE LAMP MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. D–731. IN RE DISBARMENT OF CLAYTON. Disbarment entered. [For earlier order herein, see 487 U. S. 1249.]

No. D–739. IN RE DISBARMENT OF BENJAMIN. Disbarment entered. [For earlier order herein, see *ante*, p. 906.]

No. D–748. IN RE DISBARMENT OF JURON. It is ordered that Marvin Juron, of Deerfield, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–749. IN RE DISBARMENT OF CARTER. It is ordered that Robert A. Carter, Jr., of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–750. IN RE DISBARMENT OF SOUCEK. It is ordered that Jonathan H. Soucek, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–751. IN RE DISBARMENT OF EBERSTEIN. It is ordered that Brian A. Eberstein, of Dallas, Tex., 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. 115, Orig. ARKANSAS *v.* OKLAHOMA. Motion for leave to file bill of complaint denied.

No. 87–826. GOLDBERG ET AL. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.; and

No. 87–1101. GTE SPRINT COMMUNICATIONS CORP. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 484 U. S. 1057.] Motion of appellant GTE Sprint Communications Corp. for leave to file a supplemental brief after argument granted.

No. 87–1428. LORANCE ET AL. *v.* AT&T TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 887.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1589. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL.; and

No. 87–1888. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 965.] Motion of respondents to argue these cases in tandem with No. 88–1, *Consolidated Rail Corporation* v. *Railway Labor Executives' Assn. et al.* [certiorari granted, *ante*, p. 815], denied.

No. 87–1855. GILHOOL, SECRETARY OF EDUCATION OF PENNSYLVANIA *v.* MUTH ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion of respondent Central Bucks School District for divided argument and for additional time for oral argument denied.

No. 87–1862. CALIFORNIA ET AL. *v.* ARC AMERICA CORP. ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 87–1956. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. *v.* MINNESOTA NEWSPAPER ASSN., INC. D. C. Minn. [Probable jurisdiction noted, *ante*, p. 815.] Motion of appellee to dismiss the appeal denied.

No. 87–6571. GRAHAM *v.* CONNOR ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 88–305. SOUTH CAROLINA *v.* GATHERS. Sup. Ct. S. C. [Certiorari granted, *ante*, p. 888.] Motion of respondent to dismiss the writ of certiorari denied.

No. 88–317. DUCKWORTH *v.* EAGAN. C. A. 7th Cir. [Certiorari granted, *ante*, p. 888.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–454. UNITED STATES *v.* MONSANTO. C. A. 2d Cir. [Certiorari granted, *ante*, p. 941.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–557. MICHIGAN *v.* LEIGH. Ct. App. Mich.;

No. 88–597. CITY OF GRETNA, LOUISIANA, ET AL. *v.* CITIZENS FOR A BETTER GRETNA ET AL. C. A. 5th Cir.; and

No. 88–606. CITY OF BAYTOWN, TEXAS, ET AL. *v.* CAMPOS ET AL. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 88–5526. BETKA *v.* A–T INDUSTRIES, INC., ET AL., *ante*, p. 939. Motion of appellant for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 88–5803. IN RE MILKOWSKI ET UX. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until January 30, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of mandamus and/or prohibition without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5823. IN RE WRIGHT ET AL.;

No. 88–5949. IN RE CHRISTIANSON;

No. 88–5982. IN RE GILL; and

No. 88–6084. IN RE RENTSCHLER. Petitions for writs of habeas corpus denied.

No. 88–5921. IN RE MARTIN. Petition for writ of prohibition denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted

No. 88–515. SABLE COMMUNICATIONS OF CALIFORNIA, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 88–525. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* SABLE COMMUNICATIONS OF CALIFORNIA, INC. Appeals from D. C. C. D. Cal. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 692 F. Supp. 1208.

No. 88–605. WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 851 F. 2d 1071.

Certiorari Granted

No. 88–348. NEW ORLEANS PUBLIC SERVICE INC. *v.* COUNCIL OF THE CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 850 F. 2d 1069.

No. 88–412. HOFFMAN, TRUSTEE *v.* CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 850 F. 2d 50.

No. 88–774. NEWMAN-GREEN, INC. *v.* ALFONZO-LARRAIN ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 854 F. 2d 916.

No. 88–782. UNITED STATES DEPARTMENT OF JUSTICE *v.* TAX ANALYSTS. C. A. D. C. Cir. Certiorari granted. Reported below: 269 U. S. App. D. C. 315, 845 F. 2d 1060.

No. 88–333. ALABAMA *v.* SMITH. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 557 So. 2d 13.

No. 88–420. JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN AT MOBERLY *v.* THOMAS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 844 F. 2d 1337.

No. 88–5014. GOMEZ *v.* UNITED STATES; and

No. 88–5158. CHAVEZ-TESINA *v.* UNITED STATES. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total

of one hour allotted for oral argument. Reported below: 848 F. 2d 1324.

Certiorari Denied. (See also Nos. 88–759, 88–804, 88–852, 88–896, 88–5425, and 88–5852, *supra.*)

No. 87–1420. M-TRON INDUSTRIES, INC. *v.* HILLEBRAND. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 363.

No. 87–1448. WESTINGHOUSE ELECTRIC CORP. *v.* BHAYA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 258.

No. 87–1731. CARSON PIRIE SCOTT & CO. *v.* LACEY. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 461.

No. 87–2072. YOUNG *v.* GENERAL FOODS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 825.

No. 88–326. SMITHSON ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 791.

No. 88–390. PETERMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 841 F. 2d 1474.

No. 88–428. VERITY, SECRETARY OF COMMERCE, ET AL. *v.* CENTER FOR ENVIRONMENTAL EDUCATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 116, 839 F. 2d 795.

No. 88–436. HEINTZ, COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE OF CONNECTICUT *v.* UNITED STATES. Sup. Ct. Conn. Certiorari denied. Reported below: 207 Conn. 743, 542 A. 2d 1153.

No. 88–487. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND *v.* HAWKEYE-SECURITY INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 609.

No. 88–500. ILLINOIS COMMERCE COMMISSION ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 270 U. S. App. D. C. 214, 848 F. 2d 1246.

No. 88–502. IN RE SOLERWITZ. C. A. Fed. Cir. Certiorari denied. Reported below: 848 F. 2d 1573.

No. 88–505. NATIONAL ASSOCIATION OF COUNTIES ET AL. *v.* BRADY, SECRETARY OF THE TREASURY. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 373, 842 F. 2d 369.

No. 88–514. HENSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 1374.

No. 88–521. JESSUP ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 183.

No. 88–548. NEWMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 88–559. AZAR *v.* MINISTER OF LEGAL AFFAIRS OF TRINIDAD AND TOBAGO. C. A. 11th Cir. Certiorari denied. Reported below: 848 F. 2d 1151.

No. 88–593. TRUJILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 851 F. 2d 111.

No. 88–596. COUNTY OF SUMMIT *v.* CITY OF AKRON. Sup. Ct. Ohio. Certiorari denied. Reported below: 36 Ohio St. 3d 85, 521 N. E. 2d 818.

No. 88–602. ALLIED CHEMICAL *v.* NIAGARA MOHAWK POWER CORP. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 271, 528 N. E. 2d 153.

No. 88–607. WEIGNER *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 852 F. 2d 646.

No. 88–612. ROBINSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 361.

No. 88–617. YORK BANK & TRUST CO. *v.* FEDERAL SAVINGS & LOAN INSURANCE CORPORATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 2d 637.

No. 88–622. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL–CIO *v.* BLOUNT INTERNATIONAL, LTD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 519 So. 2d 1009.

No. 88–624. HICKS *v.* FEENEY, DIRECTOR, DELAWARE STATE HOSPITAL. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 152.

No. 88–628. CAUCUS DISTRIBUTORS, INC., ET AL. *v.* MINNESOTA COMMISSIONER OF COMMERCE. Ct. App. Minn. Certiorari denied. Reported below: 422 N. W. 2d 264.

No. 88–632. CONSOLIDATED CAPITAL CORP. ET AL. *v.* SHEA & GOULD ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 88–655. GRECO ET AL. *v.* TAMPA WHOLESALE CO. ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 522 So. 2d 506.

No. 88–673. JORDAN *v.* HODEL, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 1368.

No. 88–685. KURITZKY ET AL. *v.* BLUE SHIELD OF WESTERN NEW YORK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 126.

No. 88–686. D'ANDREA *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–692. TEETER ET UX., DBA SKY'S THE LIMIT *v.* GRAVITY GUIDANCE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 854 F. 2d 1327.

No. 88–695. MILLER *v.* MORONGO BAND OF MISSION INDIANS. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 1376.

No. 88–698. VOGLER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 638.

No. 88–700. CORWIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–704. HOFFMAN ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 290.

No. 88–716. COOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 854 F. 2d 371.

No. 88–717. ALLARD *v.* FRECH, INDEPENDENT EXECUTRIX OF THE ESTATE OF ALLARD. Sup. Ct. Tex. Certiorari denied. Reported below: 754 S. W. 2d 111.

No. 88–719. TUCKER *v.* NORTHEAST SAVINGS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1468.

No. 88–720. MALONEY, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* LANIGAN. C. A. 1st Cir. Certiorari denied. Reported below: 853 F. 2d 40.

No. 88–721. POE *v.* HAYDON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 418.

No. 88–722. STAPLETON *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 88–723. JENKINS *v.* GEORGIA POWER CO. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 507.

No. 88–725. CLAMP-ALL CORP. *v.* CAST IRON SOIL PIPE INSTITUTE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 851 F. 2d 478.

No. 88–726. MCDOWELL ET AL. *v.* BARNES. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 725.

No. 88–727. BLUMBERG *v.* HCA MANAGEMENT CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 642.

No. 88–728. CONSTANT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 861 F. 2d 728.

No. 88–736. WANKOFF, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WANKOFF *v.* TIBBS ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 372 Pa. Super. 646, 534 A. 2d 1124.

No. 88–737. MORGAN *v.* FORETICH. Ct. App. D. C. Certiorari denied. Reported below: 546 A. 2d 407.

No. 88–739. SKIRLICK ET AL. *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 409, 852 F. 2d 1376.

No. 88–740. MADEJ *v.* AIR PRODUCTS & CHEMICALS, INC. Super. Ct. Pa. Certiorari denied. Reported below: 373 Pa. Super. 646, 536 A. 2d 833.

No. 88–741. CLALLAM COUNTY, WASHINGTON, ET AL. *v.* DEPARTMENT OF TRANSPORTATION OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 424.

No. 88–742. VONHOF ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 51 Wash. App. 33, 751 P. 2d 1221.

No. 88–746. ADAMS ET AL. *v.* BUDD CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 846 F. 2d 428.

No. 88–747. ALLIED CORP. *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 850 F. 2d 1573.

No. 88–748. DATA CONTROLS NORTH, INC., ET AL. *v.* EQUITABLE BANK, NATIONAL ASSN. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 2d 691.

No. 88–749. KUNTZ ET AL. *v.* CITY OF DAYTON, OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 37 Ohio St. 3d 713, 532 N. E. 2d 764.

No. 88–750. GEORGE *v.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES ET AL. Ct. App. Mich. Certiorari denied.

No. 88–752. MARTIN *v.* WALKER. C. A. 8th Cir. Certiorari denied. Reported below: 850 F. 2d 433.

No. 88–755. ESTATE OF VANE *v.* THE FAIR, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 2d 186.

No. 88–757. HENING *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 132 App. Div. 2d 783, 517 N. Y. S. 2d 331.

No. 88–762. SPECHT ET UX. *v.* JENSEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 853 F. 2d 805.

No. 88–763. MICHIGAN *v.* SERRANO. Ct. App. Mich. Certiorari denied.

No. 88–765. THANH VONG HOAI *v.* THANH VAN VO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 2d 185.

No. 88–766. MAYES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 323 N. C. 159, 371 S. E. 2d 476.

No. 88–767. RELIFORD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 176.

No. 88–769. HARLAN *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1085.

No. 88–770. PULITZER PUBLISHING CO. ET AL. *v.* DUGGAN, JUDGE, CIRCUIT COURT OF MISSOURI, ST. CHARLES COUNTY. Sup. Ct. Mo. Certiorari denied.

No. 88–771. SUN-TEK INDUSTRIES, INC. *v.* KENNEDY SKY-LITES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 848 F. 2d 179.

No. 88–779. GARNER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 371 Pa. Super. 408, 538 A. 2d 506.

No. 88–780. CIMO ET AL. *v.* PETTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 654.

No. 88–781. MUNCIE POWER PRODUCTS, INC. *v.* CHURNOCK. C. A. 3d Cir. Certiorari denied.

No. 88–783. VANDERCREEK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 531 So. 2d 719.

No. 88–784. BRISTOW *v.* LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE. Sup. Ct. Miss. Certiorari denied. Reported below: 529 So. 2d 620.

No. 88–787. RAJARAM *v.* INTERNATIONAL TYPOGRAPHICAL UNION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 566.

No. 88–789. RAILROAD COMMISSION OF TEXAS ET AL. *v.* MISSOURI PACIFIC RAILROAD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 850 F. 2d 264.

No. 88–794. BRUEGGING *v.* WILSON, ARCHIVIST OF NATIONAL ARCHIVES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88-798. HODEL, SECRETARY OF THE INTERIOR *v.* MUSCOGEE (CREEK) NATION. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 212, 851 F. 2d 1439.

No. 88-799. WOLSKE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 143 Wis. 2d 175, 420 N. W. 2d 60.

No. 88-801. VSL CORP., INC., ET AL. *v.* CONMAR CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 499.

No. 88-808. CALIFORNIA LAND & CATTLE CO. *v.* AMSTAR CORP. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 88-817. CARTER, ADMINISTRATRIX OF THE ESTATE OF CARTER *v.* CITY OF CHATTANOOGA, TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 850 F. 2d 1119.

