# Supreme Court of the United States



In the Matter of:

Docket No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California

Petitioner,

vs.

LOUIS NELSON, Warden, California State Prison at San Quentin,

Respondent.



Place Washington, D. C.

Date December 9, 1968

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

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| GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California, Petitioner; | : | |
| vs. | : | No. 199 |
| LOUIS NELSON, Warden, California State Prison at San Quentin, Respondent. | : | |

Washington, D. C.

December 9, 1968

The above-entitled matter came on for argument at 11:30 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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JEROME M. FEIT, ESQ.
Attorney, U. S. Department of Justice
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 199, George B. Harris, Judge of the United States District Court for the Northern District of California, petitioner; versus Louis Nelson, Warden, California State Prison at San Quentin, respondent.

Mr. Pottinger?

ARGUMENT OF J. STANLEY POTTINGER, ESQ.

ON BEHALF OF THE PETITIONER

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

This case presents the question of whether or not a District Court has the power or the authority to order the use of discovery interrogatories in habeas corpus proceedings.

This particular question stems from a habeas corpus proceedings below instituted by the petitioner, a Mr. Alfred Walker. Mr. Walker was arrested and his premises were searched on the basis, and solely on the basis, of information supplied to the Oakland police officers by an informant, a lady named Miss Frances Jenkins.

The record indicated, however, so serious a question as to the reliability of the informant, which is the sole basis which could sustain, constitutionally sustain, probable cause, that Chief Judge Harris ordered counsel to be appointed and an evidentiary hearing on this sole question to be held.

Shortly prior to the evidentiary hearing, petitioner

Walker propounded a short set of interrogatories to the respondent, inquiring into the possible record that would either establish reliability or unreliability on the part of the informant.

The respondent objected to these interrogatories, not on the ground that they were inappropriate, but on the ground that the District Court had no authority for permitting their use in a habeas corpus proceeding. The matter was argued and Chief Judge Harris ordered answers to the interrogatories.

The respondent immediately sought leave to file a petition for mandamus or prohibition in the Ninth Circuit, and such leave was granted, thereby postponing the evidentiary hearing. The matter was briefed and argued in the Ninth Circuit and the Ninth Circuit Court of Appeals did, in fact, enter an order vacating Chief Judge Harris' order.

Petitioner Walker then petitioned for a writ of certiorari and the case is now before you on the basis of a writ issued to the Ninth Circuit.

In considering any applicability of discovery procedures to habeas corpus, I think it is essential to bear in mind one indisputable premise: that is that the constitutional and historic validity of the writ of habeas corpus today depends in large part upon the District Court's ability to fulfill its duty, to inquire into disputed issues of fact.

As this Court stated in the landmark case of Townsend

against Sain, determination of fact issues in habeas proceedings today is the typical and not the rare case.

Given this duty, the question arises in this case, and in other habeas proceedings, as to what rules, what guidelines, what procedures a District Court can look to in order to fulfill this fact finding task.

We have suggested two basic guidelines, two basic areas, two grounds, which the court might look to. The first is the application of suitable or appropriate Federal Rules of Civil Procedure, and the second is an application of appropriate procedures pursuant to the Court's inherent power.

I should first like to discuss the applicability of the Federal Rules of Civil Procedure, since we believe that the controlling rule, that is, Rule 81(a)(2), supports such an application and because we believe that an application of appropriate rules is preferable and clearly preferable to a use of procedures pursuant to the Court's inherent power.

Q May I ask you whether there is any indication on the record here as to which theory the District Court used in ordering that the interrogatories be answered?

A No, there is not, Mr. Justice.

Q You do not know in this case whether the Court felt compelled to do so by the rules, or whether the Court was acting as a matter of discretionary power?

A No. There is no indication whatsoever. All

that we can surmise from the record is that the interrogatories were initially propounded pursuant to Federal rules. However, at the argument on this matter, the Court did not make a ruling on the Federal rules. The Court did take the matter under submission, rather than ruling from the bench, and when the order of the Court was entered, it deleted any reference to the Federal rules.

The order simply states that interrogatories are to be answered, and it did not say pursuant to the Federal Rules or pursuant to inherent power. We believe, of course, that, therefore, the ruling of the Court is sustainable on any valid ground.

My understanding of the jurisdiction of the writ of prohibition is that it can only issue if there is no jurisdiction whatsoever to sustain the order in question. We believe that there are two interpretations that Rule 81(a)(2) will support.

One is the interpretation given by the Ninth Circuit and which is urged upon this Court by respondent, and the second is a broader interpretation which is urged upon the Court by petitioner.

Rule 81(a)(2) provides that there is no doubt that some of the rules of Federal procedure are applicable to habeas corpus, but it provides that only those rules will be applicable to the extent that the practice in such proceedings is

not set forth in statutes of the United States, and, secondly, that the practice has heretofore conformed to the practice in civil actions.

The first requirement is not an objection that we concede in this case because there are no statutes governing the practice presently before the Court and, indeed, the Ninth Circuit did not have a problem with this first requirement.

It is the second requirement that is in issue. Under the Ninth Circuit's interpretation, the Court has read the rule here to require a showing that there is an actual use of the specific procedure, in this case the discovery interrogatories, in civil actions prior to 1938, and that the exact same procedure was reported and used in habeas corpus proceedings prior to 1938.

In that event, and only in that event, says the Ninth Circuit, can appropriate rules be applied today. We believe that there is no reason to read the rules so restrictively. Indeed, the language does not necessarily dictate this interpretation; nor does the statutory history, which actually is very unelucidating on the entire question. It does not dictate this interpretation either.

The language of the statute, frankly, doesn't make sense under this interpretation, because the result is to make only those rules, or only those procedures, applicable which were already applicable prior to 1938, and to that extent, of

course, that procedure would continue on anyway after the promulgation of the Federal rules.

The alternative under this narrow interpretation is to make no rules applicable, in which case there was no reason for the provision to be placed in the Federal rules in the first place. So even on its face, this interpretation does not make sense.

But a more important reason for rejecting the interpretation is the result that would flow from this interpretation. The result would be to freeze all procedures which are available in habeas corpus to those procedures available in the year 1938, and the entire history of the writ of habeas corpus has been one of growth, of flexibility, of permitting the courts to meet the expanded needs of the writ itself, and certainly those needs have greatly expanded under the aegis of this Court, under the habeas corpus statutory scheme provided by Congress.

We believe it would be an intolerable restraint upon the District Courts to be restricted simply to the narrow and rather formalistic procedures available in the year 1938.

Under our interpretation of Rule 81(a)(2), we read the statute to require only a showing that there was a practice in habeas corpus conforming to a practice in civil actions in a more general sense. We read it to say that if there was a general format applicable in habeas corpus, similar to the

general format in civil proceedings, then those rules which are suitable to or which facilitate that general format are available today under the rules.