No. 88-822. AMERICAN STANDARDS TESTING BUREAU, INC. *v.* HONEYWELL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 2d 652.

No. 88-827. WITSCHEN, SHERIFF OF SHERBURNE COUNTY, ET AL. *v.* BOSWELL, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BOSWELL. C. A. 8th Cir. Certiorari denied. Reported below: 849 F. 2d 1117.

No. 88-831. BASKIN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 528 So. 2d 1120.

No. 88-835. FROSCHAUER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 858 F. 2d 1218.

No. 88-843. TICKTIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 1265.

No. 88-845. BIBB ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 863.

No. 88-860. LUMBEE FARMS COOPERATIVE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 689.

No. 88-861. MODEEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 400.

No. 88-862. RAY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 468.

No. 88–867. WILLNER *v.* UNIVERSITY OF KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 2d 1020.

No. 88–869. EVANS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 34.

No. 88–881. VON MARSCHNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 1477.

No. 88–882. BOSSELAIT ET AL. *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 130 N. H. 604, 547 A. 2d 682.

No. 88–883. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 61.

No. 88–890. ROACH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 1319.

No. 88–900. KERR *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1289.

No. 88–911. CEGELKA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 853 F. 2d 627.

No. 88–917. KAGANOVE *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 856 F. 2d 884.

No. 88–930. CUSUMANO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1090.

No. 88–937. ROSENGARTEN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 76.

No. 88–5035. O'CONNELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 841 F. 2d 1408.

No. 88–5176. ROYSTER *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 327.

No. 88–5182. ALLEN *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 845 F. 2d 610.

No. 88–5332. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 691.

No. 88–5345. HARDIN *v.* HARDIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 190.

No. 88–5442. SINK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 851 F. 2d 1120.

No. 88–5516. EVINS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5555. RED FOX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 152.

No. 88–5572. SOTO ET UX. *v.* SACRAMENTO COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 572.

No. 88–5635. WARREN *v.* CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 924.

No. 88–5644. STEVEN W. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 850 F. 2d 648.

No. 88–5647. BOOSS *v.* CARLSON ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–5649. BOOSS *v.* TURNER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5674. ANDERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 129, 851 F. 2d 384.

No. 88–5679. PENDLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–5697. PAUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 308.

No. 88–5748. BRANTLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–5758. CHOU *v.* UNIVERSITY OF CALIFORNIA AT BERKELEY; and CHOU *v.* UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 849 F. 2d 1475 (first case).

No. 88–5760. GREEN *v.* JOHNSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88–5764. MANGAN *v.* WEINBERGER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 848 F. 2d 909.

No. 88–5773. FULGHUM *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1529.

No. 88–5774. BUCHANAN *v.* ROTHGERBER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 192.

No. 88–5779. PRENZLER *v.* COUNTY OF ORANGE, CALIFORNIA, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–5780. STRINGER *v.* JOHNSON ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–5781. WILSON *v.* GARRAGHTY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 854 F. 2d 1318.

No. 88–5793. EVANS *v.* FULCOMER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1074.

No. 88–5794. GIAKOVMIS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 50 Wash. App. 1060.

No. 88–5805. RUCKER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 88–5807. PRYMER *v.* CITY OF ROCKFORD, ILLINOIS, ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 88–5809. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–5810. IVEY *v.* LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 191.

No. 88–5812. PADAVICK *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88–5813. MUHAMMAD *v.* UNITED STATES BUREAU OF PRISONS. C. A. 10th Cir. Certiorari denied.

No. 88–5817. CARROLL *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 926.

No. 88–5818. KINSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 790.

No. 88–5822. TELEPO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–5833. LATHAM *v.* GLUCKSTERN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 605.

No. 88–5835. KAY *v.* CITY OF BERKELEY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 792.

No. 88–5836. BAEZ *v.* COUNTY OF ONONDAGA. C. A. 2d Cir. Certiorari denied. Reported below: 853 F. 2d 73.

No. 88–5838. COLOZZI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 378 Pa. Super. 644, 544 A. 2d 1039.

No. 88–5840. THOMPSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–5843. RAMOS-LOPEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88–5844. BENNY *v.* CHICAGO TITLE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1147.

No. 88–5847. JANKOWSKI *v.* FULTON COUNTY MEDICAL EXAMINER ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: —— Ga. ——, 372 S. E. 2d 641.

No. 88–5848. BLAKEY *v.* VASSAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 604.

No. 88–5850. HILL *v.* SCHUKIE ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5854. CREEL *v.* HECKMANN, CHAIRMAN, TEXAS BOARD OF PARDONS AND PAROLES. Ct. Crim. App. Tex. Certiorari denied.

No. 88–5855. STERLING *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied.

No. 88–5856. LEE *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 142 App. Div. 2d 802, 530 N. Y. S. 2d 884.

No. 88–5859. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 745.

No. 88–5860. TROTZ *v.* UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 1466.

No. 88–5862. LIGHTSEY *v.* KASTNER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 846 F. 2d 329.

No. 88–5865. GOLDEN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 534 So. 2d 399.

No. 88–5867. HACKER *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 755 S. W. 2d 603.

No. 88–5870. BUCKLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 847 F. 2d 991.

No. 88–5872. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 155.

No. 88–5873. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88–5875. NESBITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 852 F. 2d 1502.

No. 88–5876. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–5877. MABRY *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 566.

No. 88–5879. WEICHERT *v.* SWINSON, SUPERINTENDENT, FEDERAL PRISON CAMP, DULUTH, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1085.

No. 88–5882. TRIPATI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–5884. BARRATTEAU *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 929.

No. 88–5885. COOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 361.

No. 88–5886. HORTON, AKA DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 922.

No. 88–5888. DAVIS *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, NAPANOCH, NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 88–5896. LITTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 854 F. 2d 1318.

No. 88–5903. DEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 725.

No. 88–5904. COOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 23.

No. 88–5905. DAROUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 690.

No. 88–5907. ROMERO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 856 F. 2d 1020.

No. 88–5911. VILANOVA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 851 F. 2d 1.

No. 88–5919. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1291.

No. 88–5920. BURGEST *v.* GEARINGER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 88–5923. HERNANDEZ-MOLINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 288.

No. 88–5927. COLEMAN *v.* DELAWARE. C. A. 3d Cir. Certiorari denied.

No. 88–5928. BONANNO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 434.

No. 88–5929. GRAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–5930. COMERFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1323.

No. 88–5932. HAMDAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 153.

No. 88–5943. MARSHBURN *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 864 F. 2d 148.

No. 88–5948. THISSEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 1466.

No. 88–5951. ELLIS *v.* KENTUCKY STATE BOARD OF PAROLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 193.

No. 88–5955. WEICHERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 305.

No. 88–5968. BARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1509.

No. 88–5973. HUGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 918.

No. 88–5995. MUHAMMAD *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 1463.

No. 88–5996. KOEDATICH *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 112 N. J. 225, 548 A. 2d 939.

No. 88–5999. GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 266.

No. 88–6001. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 545 A. 2d 1202.

No. 88–6002. SANCHEZ-CEBEZAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–6007. BRYANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1479.

No. 88–6011. REINHARDT *v.* UNITED STATES; and
No. 88–6028. HENDRICKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1090.

No. 88–6016. GURULE *v.* KAUTZKY, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied.

No. 88–6031. FELDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–6034. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 361.

No. 88–6035. HATCHER *v.* JACKSON, SUPERINTENDENT, NEWARK HOUSE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 212.

No. 88–6047. ISMAIL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 1287.

No. 88–6048. HENSLEY, AKA HOSKINS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 88–6086. BOWEN *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 88–6092. LANDRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 87–1796. MASSINGA ET AL. *v.* L. J. ET AL. C. A. 4th Cir. Motion of National Association of Social Workers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 838 F. 2d 118.

No. 87–7192. BROWNING *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 837 F. 2d 276.

No. 88–5459. SEYMORE *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 846 F. 2d 1355.

No. 88–5565. BRANCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 850 F. 2d 1080.

No. 88–630. ALABAMA *v.* COX ET AL. Ct. Crim. App. Ala. Motions of Southern Christian Leadership Conference et al. and National District Attorneys Association, Inc., for leave to file briefs as *amici curiae* granted. Motion of respondent Cox for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE

WHITE and JUSTICE KENNEDY would grant certiorari. Reported below: 531 So. 2d 71.

No. 88–733. UNITED ARTISTS THEATRE CIRCUIT, INC., ET AL. *v.* HARKINS AMUSEMENT ENTERPRISES, INC., ET AL. C. A. 9th Cir. Motion of Columbia Pictures Industries et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 850 F. 2d 477.

No. 88–738. SPRING BRANCH MINING CO., INC., ET AL. *v.* UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST AND 1950 PENSION PLAN ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 854 F. 2d 37.

No. 88–785. LEASE LIGHTS, INC., ET AL. *v.* PUBLIC SERVICE COMPANY OF OKLAHOMA. C. A. 10th Cir. Motion of Alliance for Fair Competition for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 849 F. 2d 1330.

No. 88–786. CARROLL *v.* MOORE. Sup. Ct. Neb. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 228 Neb. 561, 423 N. W. 2d 757.

No. 88–5271. EATON *v.* LOUISIANA. Sup. Ct. La.;

No. 88–5600. GILLIARD *v.* SCROGGY, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir.;

No. 88–5670. LONCHAR *v.* GEORGIA. Sup. Ct. Ga.;

No. 88–5684. NICHOLS *v.* TEXAS. Ct. Crim. App. Tex.;

No. 88–5751. VAN CLEAVE *v.* INDIANA. Sup. Ct. Ind.;

No. 88–5753. MATHENIA *v.* MISSOURI. Ct. App. Mo., Eastern Dist.;

No. 88–5756. MUNSON *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 88–5759. KING *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 88–5763. SILVA *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5777. SIRIPONGS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5880. SINGLETON *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 88–5915. STOKES *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir.; and

No. 88–6042. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 88–5271, 524 So. 2d 1194; No. 88–

5600, 847 F. 2d 1141; No. 88–5670, 258 Ga. 447, 369 S. E. 2d 749; No. 88–5684, 754 S. W. 2d 185; No. 88–5751, 517 N. E. 2d 356; No. 88–5753, 752 S. W. 2d 873; No. 88–5756, 758 P. 2d 324; No. 88–5759, 850 F. 2d 1055; No. 88–5763, 45 Cal. 3d 604, 754 P. 2d 1070; No. 88–5777, 45 Cal. 3d 548, 754 P. 2d 1306; No. 88–5880, 847 F. 2d 668; No. 88–5915, 851 F. 2d 1085; No. 88–6042, 756 S. W. 2d 493.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–5755. WILLIAMS ET AL. *v.* WARD ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 845 F. 2d 374.

No. 88–5806. NEELLEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 531 So. 2d 69.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to determine the applicable standard for reviewing *Brady* violations in the sentencing phase of a capital trial.

I

Petitioner Judith Ann Neelley was convicted of the capital offense of murder during a kidnaping. She did not deny that she had kidnaped and killed the victim. She testified, however, that she had acted at the direction and under the control of her husband, Alvin Neelley, who, petitioner contended, had physically and sexually abused her. Petitioner claimed that she was willing to do anything to avoid further abuse. A clinical psychologist

who had examined Neelley testified that she "'probably fits the battered women's syndrome to the most severe extent that [she had] seen.'" The psychologist noted that "'Alvin's mental state was substituted'" for petitioner's so that she had "'no intents of her own.'" *Neelley* v. *State*, 494 So. 2d 669, 681 (Ala. Crim. App. 1985).

To substantiate her defense further, petitioner's attorney sought disclosure of evidence seized by investigators from her mobile home—in particular, several letters petitioner sent to her husband. These letters contained references to her husband's "hypnotizing eyes" and the fact that petitioner had been hearing her husband's voice by mental telepathy. One letter also contained the suggestion that petitioner believed her letters might lead her husband to kill her. The prosecution denied that it had such letters and the trial court denied petitioner's request. The jury subsequently imposed a sentence of life without parole. Although the trial judge found that petitioner "was substantially influenced by her husband," he overruled the jury and sentenced petitioner to death. *Id.*, at 693.

After petitioner's conviction and sentence were affirmed on direct appeal, *Ex parte Neelley*, 494 So. 2d 697 (1986), her attorney learned that the investigator who had seized the letters did not deliver them to the appropriate law enforcement officials. Petitioner then filed a motion for relief from conviction and sentence, contending, *inter alia*, that the State's failure to disclose the seized evidence violated her due process rights. As a preliminary matter, a state court found that the investigator's failure to disclose the letters could be imputed to the prosecutor. Brief in Opposition 10. After reviewing the letters, however, the court concluded that "'there is no reasonable probability that any of the evidence would have altered either the guilt or punishment stage of petitioner's trial.'" *Ibid.*

II

"It is well settled that the Government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 57 (1987). This Court has determined that, for *Brady* violations during the guilt phase of a trial, *Brady* v. *Maryland*, 373 U. S. 83 (1963), materiality turns on whether there

is a reasonable probability that the evidence might have affected the outcome of the trial, such that, "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ritchie*, *supra*, at 57; see also *United States* v. *Bagley*, 473 U. S. 667, 674–678 (1985). Here, the state court simply assumed that this same standard of materiality is appropriate for suppression of evidence at the sentencing phase of a capital trial.

I am not so sure. The nondisclosure of evidence favorable to a capital defendant at the sentencing phase not only raises serious due process concerns, but also implicates the defendant's right under the Eighth and Fourteenth Amendments to present mitigating evidence before the sentencer. Given our heightened concern for reliability and individualized sentencing in the capital context, we have held that a defendant has a right to admit *all* relevant mitigating evidence. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion). Applying the outcome-focused reasonable probability standard to information withheld during the sentencing phase of a capital trial poses a serious threat to that right. In the instant case, petitioner's letters were directly relevant to her primary mitigation claim that she had acted under her husband's influence. Her right to introduce those letters into evidence was guaranteed by the Eighth and Fourteenth Amendments, independent of any due process claim she might have otherwise had.

In my view, the standard for reviewing *Brady* violations in the sentencing phase of a capital trial is an important and recurring issue that warrants the Court's attention. See *Brown* v. *Chaney*, 469 U. S. 1090, 1096 (1984) (Burger, C. J., dissenting from denial of certiorari).

III

A final comment is necessary. Petitioner's counsel before this Court wrote three terse sentences describing the reasons why we should grant certiorari. He merely asserted a *Brady* violation without discussing the relevant law or analyzing the facts of this case. Such brevity—unconscionable in a capital case—raises a serious question as to whether petitioner has received effective assistance of counsel. I dissent.

Rehearing Denied

No. 87–1921. WINSLOW ET UX. *v.* WILLIAMS ET AL., *ante*, p. 820;

No. 87–1961. TOWN OF HUNTINGTON, NEW YORK, ET AL. *v.* HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *ante*, p. 15;

No. 87–2128. CHAIRES *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., *ante*, p. 829;

No. 87–6947. MINER *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *ante*, p. 941;

No. 87–7189. WOHLFORD ET UX. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL., *ante*, p. 941;

No. 87–7284. MARTIN *v.* MORRIS, *ante*, p. 924;

No. 88–296. SHOSTAK *v.* FEDERAL ENERGY REGULATORY COMMISSION, *ante*, p. 942;

No. 88–418. SHANKS ET AL. *v.* ESTES PARK BANK, *ante*, p. 927;

No. 88–445. BROAD ET UX. *v.* CONWAY ET AL., *ante*, p. 927;

No. 88–474. NEVILLE *v.* MOLLEN, PRESIDING JUSTICE, APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT, ET AL., *ante*, p. 943;

No. 88–5252. TURNER *v.* UNITED STATES POSTAL SERVICE, *ante*, p. 969;

No. 88–5347. PATILLO *v.* GEORGIA, *ante*, p. 948;

No. 88–5400. IN RE RADVAN-ZIEMNOWICZ, *ante*, p. 923;

No. 88–5439. IKENI *v.* CALIFORNIA SUPERIOR COURT OF FRESNO COUNTY ET AL., *ante*, p. 920;

No. 88–5446. COLE *v.* MISSISSIPPI, *ante*, p. 934;

No. 88–5451. THOMPSON *v.* SOUTHEASTERN TOYOTA DISTRIBUTORS, INC., ET AL., *ante*, p. 931;

No. 88–5452. MAY *v.* WARNER AMEX CABLE COMMUNICATIONS, *ante*, p. 931;

No. 88–5461. CAMPBELL *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, *ante*, p. 948;

No. 88–5462. KRISHNAN *v.* DEPARTMENT OF THE AIR FORCE, *ante*, p. 957;

No. 88–5497. FLEMING *v.* DEAK ET AL., *ante*, p. 945;

No. 88–5507. BRADSHAW *v.* ZOOLOGICAL SOCIETY OF SAN DIEGO, *ante*, p. 945;

No. 88–5511. BIGG *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 932;

No. 88–5549. MARTIN *v.* C. ITOH & CO. (AMERICA), INC., ET AL., *ante*, p. 951;

No. 88–5592. DRABICK *v.* DRABICK, *ante*, p. 958;

No. 88–5642. ROWE *v.* DEPARTMENT OF THE ARMY, *ante*, p. 951;

No. 88–5643. ROWE *v.* DEPARTMENT OF THE ARMY, *ante*, p. 951; and

No. 88–5677. MARTIN *v.* ZOOK ET AL., *ante*, p. 972. Petitions for rehearing denied.

No. 88–416. BENSON *v.* BEARB ET AL., *ante*, p. 926. Motion of petitioner to defer consideration of petition for rehearing denied. Petition for rehearing denied.

JANUARY 17, 1989

Affirmed on Appeal

No. 87–1818. BADHAM ET AL. *v.* EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. Affirmed on appeal from D. C. N. D. Cal. THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE KENNEDY would note probable jurisdiction and set case for oral argument. Reported below: 694 F. Supp. 664.

Appeals Dismissed

No. 88–806. MERLINO ENTERPRISES, INC. *v.* THOMPSON, ADMINISTRATOR OF THE ESTATE OF SOUSA. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. THE CHIEF JUSTICE would note probable jurisdiction and set case for oral argument. Reported below: 208 Conn. 656, 545 A. 2d 1094.

No. 88–809. DAVIS ET UX. *v.* DECHIARO LIMITED PARTNERSHIP ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Reported below: 74 Md. App. 727.

No. 88–836. ASAM *v.* SHAPIRO ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 858 F. 2d 744.

No. 88–838. NIEVES *v.* MARINA GARDENS NO. 1, INC. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–5910. TALLMAN *v.* KELLEY. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–5959. WILLIAMS *v.* PLANNED PARENTHOOD ASSOCIATION OF THE ATLANTA AREA, INC., ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 859 F. 2d 926.

No. 88–5816. FRIGARD *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 87–42. CLIFT *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *United Transportation Union*, *ante*, p. 319. Reported below: 818 F. 2d 623.

No. 87–1456. INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 660 *v.* HESTER ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *United Transportation Union*, *ante*, p. 319. Reported below: 818 F. 2d 1537 and 830 F. 2d 172.

No. 88–349. FEDERAL LABOR RELATIONS AUTHORITY *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the "routine uses" published at 53 Fed. Reg. 39629 (1988) (Department of Agriculture) and 53 Fed. Reg. 44513 (1988) (Defense Mapping Agency). Reported below: 836 F. 2d 1139.

No. 88–5938. SANDERS *v.* CLARKE, WARDEN, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penson* v. *Ohio*, *ante*, p. 75. Reported below: 856 F. 2d 1134.

Miscellaneous Orders

No. A–471. DARLINGTON *v.* UNITED STATES. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–542 (88–6166). ALLRIDGE *v.* TEXAS. Application for further stay of issuance of the mandate of the Court of Criminal Appeals of Texas, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

No. D–752. IN RE DISBARMENT OF ALBIN. It is ordered that Perry Sanford Albin, of Newman, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–753. IN RE DISBARMENT OF REAVES. It is ordered that Frank Reaves, Jr., of Lexington, Ky., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–754. IN RE DISBARMENT OF HARTMAN. It is ordered that Richard Hartman, of Greenwich, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–755. IN RE DISBARMENT OF MCKAY. It is ordered that Ronald J. McKay, of McKeesport, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–756. IN RE DISBARMENT OF MCCLURKIN. It is ordered that Patrick Clark McClurkin, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–757. IN RE DISBARMENT OF SACCO. It is ordered that Anthony Joseph Sacco, of Timonium, 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.

No. D–758. IN RE DISBARMENT OF SILVERMAN. It is ordered that Mark A. Silverman, of Selden, 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.

No. D–759. IN RE DISBARMENT OF HARTMANN. It is ordered that Robert Thomas Hartmann, of Middletown, 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.

No. 87–6571. GRAHAM *v.* CONNOR ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 816.] Motion of respondents and North Carolina to permit North Carolina to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 88–293. COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. *v.* REID. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 940.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–305. SOUTH CAROLINA *v.* GATHERS. Sup. Ct. S. C. [Certiorari granted, *ante*, p. 888.] Motion of Center for Civil Rights et al. for leave to file a brief as *amici curiae* granted.

No. 88–357. MALENG, KING COUNTY PROSECUTING ATTORNEY, ET AL. *v.* COOK. C. A. 9th Cir. [Certiorari granted, *ante*, p. 941.] Motion of William L. Williams, Esq., to permit John M. Jones, Esq., to present oral argument *pro hac vice* denied.

No. 88–396. COLONIAL AMERICAN LIFE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. [Certiorari granted, *ante*, p. 980.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 88–616. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HUDSON. C. A. 11th Cir. [Certiorari granted, *ante*, p. 980.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–688. PEAT MARWICK MAIN & CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA, ET AL. Ct. App. Cal., 1st App. Dist. Joint motion of the parties to defer consideration of the petition for writ of certiorari granted.

No. 88–5906. KOKKONEN *v.* DEMOCRATIC NATIONAL COMMITTEE CHAIRMAN ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 7, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–5994. VAMOS *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 7, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6062. WRENN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 7, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6142. IN RE GRIFFIN. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 88–608. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* ZIPES ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 846 F. 2d 434.

Certiorari Denied. (See also Nos. 88–836, 88–838, 88–5910, and 88–5959, *supra.*)

No. 88–472. BIBERFELD ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 921.

No. 88–491. CITIZENS FOR JOHN W. MOORE PARTY ET AL. *v.* BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 2d 144.

No. 88–530. SALDANA *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 117.

No. 88–532. ASHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 854 F. 2d 1483.

No. 88–653. WELLS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 244, 851 F. 2d 1471.

No. 88–654. JOSHI *v.* FLORIDA STATE UNIVERSITY HEALTH CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 1030.

No. 88–703. CELOTEX CORP. ET AL. *v.* SMITH LAND & IMPROVEMENT CORP. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 2d 86.

No. 88–730. FOREST HILLS EARLY LEARNING CENTER, INC., ET AL. *v.* JACKSON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF VIRGINIA, ET AL.; and

No. 88–932. JACKSON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF VIRGINIA, ET AL. *v.* FOREST HILLS EARLY LEARNING CENTER, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 846 F. 2d 260.

No. 88–758. McDOWELL *v.* DYNAMICS CORPORATION OF AMERICA. C. A. 6th Cir. Certiorari denied. Reported below: 850 F. 2d 692.

No. 88–812. HERNANDEZ *v.* DIANELLA SHIPPING CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 582 and 848 F. 2d 498.

No. 88–815. CENTRAL COLUMBIA SCHOOL DISTRICT ET AL. *v.* POLK ET UX. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 171.

No. 88–818. MIRABILE ET AL. *v.* WRIGHT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1083.

No. 88–819. ELDER ET AL. *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 201 Cal. App. 3d 1061, 247 Cal. Rptr. 647.

No. 88–823. PITTS *v.* TURNER & BOISSEAU, CHARTERED, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 850 F. 2d 650.

No. 88–825. LIGGETT GROUP, INC., ET AL. *v.* PUBLIC CITIZEN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 858 F. 2d 775.

No. 88–826. KELSEY ET AL. *v.* MUSKIN INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 848 F. 2d 39.

No. 88–829. KING ET UX. *v.* HILTON-DAVIS, AKA HILTON-DAVIS CHEMICAL CO. C. A. 3d Cir. Certiorari denied. Reported below: 855 F. 2d 1047.

No. 88–832. WARREN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 14 Conn. App. 688, 544 A. 2d 209.

No. 88–837. MULVEHILL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 531 So. 2d 69.

No. 88–842. WINSTEAD ET AL. *v.* INDIANA INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 2d 430.

No. 88–864. STOUT ET UX. *v.* A. M. SUNRISE CONSTRUCTION CO., INC., ET AL. Ct. App. Ind. Certiorari denied. Reported below: 505 N. E. 2d 500.

No. 88–894. REARDON ET AL. *v.* MILLER, JUDGE, SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, CAMDEN COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 602.

No. 88–908. TURKS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 838 F. 2d 1222.

No. 88–944. BARROW *v.* HARRISON ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–951. WILLNER *v.* UNIVERSITY OF KANSAS; and WILLNER *v.* BUDIG ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 2d 1023 (first case); 848 F. 2d 1032 (second case).

No. 88–959. RIOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 868.

No. 88–969. LOMBARDO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 2d 1328.

No. 88–973. SOUTHERN INDIANA GAS & ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 2d 580.

No. 88–996. FENN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 16 Conn. App. 318, 547 A. 2d 576.

No. 88–5180. PLAZINICH *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 836.

No. 88–5421. NEWTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 88–5486. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 851 F. 2d 727.

No. 88–5557. ANGLIN *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 930.

No. 88–5561. GILMORE *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. D. C. Cir. Certiorari denied.

No. 88–5629. ANDREWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1557.

No. 88–5639. ARMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 862.

No. 88–5745. SLABAUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 852 F. 2d 1081.

No. 88–5883. DOUD *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 145 Wis. 2d 903, 428 N. W. 2d 646.

No. 88–5889. MADDUX *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 757 S. W. 2d 737.

No. 88–5891. RAYBORN *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 2d 84.

No. 88–5893. GOLDEN *v.* GOLDEN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–5901. LEE *v.* DUTTON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 194.

No. 88–5902. JENKINS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 221 N. J. Super. 286, 534 A. 2d 421.

No. 88–5912. RODEN *v.* MOORE ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5931. KENDALL *v.* WILLIAMS, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 88–5933. LAMBERTH *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 605.

No. 88–5934. FEAGIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–5936. DAVIS *v.* CITY OF TUCSON. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1477.

No. 88–5940. MCCABE *v.* SANDNESS. C. A. 10th Cir. Certiorari denied.

No. 88–5941. STUBBLEFIELD *v.* WILKENSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–5942. ROBERTSON *v.* CITY OF EUNICE, NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 88–5945. SIMANONOK *v.* RANDLE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 753.

No. 88–5946. PEASE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 233 Mont. 65, 758 P. 2d 764.

No. 88–5950. BRENNAN *v.* BRENNAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1078.

No. 88–5967. MCDONALD *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88–5991. FORBES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 88–5997. WAKEFIELD *v.* BEYER ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6023. ROBERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 919.

No. 88–6024. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 923.

No. 88–6039. OAKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 2d 551.

No. 88–6069. VATTLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 725.