In other words, the general format that did apply to habeas corpus prior to 1938 and to civil proceedings prior to 1938 was the development and trial of issues of fact by a court. Those two practices were identical or did exist in both civil and habeas proceedings.

We feel that to that extent, rules in the Federal Rules of Civil Procedure which facilitate that practice should be available. This, of course, would exclude, for instance, civil rules governing trials by jury, since there never was a trial by jury in habeas proceedings and there should not be such a trial today.

But those rules which are suitable we believe are supported by the statute and sound policy dictates their use today. For the same reasons as the obverse of the restrictive practice that I mentioned on the part of the Ninth Circuit, the expanded duties under the habeas corpus decisions of this Court would require the Court to utilize appropriate rules to that end.

Indeed, we point out in our brief that the vast majority of courts in this country which have utilized rules in habeas corpus have indeed adopted this interpretation, and that no fewer than six circuits in this country, over a period

of 20 years, have adopted various rules of the Federal Rules of Civil Procedure appropriate to the task before them, five circuits of which have adopted discovery rules.

All of the discovery rules of civil procedure have been used in habeas proceedings and reported other than, I believe it is, requests for admissions. I don't believe we found a case on that particular proceeding, but all other rules have been used, including Rule 35.

Q Do you mean a full sweep of the discovery rules?

A Yes, Your Honor. Every discovery rule other than, I believe, one has been reported in use in District Courts or in Circuit Courts.

Q A full sweep of the rules as ordinarily applicable to a civil cause.

A The full extent of the rules. But when you say "full sweep," it doesn't necessarily mean it would work the same way in a civil proceeding. In other words, there are some distinctions in habeas and civil proceedings which exist and which, once the rule is applied, would not necessarily let it be applied to the full extent.

Q Can you illustrate that?

A Yes. This particular problem arises from the argument by the State that abuse would occur if certain of the rules, the discovery rules, were permitted in habeas corpus. I think that the basic objection by the State is one of abuse.

The State contends that most habeas petitioners today are proceeding in the form of paupers. They are indigents. That is true. We don't dispute that. They contend that if such a person who is unrestrained by litigation costs would have the ability to use discovery rules, he would greatly burden the State out of an attempt to embarrass them, to burden them for its own sake, to use the rules in bad faith.

For this reason, the State contends that it will be forced to attend hearings to obtain protective orders that it would not otherwise be required to attend or to seek under the present habeas statutory scheme. But this particular argument simply does not hold water.

First of all, if you look at the habeas corpus --

Q That is not an unfamiliar argument anyway in the matter of discovery generally, is it?

A That is correct, Mr. Justice. It is not an unfamiliar argument. We think that initially, the way that argument has been met in the last 30 years, it can be met here. That is that the rules themselves provide completely adequate protection, specifically Rule 30 of the Federal Rules of Civil Procedure, which permits the court on its own motion, by an ex parte motion, or by an argument to the motion, to enter fully objective orders.

Fully aside from that, it is important to note that the habeas corpus statutory scheme and the Federal rules, when

integrated as they presently exist, would still not permit any discovery by any petitioner until the matter has been reviewed by a District Court under present law. This occurs for a simple reason.

In section 1915, Title 28, it provides that a form of pauper's proceeding cannot commence until an order of the Court permits it to commence. Normally, that order is entered in a show-cause order when the District Court has reviewed the rquest for the proceeding along with the petition itself.

Rule 33 provides that there can be no discovery without special leave of the Court for 10 days following the commencement of the action; in other words, following a determination by the District Court that the action does or does not have merit in the entrance of a show-cause order.

Rule 26, incidentally, covering depositions, provides an even longer moratorium of 20 days before any discovery can commence. The result is that any petitioner who submits a petition in the form of paupers or otherwise, cannot even have the action commence under Rule 33 or the Federal rules until the District Court has looked at the merits.

Of course, if it is an unmeritorious, frivolous or burdensome petition, it will be dismissed, as it is today, and discovery cannot ensue. If, on the other hand, the Court issues a show-cause order, Title 28 provides that the statements are filed in return of five days of that order and a hearing on

the entire matter is to be held three days thereafter. So even if the matter proceeds, there will be a full hearing within the 10 days that Rule 33 would commence, within eight days.

At that particular hearing, and again we point out that there can be no discovery even attempted at this point, the Court will be permitted, in fact, will have, several choices: It can either issue the writ, at which point discovery will be immaterial; it can deny the writ, at which point discovery would be immaterial; or it can order an evidentiary hearing.

Q I gather that in the habeas corpus indictment it imposes the restraint that you have been mentioning.

A That is correct.

Q On the application of the discovery rules and the civil rules.

A That is right.

Q There aren't any comparable restraints in the ordinary civil cases.

A That is right.

Q In the ordinary civil case, one files the complaint and the other side just goes ahead and proceeds in discovery.

A That is exactly right. Under the present statutory scheme, there are already built-in reviews and restraints on the use of discovery wholly aside from what we believe is a completely adequate restraint in the Federal rule itself,

Rule 30. So we have two separate built-in restraints that will preclude the kind of abuse that the State will suggest will occur in habeas cases.

In addition to this, we have to note two other experiences with the rules. Since 1938, when the rules were promulgated, a prisoner has been permitted to bring a civil rights action, and under that, he has been permitted to invoke the entire spectrum of civil discovery, so that if a prisoner is really interested solely in burdening the State, as the State suggests the bad-faith prisoner supposedly would be doing, he could have done so for the last 30 years. Yet we have scoured decisions and have been unable to find any number of decisions reported where this kind of abuse took place.

In addition to that, we have to point out that several circuits have, for many years now, applied discovery rules directly to habeas proceedings, and yet over these past few years that this application has been available, we find no cases reported where prisoners have abused the availability of the Federal rules.

So not only does the statutory scheme preclude abuse, but experience that has already been had with the rules, both in habeas and civil rights cases, indicates that abuse simply is non-existent.

Q How much discovery do you think in a habeas proceeding is available to the State?

A Well, I think that in habeas proceedings the issue is not one of guilt or innocence and, therefore, does not involve the self-incrimination privilege. It is not really often one that even involves the testimony of the petitioner.

In our case, the petitioner couldn't perjure himself, even if he were so inclined. He will not testify on the issue. We are dealing with the process by which one is incarcerated, rather than guilt or innocence.

I think the State will have just as much discovery available to it as the petitioner will. For instance, it will be available to the State to inquire into any of the matters surrounding probable cause that it feels appropriate to a particular case.