No. 88–6070. WILLOUGHBY *v.* UNITED STATES; and
No. 88–6088. PRIOLEAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 860 F. 2d 15.

No. 88–6076. GILLIARD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 847 F. 2d 21.

No. 88–6083. CRUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 863.

No. 88–6094. FRALEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 230.

No. 88–6097. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 1387.

No. 87–1914. ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN *v.* GREEN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 839 F. 2d 300.

No. 88–834. CONNECTICUT *v.* PLOURDE. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 208 Conn. 455, 545 A. 2d 1071.

No. 88–914. CALIFORNIA *v.* RADKE. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 87–6895. GARDNER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 88–5723. WRIGHT *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 88–5733. LUCKY *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5868. BELMONTES *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5881. BUNDY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 88–5899. DAVIS *v.* OHIO. Sup. Ct. Ohio;
No. 88–5908. ROBBINS *v.* CALIFORNIA. Sup. Ct. Cal.; and
No. 88–5924. BABBITT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 87–6895, 733 S. W. 2d 195; No. 88–5723, 756 S. W. 2d 669; No. 88–5733, 45 Cal. 3d 259, 753 P. 2d 1052; No. 88–5868, 45 Cal. 3d 744, 755 P. 2d 310; No. 88–5881, 850 F. 2d 1402; No. 88–5899, 38 Ohio St. 3d 361, 528 N. E. 2d 925; No. 88–5908, 45 Cal. 3d 867, 755 P. 2d 355; No. 88–5924, 45 Cal. 3d 660, 755 P. 2d 253.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–639. PARUNGAO *v.* GOERG, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF KAUSSEN. C. A. 11th Cir. Motion of Bruno M. Kubler for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 844 F. 2d 1562.

No. 88–811. BUSINESS COMPUTER CORP. ET AL. *v.* U. S. ROBOTICS, INC., ET AL. C. A. Fed. Cir. Motion of respondent U. S. Robotics, Inc., for attorney's fees and costs denied. Certiorari denied. Reported below: 856 F. 2d 202.

No. 88–824. COLEMAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 26 M. J. 451.

No. 88–941. CRAWFORD PAINTING & DRYWALL CO. *v.* J. W. BATESON, INC. C. A. 5th Cir. Motion of Associated Specialty Contractors, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 857 F. 2d 981.

Rehearing Denied

No. 88–609. POLYAK *v.* BUFORD EVANS & SONS, *ante*, p. 962;
No. 88–5125. TRIPATI *v.* HENMAN, WARDEN, *ante*, p. 982; and
No. 88–5230. CALDWELL *v.* BUREAU OF FEDERAL PRISONS, *ante*, p. 895. Petitions for rehearing denied.

JANUARY 23, 1989

Appeals Dismissed

No. 87–1613. PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE *v.* NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. Motions of Official Committee of Equity Security Holders of Public Service Company of New Hampshire and Official Committee of Unsecured Creditors of Public Service Company of New Hampshire for leave to file briefs as *amici curiae* granted. Appeal dismissed for want of properly presented federal question. Reported below: 130 N. H. 265, 539 A. 2d 263.

No. 88–130. WESTERN UNION CORP. *v.* INDIANA DEPARTMENT OF REVENUE. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: 511 N. E. 2d 481.

No. 88–898. COHEN ET AL. *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 371 Pa. Super. 558, 538 A. 2d 582.

No. 88–893. WALKER ET AL. *v.* VALLEY NATIONAL BANK OF DES MOINES, IOWA, ADMINISTRATOR OF THE ESTATE OF WALKER,

ET AL. Appeal from Ct. App. Iowa dismissed for want of jurisdiction. Reported below: 432 N. W. 2d 167.

No. 88–5054. SULLIVAN *v.* SULLIVAN. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–6040. MCCABE *v.* DIAS ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 87–1384. THOMAS *v.* SHIPKA. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Owens* v. *Okure*, *ante*, p. 235. Reported below: 829 F. 2d 570.

No. 88–550. UNITED STATES *v.* CHAVEZ-SANCHEZ. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mistretta* v. *United States*, *ante*, p. 361. Reported below: 857 F. 2d 1245.

Miscellaneous Orders

No. — — ——. CALPIN *v.* CARLSON ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. KIRKPATRICK *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–568 (88–287). TIMES MIRROR CO. ET AL. *v.* DOE. Ct. App. Cal., 4th App. Dist. Application to stay proceedings in the Superior Court of California, County of San Diego, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. JUSTICE STEVENS took no part in the consideration or decision of this application.

No. A–580. BUNDY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;

No. A–585. BUNDY *v.* FLORIDA; and

No. A–586. BUNDY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Applications for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him

referred to the Court, denied. JUSTICE BLACKMUN would grant the applications for stay in Nos. A–580 and A–586. JUSTICE STEVENS would grant the application for stay in No. A–580.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the applications for stay of execution.

Even were I not of the foregoing view, I would grant application Nos. A–580 and A–586 pending the filing of a petition for certiorari, which I would hold for our decision in *Dugger* v. *Adams*, No. 87–121, cert. granted, 485 U. S. 933 (1988).

In *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985), we held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Adams* and numerous cases that have been held for it raise the question whether the rationale of *Caldwell* applies to statements made by prosecutors and judges to the effect that the jury's sentence is merely advisory and that the judge remains responsible for the sentence ultimately imposed. See, *e. g.*, *Preston* v. *Florida*, No. A–216; *Ford* v. *Dugger*, No. 88–5582; *Spisak* v. *Ohio*, No. 88–5169; *Grossman* v. *Florida*, No. 88–5136; *Harich* v. *Dugger*, No. 88–5216. In Florida cases, the notion that the jury's sentence is merely "advisory" appears to be at odds with that State's settled law that the jury determination must be given "great weight" and may be overturned by the judge only when the facts are "so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975).

In the present action, the jurors were repeatedly informed throughout *voir dire* and the sentencing instructions that their role was to "render an advisory opinion only, just that, an opinion," or "just a sort of recommendation, so to speak, from the jury as to what penalty ought to be imposed," and that "[t]he law places the awesome burden upon the judge to decide what final disposition is made or penalty is imposed in a capital case." Unlike the situation we faced recently in *Daugherty* v. *Florida*, *ante*, p. 936, these were not merely two isolated comments of the prosecutor, but

rather repeated instructions by both the prosecutor and the trial judge. We have not yet decided that such comments amount to a violation of *Caldwell* v. *Mississippi*, but we have held several other cases—whose facts are virtually identical to these—pending our decision in *Dugger* v. *Adams*. I see no principled basis for refusing to do so here.

Nor should there be any procedural objection to such a course. In No. A–580, at least, the State has failed to raise any objection, either on the grounds of exhaustion or abuse of the writ. Because the State made no procedural objections in either the District Court or the Court of Appeals, any such claims should be considered waived. Cf. *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980). The District Court's boilerplate sentence holding all four of the claims applicant Bundy presented to it to constitute abuse of the writ should not change that conclusion, especially as the State subsequently failed to raise that defense in this Court.

No. D–740. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see *ante*, p. 938.]

No. D–741. IN RE DISBARMENT OF WEINBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 952.]

No. D–760. IN RE DISBARMENT OF WALLIS. It is ordered that Grace M. Wallis, of Mill Bay, British Columbia, Canada, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–761. IN RE DISBARMENT OF GRAHAM. It is ordered that Frederick Townley Graham, of San Rafael, 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.

No. D–762. IN RE DISBARMENT OF KOTZKER. It is ordered that Michael Steven Kotzker, 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.

No. D–763. IN RE DISBARMENT OF GRIDLEY. It is ordered that John N. Gridley III, of Sioux Falls, S. D., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–764. IN RE DISBARMENT OF SMITH. It is ordered that Thomas Pryor Smith, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–765. IN RE DISBARMENT OF DOUGLAS. It is ordered that Randall R. Douglas, 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. 87–1207. WILL *v.* MICHIGAN DEPARTMENT OF STATE POLICE ET AL. Sup. Ct. Mich. [Certiorari granted, 485 U. S. 1005.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 87–1661. ASARCO INC. ET AL. *v.* KADISH ET AL. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 887.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 88–305. SOUTH CAROLINA *v.* GATHERS. Sup. Ct. S. C. [Certiorari granted, *ante*, p. 888.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 88–449. HEALY ET AL. *v.* THE BEER INSTITUTE ET AL.; and No. 88–513. WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC. *v.* THE BEER INSTITUTE ET AL. C. A. 2d Cir. [Probable jurisdiction noted, *ante*, p. 954.] Motion of appellants for divided argument denied.

No. 88–782. UNITED STATES DEPARTMENT OF JUSTICE *v.* TAX ANALYSTS. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1003.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–5977. WRENN *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner

is allowed until February 13, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6204. BRANION *v.* GRAMLY, WARDEN. C. A. 7th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

Certiorari Granted

No. 88–309. WYOMING *v.* UNITED STATES ET AL. Sup. Ct. Wyo. Certiorari granted limited to Question 2 presented by the petition. Reported below: 753 P. 2d 76.

Certiorari Denied. (See also Nos. 88–5054 and 88–6040, *supra.*)

No. 87–7205. BERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 2d 1487.

No. 87–7209. ROB J. *v.* GRANT ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied.

No. 88–157. NATIONWIDE MUTUAL INSURANCE CO. *v.* CLAY. Sup. Ct. Ala. Certiorari denied. Reported below: 525 So. 2d 1339.

No. 88–232. GROSSMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 843 F. 2d 78.

No. 88–519. HO FAT SETO, DBA HO FAT OF CALIFORNIA *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 850 F. 2d 586.

No. 88–567. MONACO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1143.

No. 88–629. G & W LABORATORIES, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 1464.

No. 88–631. COX ENTERPRISES, INC., DBA WACO TRIBUNE HERALD, ET AL. *v.* GUINN. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 738 S. W. 2d 303.

No. 88–676. IKARD, DBA IKARD MANUFACTURING CO. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 931.

No. 88–702. KNOX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–710. ORKIN EXTERMINATING CO., INC. *v.* FEDERAL TRADE COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 1354.

No. 88–712. SHIRLEY ET AL. *v.* SCHRAER, POSTMASTER, UNITED STATES POSTAL SERVICE, SAN ANTONIO DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1419.

No. 88–713. ACTION AUTOMOTIVE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 433.

No. 88–731. WESTERN PENNSYLVANIA TEAMSTERS & EMPLOYERS PENSION FUND ET AL. *v.* CARL COLTERYAHN DAIRY, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 847 F. 2d 113.

No. 88–743. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 869.

No. 88–744. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 854 F. 2d 1318.

No. 88–745. NEW YORK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 853 F. 2d 124.

No. 88–756. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 272 U. S. App. D. C. 129, 854 F. 2d 1338.

No. 88–760. KEYSTONE LAMP MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 849 F. 2d 601.

No. 88–772. LANDRETH, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, ORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 850 F. 2d 532.

No. 88–814. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 110 Wash. 2d 658, 756 P. 2d 722.

No. 88–859. FRIEDMAN *v.* GANASSI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 2d 207.

No. 88–863. FRIEDGOOD *v.* PETERS PUBLISHING CO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 521 So. 2d 236.

No. 88–871. HUGHES *v.* HALIFAX COUNTY SCHOOL BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 855 F. 2d 183.

No. 88–872. BROIDA *v.* TENDRICH. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 198.

No. 88–876. VAIL VILLAGE INN ASSOCIATES, DBA VILLAGE INN PLAZA, ET AL. *v.* GIRALT, AKA BENET. Ct. App. Colo. Certiorari denied. Reported below: 759 P. 2d 801.

No. 88–884. KNEELAND ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 850 F. 2d 224.

No. 88–885. FIRESTONE TIRE & RUBBER CO. *v.* RICHARD. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 1258.

No. 88–901. ADAMS *v.* VANDEMARK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 855 F. 2d 312.

No. 88–904. JOHNSON MOVING & STORAGE CO. *v.* DANIELS. Ct. App. Colo. Certiorari denied.

No. 88–906. ZOSKY *v.* BOYER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 554.

No. 88–909. LOCKHEED CALIFORNIA CO. ET AL. *v.* BIRTELL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–910. FAUX-BURHANS *v.* BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 149.

No. 88–912. REDGRAVE *v.* BOSTON SYMPHONY ORCHESTRA, INC. C. A. 1st Cir. Certiorari denied. Reported below: 855 F. 2d 888.

No. 88–915. TEAMSTERS LOCAL 315 *v.* UNION OIL COMPANY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 856 F. 2d 1307.

No. 88–918. DUCK, TRUSTEE OF THE BANKRUPTCY ESTATE OF JEWELL, ET AL. *v.* BANK OF AMERICA, N. T. & S. A.; and No. 88–934. KRUSE *v.* BANK OF AMERICA, N. T. & S. A. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 202 Cal. App. 3d 38, 248 Cal. Rptr. 217.

No. 88–949. POST *v.* REGAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 1315.

No. 88–978. D. C. TRANSIT SYSTEM, INC. *v.* WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 406, 842 F. 2d 402.

No. 88–984. ALVAREZ *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88–1071. GETER, ADMINISTRATRIX OF THE ESTATE OF GETER *v.* WILLE, SHERIFF OF PALM BEACH COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 1352.

No. 88–5041. LANDES *v.* DEPARTMENT OF STATE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1012.

No. 88–5435. MOORE *v.* DUBOIS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 2d 1115.

No. 88–5598. CLARK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 851 F. 2d 356.

No. 88–5617. WADLEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 465, 369 S. E. 2d 734.

No. 88–5667. HARVEY *v.* GENERAL DYNAMICS CORP./ELECTRIC BOAT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 1467.

No. 88–5695. SIMMONS *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 196.

No. 88–5722. RUIZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 526 So. 2d 170.

No. 88–5742. YANEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 2d 181.