I would like to point out on this ground that this is the second objection tendered by the State; that is, the State feels that it is incongruous to have discovery available in a habeas corpus proceeding which is not to the full extent available in a criminal proceeding.

But we wish to point out that that objection also is invalid. For one reason, because we are involved in the process by which one is incarcerated rather than with guilt or innocence. The reasons for limiting discovery in some instances in criminal cases simply doesn't apply to habeas corpus cases.

The reason for limiting it in criminal cases has traditionally been not the belief that discovery would not lead

to the objective discovery of truth, but, rather, that there are counterbalancing considerations: Number 1, that a guilty defendant could tamper with witnesses who he discovered through the discovery process; and, second, he could use the self-incrimination privilege to deter the State from discovery against him.

Q California has liberal discovery provisions in its law, doesn't it?

A Yes, I believe that is correct. California does have perhaps the most liberal discovery provisions of any State in the Union. But since we are dealing here, in addition, with Federal habeas corpus, I think it is important to point out in addition to that that in any State in the country the reasons for limiting criminal discovery in some cases simply do not apply in habeas corpus cases.

In addition to that, it is important to note that where criminal Rule 16, which has greatly expanded criminal discovery, does not fully compliment civil discovery, the inherent power of the Court does. In other words, even where criminal Rule 16 has not permitted complete discovery to the same extent it would be under the Federal Rules of Civil Procedure, Courts have quite frequently exercised their inherent power to go that last mile.

We have cited cases in our brief, the Shores case, the Nolte case, and other cases, where the Courts have

complimented civil discovery. So we don't feel that there is a valid objection to extending discovery devices in habeas proceedings on this ground. At any rate, it is certainly not an objection which should control in this case.

Q Of course, in an ordinary criminal case, the parties are the State as prosecutor and the defendant as the person under indictment or against whom information has been had. Habeas corpus is slightly different in that the plaintiff, the petitioner, the applicant, is the man in custody and the defendant or respondent is custodian. I don't know that the custodian knows the answers to these questions.

How would he know? How would the warden of a penitentiary know anything about Frances Jenkins?

A Mr. Justice, what happens is that in this particular case the warden will not know of his own first-hand knowledge much information. At least to my knowledge he will not know much information about Frances Jenkins.

But the point is that historically, because of the development of the writ, the respondent has always been named as the warden of the person in custody, but the real party in interest is the State.

Just as the use of civil discovery has been permitted against nominal parties, where the real party in interest comes forth with the real information in question, so it would be in our case, and so it would be in habeas cases generally.

The warden is still going to be the nominal party. Since it is the State who represents him, the same attorneys, the real parties in interest are those witnesses who are State witnesses and who, therefore, should furnish the information.

Q You ask in your interrogatories, appearing at page 34 of the record, that the respondent, that is, the warden of the penitentiary, answer all these questions. He can't possibly know. All he knows are the conditions under which he received the petitioner for custody in the penitentiary, is tha right; that he was convicted properly of a crime, and so on?

A Yes. The warden, again, is named as the nominal party.

Q And that is the party to answer these questions under oath.

A It was not construed as such, I believe, by the Court or any of the parties, Mr. Justice.

Q I am not attempting in my question to be technical with respect to this case, but I am expressing my tentative question as to whether or not this might not be an additional reason why discovery procedures arenot appropriate in a habeas corpus case.

Q Just exactly how would this work? Is this, in effect, a writ asking that the State proceed to find out the answers?

A Nominally, again, yes.

Q Actually, what will happen?

A Actually, what would happen is that Mr. Granberg, or other persons we have dealt with in this case in the State Attorney's Office, and who will be representing the State in the proceeding, if ordered to answer, will secure the information from the police officers to whom the questions are directed, in fact.

Q It is quite a different thing from a civil interrogatory, because what the prisoner here is asking is that the State be commanded to procure information for him, namely, the answers to these questions. In the usual civil interrogatory, of course, you address the interrogatory to the person who is in possession of the information.

Is that what this is? What you are asking us to approve here is a procedure by which the State is commanded to obtain requests for certain information. Technically, I suppose that if we accept your argument, it would mean that the jailhouse lawyer or the convicted person himself could sit down and write a set of interrogatories and having filed his petition, a writ of habeas corpus, without any Court intervention.

A Mr. Justice, I don't believe that could happen.

Q You would have to get Court approval?

A You would have to.

Q How about depositions upon written interrogatories?

A The same. It would have to be approved. And it

would be approved for the simple reason that in any event, discovery is not going to ensue until an evidentiary hearing has been had.

Q Under the civil rules, if I am involved in a civil suit, with time intervals and so on taken into account, I can just serve notice on somebody that I am going to take his interrogatory, take his deposition, and I don't need Court approval. Isn't that right?

A Ordinarily that is the case, but I don't believe that could be the case in habeas proceedings for the simple reason that the Court, on its own motion, or the parties on their own motion, or the petitioner seeking to acquire information -- any of these parties can simply state that no discovery under Rule 30 will proceed until an evidentiary hearing has been determined to be necessary, until counsel is appointed.

Q Is that in the civil rules?

A It is supported by Rule 30; yes, Your Honor.

Q I listened with interest to your argument about Rule 30, but actually if you say that the civil rules applied in habeas proceedings, I suppose it is at least arguable that a person could serve notice on Frances Jenkins that that person wants to take her deposition; is that right?

A Yes, sir; it is possible, but I see no burden upon that particular person other than to notify the Court that notice has been received and have the Court review the

appropriateness of it, which, in effect, in this case means that the Court would have two possibilities:

The Court can say, without discovery at the present time, when it appears that a witness might have relevant information in good faith, "I must have this person come to a hearing, because this person, as an informant, may have relevant information."

Therefore, any person who it is believed has information, whether they have it or not, is forced to a hearing. They must come to a hearing, at which time the Court can do one of two things: Have the evidentiary hearing itself, and when a person is found not to have any relevant information the person is dismissed, even though the time has been used and the person has had to travel tothe hearing; or the Court can have two hearings. It can have the first hearing to determine who has relevant information, segregate those that do not from those who do, and hold the evidentiary hearing in the second place. Discovery would obviate this.

Q Aren't you a little concerned that this might turn out to be occupational therapy for jailhouse inmates and cause a certain amount of inconvenience to the rest of the world?

A I don't believe it will, Mr. Justice, again because jailhouse lawyers could have done so long ago if they intended to do so, at least in several circuits.

There is no indication of such abuse. And second, because I think as a matter of course, particular orders will be entered. When the State files its return, all it has to do is, in a one-line sentence, ask for a preclusion of discovery until an evidentiary hearing is ordered or until it is viewed by the Court to be necessary.

MR. CHIEF JUSTICE WARREN: We will recess.

(Whereupon, at 12 Noon the oral argument in the above-entitled matter was recessed, to reconvene at 12:30 p.m. the same day.)

(Argument resumed in the above-entitled matter)

MR. CHIEF JUSTICE: Mr. Pottinger, you may proceed with your argument.

FURTHER ARGUMENT OF J. STANLEY POTTINGER, ESQ.

ON BEHALF OF PETITIONER

MR. POTTINGER: Mr. Chief Justice, may it please the Court:

We were in the process of reviewing objections which have been tendered by respondent to the application of appropriate Federal rules or other discovery devices pursuant to inherent power to habeas corpus proceedings.

Q Pursuant to what power?

A Of procedures, either through the Federal rules or pursuant to inherent power. That is to say that discovery devices could be applied to habeas corpus proceedings by a District Court pursuant to its own inherent power as a separate ground from applying those rules pursuant to ---

Q Without any previous support of Congress or does the Court draw up the rules?

A Mr. Justice, we belive that under the inherent power authorities that we have argued there are essentially three separate specific authorities for the use of appropriate procedures in habeas corpus. The one is the inherent power of the Court, wholly aside from any statute or any constitutional provision.

And we have cited the case of ex parte Petterson, decided by this Court, which did establish that Courts do have the inherent power to act to the ends of justice aside from any specific statute. That is cited and discussed in our reply brief.

Q They have the power to do what?

A To act and adopt procedures pursuant to the end of justice as they determine them to be needed in a Court.

Q It would be a lot better for you, wouldn't it, if you could hang onto some act of Congress?

A Yes, Mr. Justice, I think that we would much prefer to have the rules applied pursuant to Rule 81(a)(2) of the Federal Rules, which is tantamount to Congressional provisions since the rules were approved by Congress. That is ture. We would prefer to have the rules extended pursuant to 81(a)(2) as opposed to having this order sustained below pursuant to inherent power.

Because while we believe that there is no question that the Court in habeas proceedings in particular has the inherent power and the discretion to act to the ends of the duties before the Court, in this case to try issues of fact. We believe that it is preferable to have the rules applied where appropriate, because the rules are codified, they are available to all attorneys, they are available to petitioners and the entire body of law that has grown up around the practice

set forth in the Federal Rules of procedure would be available throughout the country.

On the other hand, if procedures were to be adopted pursuant to the inherent power of the Court, and if that were the sole ground for sustaining the District Court's order in this Court, then we would find that various District Courts throughout the country would adopt appropriate procedures on an ad hoc basis. Their decisions would be scattered through various reports. There would be a lack of uniformity. And while it is important that, as an alternative, inherent power is an important ground and a valid ground for sustaining the order, we have no doubt that it would be preferable to have the Federal Rules apply.

Q Maybe no one else would be bothered by the Court, but it gives me troubles talking about inherent power to do what is practical in legislation.

Q You do have an act of Congress explicitly applicable to habeas corpos, don't you, and I am referring to 2246, which says that on application for a writ of habeas corpus, evidence may be taken orally or by deposition or, in the discretion of the Judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits.

A Mr. Justice Stewart, that provision, however, most definitely does not deal with discovery. It deals strictly

with evidentiary matters.

Q That is correct.

A And for that reason it does not control, it does not allude to and it does not regulate discovery procedures in habeas corpus proceedings. It simply is not relevant to the present determination.

Q Well, it does regulate and control depositions and affidavits and written interrogatories with respect to the actual hearing in a habeas corpus case and does provide in these terms that such a hearing need not always conform to the more formal requirements of a criminal trial, that is evidence may be taken by affidavit, for example, in the discretion of the Judge.

And, at least arguably, this means that when Congress has provided this much with respect to interrogatories, depositions and affidavits, it did not mean to provide for anything further by way of discovery.

A Well, I suppose that is arguable. Certainly respondent has argued it. But we believe that it should be clear from decisions which have construed this provision, decisions incidentally which have been favorable in the ultimate result to respondent but in dtermining this provision such decisions and the history of the act and the language of the act, itself, all indicate that that particular section, 2246, deals only with the limited specific procedures of a manner of taking evidence

for a habeas proceeding and not for dealing with pretrial discovery.

Q There is one argument of that habeas corpus that I am not sure you made. That it is a constitutional remedy and it might be more inherent power in connection with the constitutional remedy which is given to the Court than it would in connection with other matters.

A I believe that is true. I think that that would support our position that inherent power is a valid ground for sustaining the order below.

Q That gets up close to the questions as to whether Congress could do away with habeas corpus.

A I believe that is impossible, if I read the suspension clause correctly in the Constitution. I don'g believe that could be done.

Q Mr. Pottinger, I am having a little difficulty understanding why the written interrogatories procedure would not be effective for you here. Now the depositions under the Federal Rules of Civil Procedure would not be available to petitioner here until he had filed his application for a writ, would they?

A They would not be available even then.

Q I know, and then there would be a lapse of time?

A That is correct.

Q Why couldn't, after he has filed this application

for a writ, why can't he go to the Court and ask the Court to proceed by written interrogatories?

Now, your answer to that may be that the deposition procedure is at least nominally mandatory. The Judge has to permit him to go ahead. On written interrogatories, the Judge can say, "I don't chose to proceed by written interrogatories here." Is that right?

A Do I understand you to be referring now to 2246?

Q That is right.

A I think that that is a correct interpretation of 2246, insofar as it applies only to evidence, however.

Q Whatever it may be, because if a person should proceed by written interrogatories under the Federal Rules of Civil Procedure, the interrogatories, presumably, would be available, they ordinarily are available to both parties.

A That is correct.

Q And the state could introduce whatever the prisoner does not introduce. It is a little hard to see that there is any real operative difference here when you relate the two procedures, 2246 in the Federal Rules of Civil Procedures to the habeas proceeding, except for the element of power the Judge, under 2246, to say, "No, I am not going to proceed by written interrogatories here."

A No, I don't believe that is correct, Mr. Justice

Fortas, because rule 2246 provides for interrogatories only as a means of cross-examining an affiant of an affidavit. The Court is not permitted, under 2246, to permit a party to proceed with interrogatories. The only time interrogatories are available under 2246 is in the event in a prior determination the Court has decided to allow evidence to come in by affidavit.

Interrogatories, otherwise, cannot even be permitted under 2246. It is clear from the language and the interpretation.

Q I am aware of that, but I suppose if the Court proceeds by affidavit that he could accept as evidentiary whatever comes in on written interrogatories. That would be sworn.

A That is true.

But unfortunately the affidavit provisions do not permit any discovery. In this particular case there is no reason to believe that we would have the right or the ability to obtain an affidavit from the State.