No. 88–5821. COX *v.* UNITED STATES; and
No. 88–5842. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 151.

No. 88–5866. EZEODO *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 856 F. 2d 190.

No. 88–5918. RUFFIN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 848 F. 2d 1512.

No. 88–5947. SQUIRES *v.* FLEMING, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 854 F. 2d 1317.

No. 88–5952. BILDER *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 39 Ohio App. 3d 135, 529 N. E. 2d 1292.

No. 88–5954. LIS *v.* MAMOTT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 1314.

No. 88–5956. WILLIAMS *v.* ARN, SUPERINTENDENT, OHIO STATE REFORMATORY FOR WOMEN. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 197.

No. 88–5960. DODRILL *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 193.

No. 88–5962. GRANT *v.* KERBY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–5963. JIMENEZ *v.* CALIFORNIA; and IN RE JIMENEZ. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 88–5969. CAMPBELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 88–5972. BAGGETT *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 88–5974. JANKOWSKI *v.* BRAUMANN. State Court of Fulton County, Ga. Certiorari denied.

No. 88–5975. BROWN *v.* RHYNE FLORAL SUPPLY MANUFACTURING CO., INC., ET AL. Ct. App. N. C. Certiorari denied. Reported below: 89 N. C. App. 717, 366 S. E. 2d 894.

No. 88–5976. SZAREWICZ *v.* ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 88–5978. PORTEE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 1478.

No. 88–5979. SHANE *v.* LOS ANGELES POLICE DEPARTMENT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–5983. PRUNTY *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied.

No. 88–5984. RODRIGUEZ-SUAREZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 135.

No. 88–5987. MCCONICO *v.* ROBINSON. Sup. Ct. Ala. Certiorari denied. Reported below: 537 So. 2d 67.

No. 88–5989. OWENS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied.

No. 88–5992. CHURCH *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 149.

No. 88–6003. PEROTTI *v.* SEITER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 609.

No. 88–6004. PASTER *v.* CURTISS WRIGHT CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6010. JENKINS *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–6013. SHELLS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 88–6014. SPEARS *v.* THIGPEN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 1327.

No. 88–6018. CURRY *v.* CLERK OF COURT, GLOUCESTER COUNTY CIRCUIT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 714.

No. 88–6019. RIVERA *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 781, 531 N. E. 2d 372.

No. 88–6020. WRIGHT *v.* BANK OF LOUISVILLE. Ct. App. Ind. Certiorari denied. Reported below: 520 N. E. 2d 479.

No. 88–6029. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 170 Ill. App. 3d 1158, 542 N. E. 2d 184.

No. 88–6032. ATKINS *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 192.

No. 88–6033. DIPRIZIO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 26 Mass. App. 1111, 527 N. E. 2d 752.

No. 88–6036. BOWIE *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 88–6041. SEGURA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 88–6044. ROGERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 123 Ill. 2d 487, 528 N. E. 2d 667.

No. 88–6045. PACHECO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1493.

No. 88–533. DONNELLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONNELLY *v.* EKLUTNA, INC., ET AL.; and

No. 88–549. LEE *v.* EKLUTNA, INC., ET AL. C. A. 9th Cir. Motions of Alan Abramson et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 850 F. 2d 1313.

No. 88–568. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* RUFFIN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 848 F. 2d 1512.

No. 88–821. VERMONT *v.* BRUNELL. Sup. Ct. Vt. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 150 Vt. 388, 554 A. 2d 242.

No. 88–899. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* WILLIAMS ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 851 F. 2d 867.

No. 88–5746. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 45 Cal. 3d 351, 753 P. 2d 1109.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant certiorari and vacate the death sentence in this case. Even if I did not hold this view, however, I would grant the petition to resolve the question whether a trial court may instruct a penalty phase jury that, "if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." I have grave doubts that such an instruction permits the individualized and reliable sentencing determination that the Constitution requires in capital cases, particularly where, as here, it is coupled with prosecutorial remarks stressing the limits on jurors' discretion.

I

Petitioner Bernard Lee Hamilton was charged with first-degree murder, kidnaping, robbery, and burglary. During *voir dire*, the prosecutor told 11 of the 12 persons who ultimately served as

jurors that the law required them to impose a death sentence if they found that the aggravating factors outweighed the mitigating factors. All 11 persons stated that they understood the law as explained by the prosecutor and promised to follow it.*

Hamilton was convicted of all charges. He was found to have committed the murder in the course of robbery, kidnaping, and burglary. These special circumstance findings made him eligible for the death penalty. During closing argument in the penalty phase, the prosecutor emphasized the limits on the jurors' discretion.

> "Now remember at the time of the voir dire you all promised that in the event that this case went to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." Record 4642.

The trial judge echoed the prosecutor's remarks when he instructed the jury: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *Id.*, at 4669. This instruction mirrors Cal. Penal Code Ann. § 190.3 (West 1988), which provides that, "the trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." The jury sentenced Hamilton to death.

The California Supreme Court affirmed Hamilton's conviction but set aside the special circumstance findings and reversed the death sentence. 41 Cal. 3d 408, 710 P. 2d 981 (1985). This Court granted certiorari, 478 U. S. 1017 (1986), vacated, and remanded for reconsideration in light of *Rose* v. *Clark*, 478 U. S. 570 (1986). On remand, the California Supreme Court affirmed both the conviction and the sentence. 45 Cal. 3d 351, 753 P. 2d 1109 (1988). It noted that it had upheld the constitutionality of § 190.3 in *People* v. *Brown*, 40 Cal. 3d 512, 726 P. 2d 516 (1985), even though

---

*Record 587, 650, 670, 740, 750, 879, 1200–1201, 1247, 1435, 1477, 1518. The prosecutor's exchange with Sandra Sheffield is illustrative. The prosecutor stated:

"Q. 'If [the trial court] would instruct you that the evidence in aggravation outweighed that in mitigation, *there is no way around it, you'd have to bring back a verdict of death.* Would you follow that instruction as well?'
"A. Yes." *Id.*, at 750 (emphasis added).

Brown had recognized that "when delivered in an instruction [§ 190.3's] mandatory sentencing language might mislead jurors as to the scope of their sentencing discretion and responsibility," 45 Cal. 3d, at 370, 753 P. 2d, at 1122. The court further noted that in *Brown* it had barred the future use of the "bare words of the statute," 45 Cal. 3d, at 371, 753 P. 2d, at 1122, and had stated that, with respect to cases in which the bare words had been employed, it would engage in a case-by-case determination whether the jurors may have been misled as to their sentencing discretion.

Applying *Brown* to the instant case, the California Supreme Court concluded that the instruction did not prejudice Hamilton. It pointed to closing remarks by both the prosecutor and defense counsel which emphasized the jurors' responsibility for the sentencing decision. In addition, the court noted that the trial judge had instructed the jurors that they should weigh rather than count the aggravating and mitigating factors, and that they had to be "convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[s] the totality of the mitigating circumstances" in order to impose a death sentence. 45 Cal. 3d, at 371, 753 P. 2d, at 1122. The court concluded that, given the statements, the jurors could not have been misled by the mandatory language contained in the instruction.

II

Because the death penalty is qualitatively different from any other sentence, this Court requires that sentencing in capital cases be particularized with regard to the individual and the crime charged. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). Toward that end, we have struck down state laws and instructions that prevent a jury from considering any mitigating aspect of a capital defendant's character or background. See, *e. g.*, *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987); *Lockett* v. *Ohio*, *supra*. We have also held that mandatory death sentences are impermissible because they do not allow for consideration of particularized mitigating factors. See, *e. g.*, *Sumner* v. *Shuman*, 483 U. S. 66 (1987) (invalidating mandatory death sentence for murder committed by a defendant who is already serving a life sentence); *Roberts* v. *Louisiana*, 431 U. S. 633 (1977) *(per curiam)* (invalidating mandatory death sentence for murder of a police officer).

The mandatory element of the California trial court's instruction pursuant to § 190.3 runs counter to our demand for individual-

ized consideration in capital cases. It establishes a fixed formula for the jury's deliberations which severely circumscribes the jury's discretion in sentencing. Indeed, the California Supreme Court has conceded in the instant case, in *Brown*, *supra*, and in *People* v. *Myers*, 43 Cal. 3d 250, 729 P. 2d 698 (1987), that a juror who finds that the aggravating evidence outweighs the mitigating evidence, but who believes that the death sentence is not appropriate, may reasonably understand such an instruction to require him to vote for a sentence of death.

Here, the state court found that the instruction's constitutional defect was cured by other instructions that the jurors must weigh aggravating and mitigating factors, and that they must be convinced beyond a reasonable doubt that the aggravating factors prevailed in order to impose the death penalty. Neither of these instructions, however, informed the jury that it retained discretion to impose a life sentence after it had determined that the aggravating factors outweighed the mitigating ones. At no time, furthermore, did the prosecutor or defense counsel suggest that the jurors had discretion in sentencing once they had decided that the aggravating factors outweighed the mitigating ones. Indeed, the prosecutor expressly reminded the jurors that they had promised during *voir dire* that they would automatically impose a death sentence if they found that the evidence in aggravation outweighed that in mitigation. In light of the foregoing, it is impossible to know whether Hamilton was sentenced to death because the jurors thought they had no alternative.

The instruction given in this case mandated a death sentence upon a finding that the aggravating circumstances outweighed the mitigating circumstances. Because the instruction does not comport with the individualized sentencing determination required in capital cases by the Eighth and Fourteenth Amendments, I would grant the petition for certiorari.

No. 88–5770. PRESNELL *v.* KEMP, WARDEN, ET AL. C. A. 11th Cir.;
No. 88–5801. JACKSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–5861. GUZMAN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5864. HOOKS *v.* ALABAMA. Sup. Ct. Ala.;
No. 88–5957. GRANT *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5964. AINSWORTH *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5981. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5985. RICH *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–6015. DANIELS *v.* ALABAMA. Sup. Ct. Ala.; and

No. 88–6017. FAIRCHILD *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: No. 88–5770, 835 F. 2d 1567; No. 88–5801, 530 So. 2d 269; No. 88–5861, 45 Cal. 3d 915, 755 P. 2d 917; No. 88–5864, 534 So. 2d 371; No. 88–5957, 45 Cal. 3d 829, 755 P. 2d 894; No. 88–5964, 45 Cal. 3d 984, 755 P. 2d 1017; No. 88–5981, 45 Cal. 3d 1268, 756 P. 2d 221; No. 88–5985, 45 Cal. 3d 1036, 755 P. 2d 960; No. 88–6015, 534 So. 2d 664; No. 88–6017, 857 F. 2d 1204.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. D–724. IN RE DISBARMENT OF STORTS, *ante*, p. 963;

No. 86–1904. ARIZONA *v.* YOUNGBLOOD, *ante*, p. 51;

No. 87–7201. FOLEY *v.* SECRETARY OF THE ARMY, *ante*, p. 980;

No. 88–464. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL., *ante*, p. 966;

No. 88–5318. IN RE YOUNGS-SETTLE, *ante*, p. 923;

No. 88–5353. BENTLEY *v.* UNITED STATES, *ante*, p. 970;

No. 88–5496. YOUNGS *v.* LAWYERS SURETY CORP. ET AL., *ante*, p. 945;

No. 88–5524. IN RE KERPA, AKA LAWSON, *ante*, p. 964;

No. 88–5614. LUTHER *v.* PENNSYLVANIA, *ante*, p. 971;

No. 88–5630. HAMBLIN *v.* OHIO, *ante*, p. 975;

No. 88–5660. TEDDERS *v.* LORD ET AL., *ante*, p. 962;

No. 88–5693. MCCOLPIN *v.* BROOKS, *ante*, p. 984; and

No. 88–5747. KNOWLES *v.* UNITED STATES, *ante*, p. 974. Petitions for rehearing denied.

No. 88–640. EMPIRE BLUE CROSS & BLUE SHIELD ET AL. *v.* UNITED STATES, *ante*, p. 993; and

No. 88–5558. FLOWERS *v.* WARDEN, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS, CONNECTICUT, *ante*, p. 995. Peti-

tions for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of these petitions.

JANUARY 26, 1989

Certiorari Denied

No. 88-6138 (A-583). JULIUS *v.* ALABAMA ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 856 F. 2d 198.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

FEBRUARY 3, 1989

Miscellaneous Order

No. A-603. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* CLARK. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1052 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* BOUKNIGHT

ON APPLICATION FOR STAY

No. A–494. Decided December 21, 1988

An application to stay the judgment of the Court of Appeals of Maryland—that Jacqueline Bouknight's confinement for civil contempt violated her privilege against self-incrimination under the Fifth Amendment to the United States Constitution—is granted pending the timely filing and subsequent disposition of a petition for certiorari. At the request of the Baltimore City Department of Social Services (DSS), the Circuit Court for the city determined that Bouknight's son, Maurice, who had received several suspicious injuries, was a "child in need of assistance" under Maryland law. Bouknight received supervised custody of Maurice, but failed to cooperate with DSS and refused to produce him or tell DSS where he was. Subsequently, she was arrested and ordered to disclose the child's whereabouts. After giving a false answer, she was jailed until she purged herself of contempt by either producing Maurice or revealing his location. The Court of Appeals found that the terms of the confinement violated Bouknight's privilege against self-incrimination, since the risk that producing Maurice would necessarily admit a measure of continuing control over the child that might be relevant in a subsequent criminal prosecution could not be outweighed by any governmental interest in finding Maurice. DSS meets the requirements for the issuance of a stay. The lower court's decision is based on the United States Constitution, and the burden on Bouknight's liberty must be weighed against the very real jeopardy to a child's safety and well-being and perhaps even his life. If Bouknight is permitted to go free, DSS may not have the means to obtain information about or to locate the child. Also, it is likely that four Justices will vote to grant certiorari, and DSS has a fair prospect of persuading a majority of the Court that the state-court decision was erroneous.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The Baltimore City Department of Social Services (DSS) has asked me to stay the judgment of the Court of Appeals of Maryland in this case, *In re Maurice*, No. 50 (Dec. 19, 1988). The Court of Appeals held that Jacqueline Bouknight's confinement for civil contempt violated the privilege against self-incrimination secured to her by the Fifth Amendment to the United States Constitution. Bouknight is presently incarcerated until she either presents her child, Maurice M., to the DSS or tells where the child can be found. There is no indication that she is unable to comply in one way or the other.