Q But the chronology in the peculiar situation of a habeas case, chronology works out so as, I think you very aptly and very well put it, sir, chronology works out so that if you don't have the usual difference between discovery, pre-trial discovery, and the use on trial that you have in a civil proceeding.

A Well, certainly not up until -- it is true that the procedure differs greatly until an evidentiary hearing is ordered.

At that point, I believe that the procedures are directly paralleled, because once an evidentiary proceeding is ordered, then we find ourselves confronted with precisely the same type of determination that a Court and counsel are confronted with in a civil proceeding and that is to find, develop, present, and draw conclusions of fact.

And that is exactly what has happened in habeas corpus proceedings today under, first, Brown against Allen and then under the mandatory provisions of Townsend against Sain.

We are contending that given that requirement the Court must have the tools to fulfill it and the only tools that it can use to fulfill it are provided either pursuant to its inherent power or preferably pursuant to the Federal Rules of Civil Procedure.

Briefly, there are three other objections that the State has tendered. One is we believe to be somewhat curious. They have contended that the summary provisions of Section 2243 require a speedy hearing and for this reason discovery would actually slow down the hearing and be contrary to the 2243.

As I have already pointed out, discovery, on the contrary, will facilitate and speed the hearing by permitting the exclusion of the double hearing. And, secondly, I think we need only point out that any delay that is occasioned by a petitioner's use of discovery is delay of his own choosing.

Thirdly, I think it is important to point out that the summary provisions of 2243 require the Court to quickly review the matter and not ultimately dispose of the matter quickly.

In other words, the review process must get underway quickly after a petition is filed, but if it is in the interest of the petitioner and Court to develop facts ultimately to be determined at the evidentiary hearing, certainly the summary provisions of Section 2243 would not suggest that the Court or the parties should sacrifice the ultimate justice to be accorded the petitioner through this fact-finding process simply for the sake of speed.

If I may, I will reserve the few remaining moments for rebuttal.

MR. CHIEF JUSTICE: You may, Mr. Pottinger.

Mr. Granberg?

ARGUMENT OF DERALD E. GRANBERG, ESQ.

ON BEHALF OF RESPONDENT

MR. GRANBERG: Mr. Chief Justice, may it please the Court:

I would like to direct my remarks, initially, to petitioner's argument that the Federal Rules of Civil Procedure authorize the use of the discovery mechanism provided therein to a habeas proceeding.

This, of course, turns on the construction to be

afforded to Rule 81(a)(2) of those rules, which provide simply: These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warrento to the extent that the practice in such proceedings is not set forth in statutes of the United States and as heretofore conformed in the practice in civil actions. This imposes two conditions. And we will argue later that neither of these conditions can be met.

Before I reach that argument, however, I would like to present some remarks with respect to what I feel this evidences as to the purpose of the original framers of these rules back in 1938. First of all, I believe we can discern, it makes it perfectly apparent, that the framers of the rules recognized that procedures with respect to habeas corpus are set forth in the statute.

Secondly, it expresses a clear intention that procedures with respect to habeas corpus are to be controlled by statutory changes as well. That is, in the event that a statutory change occurred with respect to procedure, that is to control.

And, finally, with respect to that second condition about conforming to the practice prior to 1938, that evidences a clear intention not to change existing practice in habeas corpus. A clear intention to maintain, if you werek status quo with respect to habeas practice as it existed in 1938 and

not to freeze it there but to leave any changes that are to occur to Congress through the statutory changes that it sees fit to make.

Now, certainly Congress has since that time effected changes with respect to habeas procedure. The most recent evidence of that can be found in Section 2241 an enactment there in 1966 and enactment in 2254 in 1966, enactments which significantly effect procedure with respect to habeas proceedings.

I believe that ---

Q What are the changes in 2241 and 2254?

A 2241 relates essentially to jurisdiction and provides that when you have a state with more than one Federal Judicial District that a habeas petition can be entertained either in the district within which the petitioner is confined or the district within which his state criminal conviction and sentence occurred.

2254 provides significant changes with respect to the presumption of correctness which is to attend a state factual determination reached after a hearing and reflected by written indicia or findings.

Q And both those amendments were made in the 1960's?

A 1966, yes, Your Honor.

Now I believe that this policy decision reflected in Rule 81(a)(2) as of 1938 is a very sound one. That it was

sound when made and remains sound today.

First of all, pleading procedures in habeas corpus is completely inconsistent with pleading procedure as it exists now under the conventional rules of practice for civil litigation. And a habeas petitioner is required to allege with particularity those facts upon which he relies and which if established would justify him to relief.

When Congress introduced the discovery procedure through the Civil Rules in 1938 it affected what this Court referred to as one of the most significant innovations of those rules. Yet those rules came in along with substantial changes with respect to pleading in civil actions as well, simplified pleading, and part of the justification for the change in pleading exists in the fact that discovery techniques are afforded to the parties to be exercised by the parties for the purposes of defining issues for fact revelation and such similar purposes.

Now the justification with this discovery procedure lies certainly, in part, in these pleading changes which occurred as well, simplified pleadings, streamline pleadings. Yet these pleading changes have no pertinence whatsoever with respect to a habeas proceeding.

Now I believe a second sound reason why the framers thought that not to extend these civil rules with respect to the discovery mechanism or habeas proceeding is this: it is completely inconsistent with the summary nature of a habeas proceeding. Now

when I say "summary," certainly I am talking in terms of quick relief to a petitioner. But I am talking about other reasons as well. Such factors as minimizing the impact on a state rehabilitative process, such factors as minimizing the impact of the burden of habeas applications upon the Federal Courts as well.

There are techniques for resolving these petitions, for disposing of them, without proceeding through hearing. Certainly if petitioner has failed to allege the specific facts and has asserted only conclusory allegations in stating his claim for relief he is not entitled to a hearing. The petition is entitled to be dismissed.

Another sound policy consideration, I think, that existed in 1938 and certainly that continues today is the fact that in no criminal discovery system that has been initiated within any state or in the Federal system does anything akin to this civil discovery mechanism exist; nothing that even approximates it.

Now, certainly California, in the field of criminal discovery, has gone as far as anyone has. Perhaps much farther. We afford to a defendant copies of any statements that he has made, copies of other witnesses, copies relating to physical tests, copies relating to examination of scientific evidence, factors such as these. For a long time we have given him copies of the Grand Jury transcript that he has been indicted. He is

afforded a copy of the transcript of the preliminary hearing. If he is held, they answer through the information process.

Yet California has specifically rejected efforts to utilize depositions for purposes of discovery or interrogatories for purposes of discovery. It is a system which is simply foreign to the procedure that has been recognized as such and has been rejected. And I submit that it is just as foreign with the context of a habeas proceeding.

Q Just as a matter of interest, do you know give them a list of witnesses? Does the State give the defendant a list of witnesses?

A Yes, Your Honor, usually it is done informally. Frequently it is done pursuant to the order of the Court.

Q It isn't done automatically in every case?

A No, Your Honor.

Discovery in criminal practice in California is not a creature of the statute. It is a creature of judicial decision and is not recognized by statute. But the Court appropriately recognized that the provisions with respect to civil discovery have no applicability to criminal cases.

Finally, I believe that this policy decision made back in 1938 was sound and remains sound for a further reason. When I balance the potential for abuse which exists here against the value potential of the procedure to petitioners, I think it becomes perfectly apparent that the increase in litigation, increased burden on State's attorneys, the danger of harassment

with respect to witnesses, arresting officers, prosecuting attorneys, perhaps even defense attorneys, should the procedure be made available, indicates a sound reason for not extending civil discovery to habeas proceedings.

I would like to turn now for a moment to the specific conditions set forth in Section 81(a)(2). And I will argue that the first condition cannot be met; that is, there cannot be a showing that practice is not controlled by statute. Practice with respect to depositions and interrogatories is controlled by statute within the habeas act. Section 2246 accomplishes this. Depositions may be utilized for evidence.

Judicially in the 9th Circuit, and I refer now to Wilson versus Weigel, the Court has indicated that depositions as the term is used in 2246 includes also depositions on written interrogatories. Now that is not an acceptance of the applicability of the civil rules. It is simply a recognition that one appropriate way of taking a deposition is by written interrogatories. Of course this follows a procedure very much akin to that set out in Section 31 of the Federal Civil Rules.

But in any event 2246 limits depositions to evidentiary purposes.

In Wilson versus Weigel the 9th Circuit was asked to extend or to reconsider the decision that is now here before this Court in Wilson versus Harris and change its mind. But it did not. It sayd depositions can be taken under Section 2246.

They cannot be taken under Rule 26(a) of the Federal Civil Rules for purposes of discovery. And if objections are to be made to specific questions, then this was the appropriate matter, the appropriate approach to take.

But, nevertheless, it refused to extend the Federal Civil Rules to a habeas proceeding. It adhereed to the decision it had entered earlier in this case of the hearing issue.

I think it is extremely significant the manner in which Section 2246 regulates deposition and interrogatory practice. And, in fact, that this was enacted, 2246 was added in 1948, a full ten years after the Federal Civil Rules had been adopted. Yet not only do we have the inconsistency between Rule 26 through 37 of the Federal Civil Rules and 2246 of the habeas act that depositions, interrogatories and so forth are not permitted for discovery in habeas actions, but we also have inconsistencies with respect to the use which may be made of depositions taken or interrogatories, if you will, for purposes of evidence at a trial.

Under 2246, the section provides simply depositions may be taken for use as evidence, may be utilized in taking evidence at the habeas proceeding.

Rule 26(a), on the other hand, provides a number of conditions with respect to the utilization which can be made at the trial of depositions taken pursuant to it. Again, when Congress added 2246 in 1948, I submit, it specifically rejected

any suggestion that discovery techniques such as those found in Civil Rules should be applicable in a habeas proceeding.

Q Is there anything in the legislative history that indicates that apart from the language of the statute?

A The legislative history which we encountered with respect to 2246 deals solely with the techniques in taking evidence. There is no discussion that we have been able to find with respect to discovery. It does make the point that the use of written interrogatories under 2246, as it appears there, is limited to offering something akin to cross-examination of one who has presented an affidavit. That is, under the section, literally, written interrogatories can be used only against an individual who has presented an affidavit for use in evidence. It is a technique of testing the evidence given that way.

Finally, turning to the second condition with respect to former practice, there simply can be no showing made that anything even approaching the discovery mechanism found in the Federal Rules of Civil Procedures existed in the habeas proceedings prior to 1938.

I would submit there can be no showing that any discovery practice existed in habeas prior to 1938. The purpose expressed in maintaining status quo certainly militates against any finding that the second condition can be met.

Q Mr. Granberg, does your brief have any legislative history of 2246?

A Yes, Your Honor.

Q You said it was put in in 1948. Can you refer to it? Don't spend your time on it.

A Your Honor, it should be found starting at about page 19.

Q Thank you very much.

A Now, I would submit that this absence of authority to make any showing prior to discovery practice in a habeas proceeding, prior to 1938 that is, is extremely significant.

Certainly this absence of authority was viewed as one of the factors which led this Court to conclude in Minor versus Atlas that there was no traditional inherent power, if you were, to order depositions or to authorize deposition for discovery purposes and in admiralty proceedings. This Court noted specifically that there was no indication of traditional practice in this regard.

Turning to the argument, apart from the Civil Rules, the Court has some sort of inherent power to authorize and implement and sanction and fashion, if you were, a discovery procedure akin to that found in the Civil Rules, I submit that this is not an appropriate area for an exercise of inherent power.

One of the justifications that has been offered to this Court by petitioner is that such a power can be found within the habeas statutes themselves, the hearing requirement

imposed by Section 2243 to be heard and resolved. I submit that that affords no basis for implementing or for permitting District Courts to implement, if you were, discovery practice akin to this.

Now, certainly 2246 within the habeas statutes affords no basis for implementing a discovery practice akin to this. The time provisions found in 2243, the time requirements, are completely at odds with implementing a discovery procedure akin to that found in the Federal Civil rules.

We have argued earlier the pleading requirements with respect to habeas are completely inconsistent with implementing a discovery procedure. An applicant is required to plead and assert with particularity those factual matters upon which he would rely in seeking relief. It is also significant to note that the habeas statutes do deal with the production of records, documents, and that this offers one additional reason for finding no real necessity for civil discovery techniques in a habeas proceeding.

One of the requirements with respect to a habeas applicant in the Federal Courts is that he have exhausted State remedies before he reaches the Federal Courts or before the Federal Courts at least assume jurisdiction.

2254 of the habeas statutes now provides when a factual determination has been made by a State Court, that has been made after a hearing on the merits, it is entitled to a

presumption of correctness. If an issue passes through the State Courts and reaches the Federal Courts and those records become significant, 2254 also provides a means whereby those records, court records and materials relating to that factual determination, can be brought before the Federal Court and can be relied upon in resolving a petition.

Insofar as any suggestion that an inherent power may be found apart from the habeas statute is kind of a vague, general inherent power, I would suggest that this is not an area which is appropriate for the exercise of inherent power.