When Maurice was three months old, he was admitted for treatment of a fractured left leg. X rays disclosed that the child had previously suffered multiple fractures of various other major bones. Nurses and others observing Maurice's mother at the hospital reported her unusual conduct with the child, including shaking him and dropping him into his crib when he was in a cast. Because of the suspicious nature of Maurice's injuries at such a young age, DSS obtained authorization to place the child in foster care. It then filed a petition in the Circuit Court for Baltimore City seeking a determination that Maurice was a "child in need of assistance" under Maryland law, Md. Cts. & Jud. Proc. Code. Ann. § 3–801(e) *et seq.* (1984 and Supp. 1988). Maurice was found to be such.

By agreement of the parties, Bouknight received custody of Maurice under an order of protective supervision specifying that she accept parenting assistance, attend classes, and refrain from corporal punishment of the child. Some months later, DSS advised the court that Bouknight had ceased cooperating with it, and that she had refused to produce the child or tell DSS where he was. DSS feared for Maurice's safety because Bouknight was not complying with the court order, because of her history of child abuse, because of her known use of drugs and current threats to kill herself, and

because Maurice had not been seen for nearly a month and could not be located by DSS or the police.

Bouknight did not attend the hearing set to consider these representations, but was later arrested and ordered to disclose the whereabouts of Maurice. After giving a false answer, she was jailed until she purged herself of contempt by either producing Maurice or revealing his location.

The Court of Appeals of Maryland granted certiorari and heard the case without decision by the state intermediate appellate court. It found that the terms of Bouknight's confinement violated her privilege against compulsory self-incrimination. Noting that some acts of production have been found testimonial, see *United States* v. *Doe*, 465 U. S. 605 (1984), it concluded that the act of producing Maurice would necessarily admit a measure of continuing control over the child which might be relevant in a subsequent criminal prosecution. That risk, it thought, was so substantial that it could not be outweighed by any governmental interest in finding Maurice. Two judges dissented. They argued that there were no testimonial components to compliance with the civil contempt order; that if there were, they were clearly outweighed by the public interest in protecting children from abuse; and that Bouknight had waived any Fifth Amendment privilege against disclosing Maurice's whereabouts when she accepted conditional custody of the child from the city.

In my opinion DSS meets the requirements we have established for the issuance of a stay. See *Rostker* v. *Goldberg*, 448 U. S. 1306 (1980) (BRENNAN, J., Circuit Justice); *California* v. *Riegler*, 449 U. S. 1319, 1321 (1981) (REHNQUIST, J., Circuit Justice). First, the decision of the Court of Appeals of Maryland is unquestionably based on the United States Constitution. Second, I think the balance of equities favors the granting of a stay. There is undoubtedly a burden on Bouknight's liberty caused by her confinement, but against it must be weighed a very real jeopardy to a child's safety, well-being, and perhaps even his life. There is hard

evidence in this case suggesting Bouknight has abused Maurice in the past and may well do so again. If she is permitted to go free, DSS may not have an alternative means of obtaining information about the child or of locating the child.

Finally, I conclude that it is likely that four Justices of this Court will vote to grant certiorari in this case, and that DSS has a fair prospect of persuading a majority of the Court that the decision of the Court of Appeals of Maryland was erroneous. Of the claims made in the application to me, I think two fit this category. The first is an important question about whether acts—such as the act of production of Maurice on the part of Bouknight—would constitute testimony for purposes of the Fifth Amendment. See *United States* v. *Doe*, *supra; Fisher* v. *United States*, 425 U. S. 391, 411–412 (1976); *Schmerber* v. *California*, 384 U. S. 757 (1966).

Second, and in my view equally as important, is whether even assuming there is a testimonial element in the act of surrendering Maurice, the Fifth Amendment privilege is available in this situation. In *California* v. *Byers*, 402 U. S. 424 (1971), we upheld a California law making it a crime to leave the scene of an automobile accident without giving one's name and address. In that case we recognized that "[t]ension between the State's demand for disclosures and the protection of the right against self-incrimination" must "[i]nevitably . . . be resolved in terms of balancing the public need on the one hand, and the individual claim of constitutional protections on the other." *Id.*, at 427 (plurality opinion of Burger, C. J.). This plurality found it significant that the law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities," *id.*, at 430, and was not aimed at a "'highly selective group inherently suspect of criminal activities.'" *Ibid.*, quoting *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 79 (1965).

"Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the dis-

closures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." 402 U. S., at 458 (Harlan, J., concurring in judgment.)

In *New York* v. *Quarles*, 467 U. S. 649 (1984), we recognized a public safety exception to the usual Fifth Amendment rights afforded by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), so that police could recover a firearm which otherwise would have remained in a public area. In the present case, a citation for civil contempt in order to obtain the production of a child such as Maurice, or knowledge about his whereabouts, is not essentially criminal in nature and aims primarily at securing the safety of the child. Protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents.

The DSS has offered to file a petition for certiorari within 35 days. The stay requested is therefore granted, pending consideration of a timely petition for certiorari and disposition of the same by the Court. If the petition is granted, the stay shall remain in effect until the Court disposes of the case or otherwise orders.

JOHN DOE AGENCY ET AL. *v.* JOHN DOE CORP.

ON APPLICATION FOR STAY

No. A–552. Decided January 30, 1989

An application to stay the enforcement of the Court of Appeals' judgment granting the Freedom of Information Act (FOIA) request of John Doe Corporation (Corporation) pending the disposition of a petition for a writ of certiorari is granted. The court below held that documents prepared during a Government audit in connection with the Corporation's performance of Government contracts and subsequently transferred to a law enforcement agency during a grand jury investigation of the Corporation were not exempt from disclosure under the FOIA's exemption for records or information compiled for law enforcement purposes. The balance of equities clearly weighs in favor of a stay, since the Court of Appeals left undisturbed the District Court's finding that disclosure posed a substantial risk of jeopardizing the grand jury investigation; since disclosure would moot part of the Court of Appeals' decision; and since the Corporation's interest in receiving the information immediately, while significant if its interpretation of the FOIA is correct, poses no threat of irreparable harm. There is a reasonable probability that four Justices will vote to grant certiorari, since there are divergent interpretations of the meaning of the FOIA exemption at issue. And, given the plausibility of the arguments advanced in those cases adopting a broader view of the exemption, there is a fair prospect that a majority of the Court will vote to reverse.

JUSTICE MARSHALL, Circuit Justice.

The Solicitor General requests that I issue a stay pending the disposition of the federal parties' petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. The Second Circuit granted the request of John Doe Corporation (Corporation), a government contractor, for certain documents under the Freedom of Information Act, 5 U. S. C. § 552 (1982 ed. and Supp. IV) (FOIA). The documents had been prepared during a 1978 audit by John Doe Agency (Agency) of certain costs incurred by the Corporation in connection with its performance of government contracts. Eight years later, the Corporation filed

a request with the Agency under the FOIA for documents relating to this audit. The request came in the context of a grand jury investigation into possibly fraudulent activity by the Corporation in connection with its government contracts, an investigation in which these documents were believed to be relevant. 850 F. 2d 105, 106 (1988).

The Agency denied the request on November 18, 1986. It stated, apparently upon the advice of a federal prosecutor, that the documents were exempt from disclosure under Exemption 7 of the FOIA, which exempts from mandatory disclosure "records or information compiled for law enforcement purposes" to the extent disclosure gives rise to one or more specified harms. 5 U. S. C. § 552(b)(7) (1982 ed., Supp. IV). It proceeded to transfer the requested records to John Doe Government Agency (Government Agency), a federal law enforcement agency. The Corporation then filed a similar FOIA request with the Government Agency. 850 F. 2d, at 106–107.

After an administrative appeal failed, the Corporation sought *de novo* review in the Federal District Court for the Eastern District of New York. The court ordered the Agency and the Government Agency to prepare a "*Vaughn* index" (after *Vaughn* v. *Rosen*, 157 U. S. App. D. C. 340, 484 F. 2d 820 (1973), cert. denied, 415 U. S. 977 (1974)) describing the documents, and to submit the index for an *in camera* inspection. After reviewing the index, the court ruled, without elaboration, that there was a "substantial risk" that disclosure of the documents or the *Vaughn* index would jeopardize the grand jury proceedings investigating the Corporation. The court therefore ruled that the Agency and the Government Agency were not required to turn over the documents to the Corporation. 850 F. 2d, at 107.

The Court of Appeals for the Second Circuit reversed. It held that, because the documents in question were prepared in routine audits and only later transferred to a law enforcement agency, they were not "compiled for law enforcement

purposes" within the meaning of § 552(b)(7). *Id.*, at 106. The court's mandate issued on November 28, 1988. On remand, the District Court ordered that the *Vaughn* index be disclosed, and the Court of Appeals refused to stay that order. The Solicitor General, on behalf of the Agency and the Government Agency, has filed a petition for a writ of certiorari (No. 88–1083) seeking review of the Court of Appeals' determination that the documents in question were not "compiled for law enforcement purposes." The Solicitor General seeks a recall and stay, pending the disposition of the petition for a writ of certiorari, of the mandate of the Court of Appeals, and a stay of the District Court's order on remand requiring disclosure of the *Vaughn* index.

My obligation as a Circuit Justice in considering a stay application under 28 U. S. C. § 2101(f) and this Court's Rule 44 is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School Dist.* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers); see also *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U. S. 1310, 1312–1313 (1977) (MARSHALL, J., in chambers). Evaluating these factors, I am convinced that the request for a stay should be granted.

First, the balance of the equities clearly weighs in favor of a stay. The District Court, having undertaken an *in camera* review of the *Vaughn* index and other documents, specifically found that disclosure of the *Vaughn* index and the documents posed a substantial risk of jeopardizing an important ongoing grand jury investigation. The Court of Appeals did not disturb this finding, basing its judgment for the Corporation instead on its determination that Exemption 7 mandated release of the documents. The Solicitor General further supports this interest by proffering an affidavit from an Assistant United States Attorney; the affidavit states that disclo-

sure can reasonably be expected to interfere with an ongoing law enforcement investigation by apprising the targets of that investigation of the nature of the grand jury's inquiry and by facilitating hindrance of the investigation. The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure of the *Vaughn* index would also create an irreparable injury. See *New York* v. *Kleppe*, 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals"). Conversely, the Corporation's interest in receiving this information immediately, while significant if the Corporation's interpretation of the FOIA is correct, poses no threat of irreparable harm.

I also believe that there is a "reasonable probability" that four Justices will consider the Exemption 7 issue posed by this case sufficiently meritorious to grant certiorari, and that there is a "fair prospect" that a majority of the Court will conclude that the decision below was erroneous. *Rostker*, *supra*, at 1308 (BRENNAN, J., in chambers). The Courts of Appeals have widely differed in interpreting the meaning of the FOIA exemption for documents "compiled for law enforcement purposes." Compare *New England Medical Center Hospital* v. *NLRB*, 548 F. 2d 377, 386 (CA1 1976); *Gould, Inc.* v. *GSA*, 688 F. Supp. 689, 699 (DC 1988); *Fedders Corp.* v. *FTC*, 494 F. Supp. 325, 328 (SDNY) (holding it is the context in which the documents in question are *currently* being used rather than the purpose for which they are created that is relevant in determining whether a record was "compiled for law enforcement purposes"), aff'd, 646 F. 2d 560 (CA2 1980), with *John Doe Corp.* v. *John Doe Agency*, 850 F. 2d 105, 109 (CA2 1988) (case below); *Hatcher* v. *USPS*, 556 F. Supp. 331 (DC 1982); *Gregory* v. *FDIC*, 470 F. Supp. 1329, 1333–1334 (DC 1979) (holding that record must originally

have been compiled for law enforcement purposes to qualify under Exemption 7); see also *Crowell & Moring* v. *Department of Defense*, 703 F. Supp. 1004, 1009 (DC 1989) (reading of Exemption 7 in *John Doe Corp.* "comports with neither the plain language of the exemption nor the purpose underlying its enactment").

In light of these divergent interpretations, I believe it likely that four Justices will vote to grant certiorari. In light of the plausibility of the arguments advanced in those cases adopting a broader view of Exemption 7's compilation provision than that of the court below, there is also a "fair prospect" that a majority of the Court will vote to reverse. I therefore grant the requested stay of the enforcement of the Court of Appeals' mandate and of the District Court's disclosure order pending the disposition of the petition for a writ of certiorari in this case.

It is so ordered.

CALIFORNIA *v.* FREEMAN

ON APPLICATION FOR STAY

No. A–602. Decided February 1, 1989

California's application for a stay of enforcement of the State Supreme Court's judgment reversing respondent Freeman's conviction for pandering under the California Penal Code pending the disposition of a petition for certiorari is denied. It is unlikely that four Justices would vote to grant certiorari since the state court's decision rests on the adequate and independent state law ground that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under the State Code. The court's discussion of state law is not interwoven with its discussion of federal law, specifically the First Amendment. Even if this Court were to review the case below and find that the state court had misinterpreted the strictures of the First Amendment, on remand that court would still reverse Freeman's conviction on state statutory law grounds.

JUSTICE O'CONNOR, Circuit Justice.