Traditionally, as I understand the concept, inherent power may be relied upon by a Court which has a particular duty imposed on it; that is, if the Court has been, say, required by statute to conduct hearings with respect to a certain matter, it does have inherent power necessary to it to carry out its jurisdictional obligations. That is, the procedure has not been provided which is absolutely necessary to the exercise of its power and through inherent power it can resolve a procedure to meet the problem. But discovery just doesn't come within that.

Civil discovery practice, not by any stretch of the imagination, can be characterized as something that is necessary to a habeas court to carry out its responsibilities under the statute. The civil discovery mechanism is simply foreign to the habeas practice.

I think it is also significant in this regard that Congress has never seen fit to extend civil discovery practice to habeas proceedings. That suggests to me, as well, that this is an area which is simply inappropriate for an exercise of inherent power.

Q Your position is that even if a prisoner in a habeas proceeding should make some sort of a case and by affidavit, let us say, and a credible case, and then he comes to the Judge and asks the Judge, in the exercise of his inherent power, discretionary power under all writs and what not, to authorize him to serve written interrogatories on named people, that the Court would not have such power; is that your position?

A Well, Wilson versus Weigel does suggest that in a situation in which it would be appropriate to take a deposition for purposes of evidence, that that deposition can be taken by utilizing written interrogatories, cross written interrogatories and so forth. Now that is a procedure which authorizes the use of written interrogatories as a technique for taking an evidentiary deposition.

Q Those are pretty confusing concepts unless they are particularized. Just take the case that I put to you. A prisoner makes out a prima-facie case by affidavit. The Judge is persuaded that it is a prima-facie case. The prisoner says, "In order to prove this out, I have got to engage in some discovery. So please permit me to serve written

interrogatories on certain persons."

Now, is it your position that the Court does not have power to do it, or is it your position that the Court could do it under the habeas statute, 2240, whatever it is?

A Initially, and I want to be perfectly clear on this point, that Court would have no power even within the Federal Civil Rules or apart from the Federal Civil Rules to authorize written interrogatories for purposes of discovery or to authorize depositions for purposes of discovery.

Q. I don't care what you call this. I don't know whether the case I put to you would properly be called discovery or evidence. But I put factually a case to you. If a person makes out a prima-facie case by affidavit and he asks the Judge to see to it that the persons were supplied to written interrogatories so that he can perfect the case which he has made out on a prima-facie basis, what I want to know from you is whether your theory, if we adopt it, means that we would be ruling that the Judge on the present state of the law has no power, no power, to do so?

A Let me, if I may, posture the case initially before I answer your question.

Now, before the District Judge orders an evidentiary hearing, he must have determined on the basis of the petition submitted by the applicant and additionally the traverse submitted by the applicant, balancing that against the return to the

order to show cause submitted by the respondnet warden, that there are certain factual questions raised, that there have been certain factual questions raised with particularity by the allegation of the petitioner that if proven to be true will, in effect, comple that he be released from custody.

Now, the petitioner has already spelled out all of that facts that he needs to know if he is to be ordered released from custody. I don't believe that discovery serves any function under those circumstnaces.

Q What is your answer, yes or no?

A I would answer, no. He does not have the power to authorize or to permit the use of discovery interrogatories or discovery depositions.

Q And in the case I put to you, your answer is that the Judge, even though he is persuaded that the prisoner has made out a prima-facie case, the Judge does not have the power to provide a procedure by which he may go further?

A The procedure already exists. It exists within the existing framework of the habeas statute. If he concludes that the petitioner has stated a meritorious claim, he orders the evidentiary hearing and we proceed with the hearing.

Q Suppose the prisoner says -- an evidentiary hearing is the final ultimate object here. The prisoner says, "I made out my prima-facie case. I need more evidence. I want you to authorize written interrogatories." I am trying to say

that just as clearly as I can, and I guess I had better quit because I have asked you the question just as clearly as I can put it.

I would like to know what your answer is, because I want to know what your theory would lead us to in terms of affirmance or denial of the Judge's power in that situation.

A Well, affirmance of the 9th Circuit opinion would be no more than this: It would be a recognition that there is now power existent in the District Court, either under the Federal Civil Rules or apart from them to authorize the type of discovery procedures set out in the civil rules.

Q I understand that. I am asking you about your theory. Are you contending for a ruling by this Court which would say that in the case I put to you the District Judge has no power to authorize written interrogatories? I think either your theory does or doesn't involve that. Maybe I am over-simplifying it, but I really don't believe so.

A Well, before the Judge has determined that an evidentiary hearing is appropriate, he has determined that there is more than a prima-facie case stated. He has determined that there are more than conclusory allegations reflected in the petition and in the traverse. That the specific facts which, if proven, would authorize release from custody.

Q You are telling me to work it out for myself.

A No, I am not, Your Honor. I am simply trying

to demonstrate that the nature of the habeas proceeding is one that does not lend itself to this discovery procedure nor does it require it. Because other procedures are already provided which afford a sufficient basis for the kind of factual exploration that is necessary in a habeas proceeding.

Q Mr. Granberg, the habeas corpus procedure is civil, right?

A Oh, yes.

Q And it is just as much a search for the truth as any other civil case?

A Certainly.

Q And, therefore, should have all of the necessary procedures to insure truth? I am sure you want to be with that last one.

A Certainly to insure truth, Your Honor. And I would submit that the habeas statute, as it exists now, affords all of the procedures necessary for that procedure.

Q Is the procedure of written interrogatories another procedure to get closer to the truth?

A The question you are really asking me ---

Q Isn't it?

A It is a technique which is utilized to ascertain facts, to clarify issues. It is utilized between the parties in conventional civil litigation. But I would submit that the discovery mechanism of the Federal Civil Rules was never

intended by the framers of the rules to be applicable to a habeas proceeding and they indicated that very clearly with the exceptions set forth in Section 81(a)(2).

Q But you still admit that it would help to get to the truth?

A The question you are really posing is this: As a matter of policy should we have some sort of discovery mechanism in a habeas proceeding? And that question is one which ---

Q That is your question. That is not mine.

A And that question is one which is appropriately left either to the legislative or certainly to the rule-making process.

Q That is your question.

A But I would submit that it is not a matter appropriate for a Federal District Court to make its own individual determination whether or not a particular rule should be applied because it would be good to have it there.

Q My question is it has been recognized that in all other civil actions this is good, but it is not good for habeas corpus.

A That is a policy determination originally made by the framers of the rules.

Q But you say that is what the law is?

A What I am suggesting is that any decision that

this Court makes ---

Q You think that it is less important to determine whether a man is in jail for his life unconstitutionally than it is to find out whether a man has been overcharged $10,000 and one cent?

A No, I don't. But what I do submit is that the procedure existent and set up with respect to habeas corpus affords a more than adequate basis to make the nature of the inquiry called for by the statute.