The State of California requests that, as Circuit Justice, I stay the enforcement of the judgment of the Supreme Court of California pursuant to 28 U. S. C. §2101(f) pending the disposition of a petition for certiorari (No. 88–1054) to review that judgment. Because I think it unlikely that four Justices would vote to grant certiorari, see *Hicks* v. *Feiock*, 479 U. S. 1305, 1306 (1986) (O'CONNOR, J., in chambers), I deny the application for issuance of a stay.

In its petition for certiorari, California seeks review of the State Supreme Court's judgment reversing the conviction of respondent Freeman for pandering under Cal. Penal Code Ann. §266i (West 1988). 46 Cal. 3d 419, 758 P. 2d 1128 (1988). Freeman is a producer and director of pornographic films who hired and paid adults to perform sexual acts before his film cameras. In 1983, Freeman was arrested and charged with five counts of pandering based on the hiring of five such performers. He was not charged with violation of any of California's obscenity laws. Freeman

was tried before a jury and convicted on all five counts of pandering; the State Court of Appeal affirmed the judgment of conviction. 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1987).

On discretionary review, the California Supreme Court first considered the relevant statutory language of the State Penal Code. In relevant part, § 266i of the Penal Code provides that a person is guilty of felonious pandering if that person "procure[s] another person for the purpose of prostitution . . . ." Prostitution, in turn, is defined in § 647(b) of the Penal Code as "any lewd act between persons for money or other consideration." Finally, "'for a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*'" 46 Cal. 3d, at 424, 758 P. 2d, at 1130 (emphasis in original), quoting *People* v. *Hill*, 103 Cal. App. 3d 525, 534–535, 163 Cal. Rptr. 99, 105 (1980).

Interpreting these definitions of terms relevant to the state pandering statute, the State Supreme Court held that "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*" 46 Cal. 3d, at 424, 758 P. 2d, at 1131 (emphasis in original). Applying this principle to Freeman, the court characterized the payments made to the performers as "acting fees" and held that "there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'." *Id.*, at 424–425, 758 P. 2d, at 1131. Thus, the court held, "[Freeman] did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution." *Ibid.* In the succeeding section of its opinion, the California Supreme Court went on to observe that "even if [Freeman's] conduct could somehow be found to come within the definition of 'prostitution' literally, the appli-

cation of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Ibid.*

California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition because in my view this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), that its analysis of the pandering provision of the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under § 266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction.

As I read the State Supreme Court's opinion, it is independent of federal law as well. This Court has held that where a state court has "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide . . . 'suits according to its own local law.'" *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977), quoting *Missouri ex rel. Southern R.*

Co. v. *Mayfield*, 340 U. S. 1, 5 (1950). This does not appear to be such a case.

The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled "First Amendment Considerations." The state court's discussion of the language of the Penal Code, which concludes with the clear holding quoted above, is not "interwoven with the federal law." *Michigan* v. *Long*, *supra*, at 1040. Discussion of federal law—specifically the First Amendment—is strictly confined to the second subsection and constitutes an independent, alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid. *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("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").

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort." 46 Cal. 3d, at 423, 758 P. 2d, at 1130. Nevertheless, in light of the subsequent clear holding based exclusively on the state pandering statute, as well as the State Supreme Court's doubts in its discussion of the First Amendment whether "[Freeman's] conduct could *somehow* be found to come within the definition of 'prostitution' literally," *id.*, at 425, 758 P. 2d, at 1131 (emphasis added), I conclude that the state court's statutory holding is inde-

pendent from its discussion of the First Amendment and was not driven by that discussion. Because the decision of the California Supreme Court rests on an adequate and independent state ground, the State of California's application for a stay of enforcement of the judgment of the California Supreme Court is denied.

So ordered.

INDEX

ADMINISTRATIVE FINALITY. See **Jurisdiction,** 1.

ADMINISTRATIVE RULEMAKING AUTHORITY. See **Social Security Act.**

ADMISSIBILITY OF EVIDENCE. See also **Constitutional Law,** VI.

Applicability of Federal Rule of Evidence 803(8)(C) to opinions and conclusions—Scope of cross-examination.—Rule 803(8)(C), which provides an exception to hearsay rule for public investigatory reports containing "factual findings," extends to conclusions and opinions contained in those reports; District Court abused its discretion in refusing to admit, on cross-examination, testimony intended to provide a more complete picture of a document about which witness had testified on direct. Beech Aircraft Corp. v. Rainey, p. 153.

AERIAL OBSERVATION OF PREMISES BY GOVERNMENT OFFICIALS. See **Constitutional Law,** VIII.

***ANDERS* BRIEFS.** See **Constitutional Law,** VII, 2.

APPEALS OF ADMINISTRATIVE AGENCIES' FINAL DETERMINATIONS. See **Jurisdiction,** 1.

APPEALS OF CRIMINAL CONVICTIONS. See **Constitutional Law,** VII, 2.

APPOINTED COUNSEL'S RIGHT TO WITHDRAW FROM FIRST APPEAL. See **Constitutional Law,** VII, 2.

ASSESSMENTS OF REAL PROPERTY. See **Constitutional Law,** V; 2.

ASSISTANCE OF COUNSEL. See **Constitutional Law,** VII.

ATTORNEY'S FEES. See **Civil Rights Attorney's Fees Awards Act of 1976.**

BALANCE OF POWERS AMONG GOVERNMENT BRANCHES. See **Constitutional Law,** IX.

BLACK LUNG BENEFITS REFORM ACT OF 1977. See also **Jurisdiction,** 1.

Eligibility criteria—Interim Labor regulation.—Interim Department of Labor regulation setting more restrictive eligibility criteria for black lung

BLACK LUNG BENEFITS REFORM ACT OF 1977—Continued.
benefit claimants than criteria of Department of Health, Education, and Welfare interim regulation in existence on June 30, 1973, violates § 902(f)(2) of Act, which provides that, pending issuance of permanent regulations, claims are to be evaluated under criteria not more restrictive than those applicable to claims filed on June 30, 1973. Pittston Coal Group v. Sebben, p. 105.

CAPITAL INVESTMENTS BY PUBLIC UTILITIES. See **Constitutional Law**, XI.

CIVIL CONTEMPT OF COURT. See **Stays**, 1.

CIVIL RIGHTS ACT OF 1871. See also **Civil Rights Attorney's Fees Awards Act of 1976.**

1. *Actions of National Collegiate Athletic Association as state action performed under color of state law.*—NCAA's participation in events leading to state university's suspension of its basketball coach did not constitute "state action" prohibited by Fourteenth Amendment and was not performed "under color of state law" within meaning of 42 U. S. C. § 1983. National Collegiate Athletic Assn. v. Tarkanian, p. 179.

2. *Statutes of limitations—Use of state personal injury statutes.*—Where state law provides for multiple statutes of limitations for personal injury actions, courts considering claims filed under 42 U. S. C. § 1983 should borrow State's general or residual personal injury statute of limitations. Owens v. Okure, p. 235.

CIVIL RIGHTS ACT OF 1968.

Title VIII—Zoning restriction—Disparate-impact test.—Assuming, as appellants conceded, that disparate-impact test is appropriate standard to use in analyzing facial challenge to local zoning code as violative of Act, record demonstrates that appellees have shown that zoning restriction has a disparate impact, and that appellants' justification to rebut prima facie case is inadequate. Town of Huntington v. NAACP, p. 15.

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

Prevailing party—Prisoner released before court rendered judgment.—Prisoner—who was released, and no longer in State's custody, on date that court entered judgment in his favor on his 42 U. S. C. § 1983 suit against prison officials—was not a prevailing party within meaning of § 1988 and was not entitled to an award of attorney's fees. Rhodes v. Stewart, p. 1.

COLLATERAL ATTACKS ON CRIMINAL SENTENCES. See **Constitutional Law**, III, 1.

COLOR OF STATE LAW. See **Civil Rights Act of 1871**, 1.

COMMERCE CLAUSE. See **Constitutional Law**, I.

COMPLETE AUTO **TEST.** See **Constitutional Law, I.**

CONCLUSIONS CONTAINED IN REPORTS AS EXCEPTION TO HEARSAY RULE. See **Admissibility of Evidence.**

CONFRONTATION OF WITNESSES. See **Constitutional Law, II.**

CONSPIRACIES. See **Constitutional Law, III, 1.**

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871, 1; Civil Rights Attorney's Fees Awards Act of 1976; Stays, 1.**

I. Commerce Clause.

Discrimination against interstate commerce—Complete Auto test.—Illinois Telecommunications Excise Tax, which covers interstate telecommunications, does not violate Commerce Clause, since it satisfies four-pronged test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274. Goldberg v. Sweet, p. 252.

II. Confrontation of Witnesses.

Impeachment of main prosecution witness—Harmless-error analysis.—In a rape case, court's refusal to allow petitioner to introduce impeachment evidence to show that main prosecution witness had motive to lie about incident denied him his right to confront witnesses against him, and that error was not harmless beyond a reasonable doubt. Olden v. Kentucky, p. 227.

III. Double Jeopardy.

1. *Collateral attack on prior guilty plea.*— Respondents' guilty pleas and convictions on two conspiracy charges in a single proceeding foreclosed them from raising, in a collateral attack on their sentences, a double jeopardy claim based on an argument that schemes alleged in their indictments were in fact part of only one conspiracy. United States v. Broce, p. 563.

2. *Reversal of conviction because of erroneously admitted evidence—Second trial not barred.*—When a reviewing court determines that a defendant's conviction must be set aside because certain evidence was erroneously admitted against him and finds that, once that evidence is discounted, there is insufficient evidence to support conviction, Double Jeopardy Clause does not forbid retrial so long as sum of evidence offered by State and admitted by trial court—whether erroneous or not—would have been sufficient to sustain a guilty verdict. Lockhart v. Nelson, p. 33.

IV. Due Process.

Preservation of evidentiary material potentially useful to criminal defendant.—In a sexual assault case, Due Process Clause did not require State to preserve semen samples that might have exonerated defendant, since defendant could not show bad faith on part of police in improperly preserving evidence. Arizona v. Youngblood, p. 51.

CONSTITUTIONAL LAW—Continued.

V. Equal Protection of the Laws.

1. *City Minority Business Utilization Plan—Award of city construction contracts.*—Court of Appeals' judgment—that city's plan requiring prime city construction contractors to subcontract specified percentage of each contract's dollar amount to minority businesses violated Equal Protection Clause in that (1) it was not justified by a compelling governmental interest, since record revealed no prior discrimination by city in awarding contracts, and (2) set-aside was not narrowly tailored to accomplish a remedial purpose—is affirmed. Richmond v. J. A. Croson Co., p. 469.

2. *Real property assessments.*—Assessments basing valuation of petitioners' real properties on their recent purchase price violate Equal Protection Clause; however, a State may divide property into classes and assign to each a different tax burden so long as those divisions and burdens are not arbitrary or capricious; Clause is not satisfied unless State itself removes discrimination rather than imposing on taxpayers burden of seeking upward revision of undervalued property's assessments. Allegheny Pittsburgh Coal Co. v. Webster County, p. 336.

VI. Privilege Against Self-Incrimination.

Miranda warnings—Roadside questioning before arrest.—Since ordinary traffic stops do not involve custody for purposes of *Miranda*, respondent was not entitled to a recitation of his constitutional rights prior to his arrest for driving while under influence of alcohol, and his roadside responses to questioning were admissible. Pennsylvania v. Bruder, p. 9.

VII. Right to Counsel.

1. *Assistance of counsel—Prejudice as an essential component of Geders rule violation—Consultation with attorney during break in testimony.*—A showing of prejudice is not an essential component of a violation of rule of *Geders* v. *United States*, 425 U. S. 80, that a trial court's order directing a defendant not to consult his attorney during an overnight recess called while defendant was testifying violated Sixth Amendment right to assistance of counsel; however, Constitution does not compel a trial judge to allow a criminal defendant to confer with his attorney during a brief—here, 15-minute—break in his testimony. Perry v. Leeke, p. 272.

2. *Right of appointed counsel to withdraw from a first appeal—Application of lack of prejudice standard or harmless-error analysis.*—Petitioner was deprived of constitutionally adequate representation on first appeal by State Court of Appeals' failure to follow procedures set forth in *Anders* v. *California*, 386 U. S. 738, for allowing appointed counsel to withdraw on basis that appeal is frivolous; application of lack of prejudice standard or harmless-error analysis in such a case would render *Anders* meaningless. Penson v. Ohio, p. 75.

CONSTITUTIONAL LAW—Continued.

VIII. Searches and Seizures.

Greenhouse on residential property—Naked-eye observation from helicopter.—State Supreme Court's judgment that helicopter surveillance of a partially covered greenhouse in a residential yard constituted a search for which Fourth Amendment requires a warrant is reversed. Florida v. Riley, p. 445.

IX. Separation of Powers.

Federal Sentencing Guidelines.—Guidelines promulgated by United States Sentencing Commission—which establish a range of determinate sentences for all categories of federal offenses and defendants—are constitutional, since Congress neither delegated excessive legislative power to Commission nor upset constitutionally mandated balance of powers between coordinate Branches by placing Commission in Judicial Branch, requiring that federal judges serve on Commission and share authority with nonjudges, or empowering President to appoint and remove members. Mistretta v. United States, p. 361.

X. Supremacy Clause.

Outer Continental Shelf Lands Act (OCSLA)—Pre-emption of state law.—OSCLA does not prevent State from including, in its formula for calculating in-state taxable income, income earned from sale of oil and natural gas extracted from Outer Continental Shelf. Shell Oil Co. v. Iowa Department of Revenue, p. 19.

XI. Taking of Property.

Utility regulation scheme—Disallowance of capital investment recovery.—A state utility regulation scheme does not "take" property simply because, in determining rate increases, it disallows recovery of capital investments that are not "used and useful in service to the public." Duquesne Light Co. v. Barasch, p. 299.

CONSULTATION WITH ATTORNEY DURING BREAKS IN TESTIMONY. See **Constitutional Law,** VII, 1.

CONTEMPT OF COURT. See **Stays,** 1.

COURTS OF APPEALS. See **Jurisdiction,** 1.

CRIMINAL LAW. See **Constitutional Law,** II–IV, VI–VIII; **Stays,** 2.

CROSS-EXAMINATION OF WITNESSES. See **Admissibility of Evidence.**

CUSTODIAL INTERROGATION BY POLICE. See **Constitutional Law,** VI.

DELEGATION BY CONGRESS OF LEGISLATIVE POWER. See **Constitutional Law**, IX.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law**, I.

DISCRIMINATION ON BASIS OF RACE OR NATIONAL ORIGIN. See **Constitutional Law**, V, 1.

DISPARATE-IMPACT ANALYSIS. See **Civil Rights Act of 1968.**

DISTRICT COURTS. See **Admissibility of Evidence.**

DOUBLE JEOPARDY. See **Constitutional Law**, III.

DRIVING WHILE UNDER THE INFLUENCE. See **Constitutional Law**, VI.

DUE PROCESS. See **Civil Rights Act of 1871**, 1; **Constitutional Law**, IV.

EFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law**, VII, 2.

ELIGIBILITY CRITERIA FOR BLACK LUNG CLAIMS. See **Black Lung Benefits Reform Act of 1977.**

EMPLOYER AND EMPLOYEES. See **National Security Agency.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, V.

ERRONEOUS ADMISSION OF EVIDENCE. See **Constitutional Law**, III, 2.

EVIDENCE. See **Admissibility of Evidence; Constitutional Law**, IV.

EXCISE TAXES. See **Constitutional Law**, I.

FEDERAL COURTS. See **Jurisdiction**, 2.

FEDERAL RULES OF EVIDENCE. See **Admissibility of Evidence.**

FEDERAL SENTENCING GUIDELINES. See **Constitutional Law**, IX.

FEDERAL-STATE RELATIONS. See **Constitutional Law**, X.

FIFTH AMENDMENT. See **Constitutional Law**, III, IV, VI, XI; **Stays**, 1.

FINAL DETERMINATIONS OF ADMINISTRATIVE AGENCIES. See **Jurisdiction**, 1.

FINAL ORDERS. See **Jurisdiction**, 3.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976. See **Jurisdiction**, 2.

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1871**, 1; **Constitutional Law**, III–VI; VII, 2; **Stays**, 1.

FOURTH AMENDMENT. See **Constitutional Law**, VIII.

FREEDOM OF INFORMATION ACT. See **Stays**, 3.

FREE SPEECH RIGHTS OF UNION MEMBERS. See **Labor-Management Reporting and Disclosure Act of 1959.**

***GEDERS* RULE.** See **Constitutional Law**, VII, 1.

GENERAL PERSONAL INJURY STATUTES OF LIMITATIONS. See **Civil Rights Act of 1871**, 2; **Labor-Management Reporting and Disclosure Act of 1959**, 2.

GUILTY PLEA AS BARRING COLLATERAL DOUBLE JEOPARDY CLAIM. See **Constitutional Law**, III, 1.

HARMLESS ERROR. See **Constitutional Law**, II; VII, 2.

HEARINGS BEFORE EMPLOYMENT TERMINATION. See **National Security Agency.**

HEARSAY RULE. See **Admissibility of Evidence.**

ILLINOIS. See **Constitutional Law**, I.

IMMUNITY OF FOREIGN SOVEREIGN FROM SUIT. See **Jurisdiction**, 2.

IMPEACHMENT OF WITNESSES. See **Constitutional Law**, II.

INTERIM DEPARTMENT OF LABOR REGULATION FOR BLACK LUNG ELIGIBILITY. See **Black Lung Benefits Reform Act of 1977.**

INTERSTATE COMMERCE. See **Constitutional Law**, I.

INVESTIGATORY REPORTS AS EXCEPTION TO HEARSAY RULE. See **Admissibility of Evidence.**

JURISDICTION.

1. *Courts of Appeals—Writ of mandamus—Review of black lung claims.*—Court of Appeals, after declaring invalid interim Labor Department regulation setting criteria for black lung eligibility, erred in issuing a writ of mandamus compelling Secretary of Labor to readjudicate a class of claims previously considered under such regulation even though Secretary's decision in those cases had become final. Pittston Coal Group v. Sebben, p. 105.

2. *Federal Courts—Foreign Sovereign Immunities Act of 1976.*—Act provides sole basis for obtaining jurisdiction over a foreign state in United States courts; action was properly dismissed because Act did not authorize jurisdiction over petitioner for damages sustained by respondent's ship

JURISDICTION—Continued.

when Argentine military aircraft attacked it in international waters during war between Great Britain and petitioner over Falkland Islands (Malvinas). Argentine Republic v. Amerada Hess Shipping Corp., p. 428.

3. *Supreme Court—Finality of decision when proceedings remain in state court.*—For purposes of Supreme Court's jurisdiction under 28 U. S. C. § 1257(2), Pennsylvania Supreme Court decision remanding case for further proceedings to revise utility's rates is a final order, since state court had ruled on constitutionality of state law at issue, and all that remained was a straightforward application of its clear directive. Duquesne Light Co. v. Barasch, p. 299.

4. *Supreme Court—Mandatory jurisdiction.*—Supreme Court review of Court of Appeals' decision striking down local zoning ordinance as a violation of federal law and ordering town to rezone project site is limited to that portion of case striking down ordinance, since it implicates the Court's mandatory jurisdiction. Town of Huntington v. NAACP, p. 15.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

1. *Free speech provisions—Removal of elected business agent.*—Removal of an elected business agent, in retaliation for statements he made at a union meeting in opposition to a dues increase sought by union trustee, violates Act. Sheet Metal Workers v. Lynn, p. 347.

2. *Statutes of limitations—Use of state personal injury statutes.*—Claims alleging violations of a union member's right to free speech as to union matters under § 101(a)(2) are governed by state general or residual personal injury statutes of limitations. Reed v. United Transportation Union, p. 319.

LACK OF PREJUDICE STANDARD OF REVIEW. See **Constitutional Law**, VII, 2.

LAWYERS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

LIMITATIONS ON ACTIONS. See **Civil Rights Act of 1871**, 2; **Labor-Management Reporting and Disclosure Act of 1959**, 2.

MANDAMUS JURISDICTION. See **Jurisdiction**, 1.

MANDATORY JURISDICTION. See **Jurisdiction**, 4.

MEDICARE PROGRAM. See **Social Security Act.**

MINORITY BUSINESSES. See **Constitutional Law**, V, 1.

***MIRANDA* WARNINGS.** See **Constitutional Law**, VI.

NAKED-EYE AERIAL OBSERVATION OF PREMISES BY GOVERNMENT OFFICIALS. See **Constitutional Law**, VIII.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ACTIVITIES AS STATE ACTION. See **Civil Rights Act of 1871**, 1.

NATIONAL SECURITY AGENCY.

Removal for cause—Statutory authority.—Neither 50 U. S. C. § 833—which provides that an NSA employee "may" be removed upon a determination that other statutes' termination procedures cannot be invoked consistently with national security—nor 5 U. S. C. § 7532—which provides that an employee must be given, *inter alia*, a preremoval hearing before he is removed in interests of national security—barred NSA from terminating an employee by invoking its for-cause removal mechanism adopted pursuant to National Security Agency Act of 1959. Carlucci v. Doe, p. 93.

NATURAL GAS. See **Constitutional Law**, X.

NONDELEGATION DOCTRINE OF SEPARATION-OF-POWERS PRINCIPLE. See **Constitutional Law**, IX.

OIL. See **Constitutional Law**, X.

OPINIONS CONTAINED IN REPORTS AS EXCEPTION TO HEARSAY RULE. See **Admissibility of Evidence.**

OUTER CONTINENTAL SHELF LANDS ACT. See **Constitutional Law**, X.

PERSONAL INJURY STATUTES OF LIMITATIONS. See **Civil Rights Act of 1871**, 2; **Labor-Management Reporting and Disclosure Act of 1959**, 2.

POLICE INTERROGATION. See **Constitutional Law**, VI.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law**, X.

PREJUDICE AS COMPONENT OF *GEDERS* RULE VIOLATION. See **Constitutional Law**, VII, 1.

PREVAILING PARTIES. See **Civil Rights Attorney's Fees Awards Act of 1976.**

PRISONERS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, VI; **Stays**, 1.

PROOF. See **Civil Rights Act of 1968.**

PROPERTY ASSESSMENTS. See **Constitutional Law**, V, 2.

PUBLIC INVESTIGATORY REPORTS AS EXCEPTION TO HEARSAY RULE. See **Admissibility of Evidence.**

PUBLIC UTILITIES. See **Constitutional Law**, XI.

RATE INCREASES BY PUBLIC UTILITIES. See **Constitutional Law**, XI.

REAL PROPERTY ASSESSMENTS. See **Constitutional Law**, V, 2.

REGULATIONS SETTING BLACK LUNG ELIGIBILITY CRITERIA. See **Black Lung Benefits Reform Act of 1977.**

REMOVAL OF ELECTED UNION OFFICIALS. See **Labor-Management Reporting and Disclosure Act of 1959**, 1.

REMOVAL OF NATIONAL SECURITY AGENCY EMPLOYEES. See **National Security Agency.**

RESIDUAL PERSONAL INJURY STATUTES OF LIMITATIONS. See **Civil Rights Act of 1871**, 2; **Labor-Management Reporting and Disclosure Act of 1959**, 2.

RETRIAL AFTER REVERSAL AS DOUBLE JEOPARDY. See **Constitutional Law**, III, 2.

RETROACTIVITY OF ADMINISTRATIVE RULES. See **Social Security Act.**

REZONING. See **Jurisdiction**, 4.

RIGHT TO COUNSEL. See **Constitutional Law**, VII.

RULEMAKING AUTHORITY OF ADMINISTRATIVE AGENCY. See **Social Security Act.**

SEARCHES AND SEIZURES. See **Constitutional Law**, VIII.

SECTION 1983. See **Civil Rights Act of 1871.**

SELF-INCRIMINATION. See **Constitutional Law**, VI; **Stays**, 1.

SENTENCING GUIDELINES FOR FEDERAL OFFENSES AND DEFENDANTS. See **Constitutional Law**, IX.

SEPARATION OF POWERS. See **Constitutional Law**, IX.

SEXUAL ASSAULT. See **Constitutional Law**, IV.

SIXTH AMENDMENT. See **Constitutional Law**, II, VII.

SOCIAL SECURITY ACT.

Medicare program—Authority to promulgate retroactive rules.—Since, as a general matter, statutory grants of administrative rulemaking authority will not be understood to encompass power to promulgate retroactive rules unless that power is conveyed by express terms, Secretary of Health and Human Services' 1984 reinstatement of a previously invalidated 1981 Medicare reimbursement regulation—which reinstatement allowed him to recoup sums previously paid to hospitals—is invalid. Bowen v. Georgetown University Hospital, p. 204.

SOVEREIGN IMMUNITY. See **Jurisdiction**, 2.

STATE ACTION. See **Civil Rights Act of 1871**, 1.

STATE TAX ASSESSMENTS. See **Constitutional Law**, V, 2.

STATUTES OF LIMITATIONS. See **Civil Rights Act of 1871**, 2; **Labor-Management Reporting and Disclosure Act of 1959**, 2.

STAYS.

1. *Confinement for civil contempt as violation of privilege against self-incrimination.*—Application to stay judgment of State Court of Appeals—that Jacqueline Bouknight's confinement for civil contempt until she revealed whereabouts of her child, over whom she had supervised custody, violated her privilege against self-incrimination under Fifth Amendment—is granted. Baltimore City Department of Social Services v. Bouknight (REHNQUIST, C. J., in chambers), p. 1301.

2. *Conviction for pandering.*—State's application to stay enforcement of State Supreme Court's judgment reversing respondent's conviction for pandering, pending disposition of a petition for certiorari, is denied, since lower court's decision rests on an adequate state law ground. California v. Freeman (O'CONNOR, J., in chambers), p. 1311.

3. *Freedom of Information Act request.*—Application to stay enforcement of Court of Appeals' judgment granting corporation's FOIA request for documents prepared during routine Government audit of corporation's Government contracts and subsequently transferred to law enforcement agency for use in grand jury investigation, pending disposition of a petition for a writ of certiorari, is granted. John Doe Agency v. John Doe Corp. (MARSHALL, J., in chambers), p. 1306.

SUBJECT-MATTER JURISDICTION. See **Jurisdiction**, 2.

SUPREMACY CLAUSE. See **Constitutional Law**, X.

SUPREME COURT. See also **Jurisdiction**, 3, 4.

1. Presentation of Attorney General, p. VII.

2. Appointment of Shelley L. Dowling as Librarian, p. IV.

TAKING OF PROPERTY. See **Constitutional Law**, XI.

TAXES. See **Constitutional Law**, I; V, 2; X.

TELECOMMUNICATIONS TAX. See **Constitutional Law**, I.

TERMINATION OF NATIONAL SECURITY AGENCY EMPLOYEES. See **National Security Agency.**

TITLE VIII OF CIVIL RIGHTS ACT OF 1968. See **Civil Rights Act of 1968.**

TRAFFIC OFFENSES. See **Constitutional Law**, VI.

UNDER COLOR OF STATE LAW. See **Civil Rights Act of 1871**, 1.

UNIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

UNITED STATES SENTENCING COMMISSION. See **Constitutional Law**, IX.

UTILITIES. See **Constitutional Law**, XI.

WITNESSES. See **Constitutional Law**, II.

WRIT OF MANDAMUS. See **Jurisdiction**, 1.

ZONING ORDINANCES. See **Civil Rights Act of 1968; Jurisdiction**, 4.