Q Your idea is that habeas corpus is an entirely different type of civil action?

A It certainly is.

Q Entirely different?

A It certainly is. It is completely foreign to conventional civil litigation.

Q You have a petitioner, don't you, and a respondent?

A Yes, sir, you do.

Q What is the measure of proof? The same?

A I have never encountered that question.

Q Is the burden of proof the same? What makes it so different?

A A conventional civil action is initiated by the filing of a complaint ---

Q Go right ahead and answer the question.

A By the filing of a complaint. The full panoply of the discovery mechanism of the civil rules, then, becomes available to the individual who has filed that complaint. And he can state his action in conformity with the simplified rules of the Federal Civil Rules with respect to pleading, just generally indicate the nature of his case. Then he proceeds into discovery. A habeas petitioner doesn't start his case that way. He starts his case by submitting a petition which has to allege with particularity to specific facts and upon which he is going to rely. And he is entitled to no hearing or no relief from the Court unless he does that and unless he poses the kind of factual allegations which, if proven, would entitle him to relief.

Q Does that seem to point to the fact that discovery would help him because his burden is tougher?

A It might very well help him to have some sort of discovery mechanism available. But the question before this Court now is whether you are going to allow the full discovery mechanism of the Federal Civil Rules to be applied in a habeas proceeding. And I would submit that the framers of the rules never intended that, and that the very nature of a habeas proceeding is not appropriate to that sort of discovery mechanism.

Q He can always summon the witness, can't he?

A Certainly he can. That is what I am suggesting. For once he has stated a basis for relief and the Court has

ordered an evidentiary hearing he can subpoena witnesses. He can call in anyone to substantiate the allegation that he has made in his petition and he has to carry the burden of proving this. And he can do it under the existing procedure.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Feit.

ARGUMENT OF JEROME M. FEIT, ESQ.

ON BEHALF OF THE RESPONDENT

MR. FEIT: Mr. Chief Justice, may it please the Court:

The Government's interest, Federal Government's interest in this case is substantial, since we are concerned that any ruling as to the automatic applicability of the civil rules of discovery of habeas would, as a matter of course, it would seem to us, require the conclusion that they apply equally to proceedings under 2255, the statutory counterpart of habeas corpus.

Q I gather 2255 in terms, at least, speaks of the case, of the case to which the petitioner is addressing his petition. It is a criminal court case, isn't it? Apart from Hayman and the others, I take it, on the face of 2255 it is only another step in the criminal court. Well, isn't it? On the face of 2255 it is just another step in the crominal court itself, Iisn't it?

A Well, it is on the face of 2255 another step in the criminal court.

Q But you don't argue that in your brief, do you? Any reason why not?

A What we think 2255 essentially is, basically this Court has suggested in Hayman ---

Q You certainly can't read it from the first word to the last without recognizing it as a little different from certain problems of the state prisoners.

A This is quite true. But, of course, the last part of 2255 does suggest that ---

Q I am just surprised. I should think that is a rather strong argument in favor of the Government, at least where your interest primarily lies, which is in 2255 proceedings. I gather you had very few actual habeas corpus cases and why don't you argue that whatever may be true of Federal habeas is a remedy for the state prisoner clearly enough for the Federal prisoner. You are just dealing with another step in the criminal court itself. So you don't have a civil pleading.

A Well, principally because we are concerned of the problem of suggesting that a state applicant might get discovery with, as Minor and Atlas points out, this is a substantial rather than procedural rule to say that a 2255 applicant is an entirely different situation. I agree with you, Your Honor, that the specifics of 2255---

Q Incidentally, as between the habeas applications

of state prisoners and the 2255 applications of Federal prisoners, what is the current statistical data? Which is the greater in number?

A I believe the state is still the greater number. We set it out in page 12 of our brief. I have found some additional figures for the Court with respect to 2255 applications. In fiscal 1967, the administrative office of the Court advises me, that 932 2255 applications were disposed of. It is not clear when they were instituted. About 90 percent or a little more, 842, of those were disposed pre-trial; six were terminated after a pre-trial conference; and 19 were withdrawn. 65 were given hearings. Now, I was unable to get specific details of the percentage of actual denials and grants, what happened at the hearing.

Q That is only 2255?

A Yes.

Q Do you have comparable statistics for the state?

A I wasn't able to get comparable statistics as to the state material, nor was I able to get an actual breakdown. I gather this had been done at the time of Brown and Allen. Mr. Justice Frankfurther had asked the administrative officer of the Court to do this at the prior argument in that case.

Q Well, I take it the number of filings, let me put it that way, of state prisoners for Federal habeas

relief must be many times the number of filings of Federal prisoners. It would have to be, wouldn't it?

A Yes. I think this is quite clear. Even the figures in our brief on page 12 point this out. I would like, also, to note, initially, that Government's view is not that the sentencing Judge under 2255 is without power, wholly apart from the Federal Civil Rules to permit discovery fact finding in the rare and unusual case.

Essentially, our position is that the civil rules of discovery in depositions do not apply in 2255 proceedings. If one looks at the statute, as Mr. Justice Brennan points out, the claimant has the obligation to set forth facts which were raised in issue. Most significantly the sentencing Court is then to examine the motion, the files and the records of the case to see if these documents conclusively show that the prisoner is not entitled to any relief. If he so concludes, he shall dismiss or deny the application; if not, he can notify the U. S. Attorney and schedule a hearing, determine the issues and make findings of fact and conclusions of law.

Moreover, whenever a hearing is to be held it is required that it be held promptly. It is at such a hearing that the issues are to be explored and it is based upon the facts adduced at such hearing that the sentencing Judge is to make his findings of fact and conclusions of law.

What Congress has done, perhaps extended the practice

in a criminal case, but in effect under 2255 it has set up a pleading method of evaluating the claim. And perhaps this is the same way of saying it, Mr. Justice Brennan, which takes in account quite clearly of the fact that the sentencing Judge is not operating on a clean slate but against the background of a crominal conviction which might have fully resolved the issue so it can be related in 2255.

And, finally, it is recognized at the hearing the sentencing Judge and no one else has the obligation to determine if the restraint alleged is unconstitutional. On the other hand, the crucial thrust of the deposition-interrogatory practice under the civil rules is just the other way. In large measure its purpose is to supplant the pleading and trial development of fact ---

Q Mr. Feit, are you getting to the point now where you don't need counsel in these proceedings, because you make them very criminal?

A Well, we are ---

Q You make it an extension of the crominal proceeding; am I right?

A I think the statute, though, put the primary focus on the examination of the files and records. If they conclusively show the prisoner is entitled to no relief, the Judge must dismiss the motion. Now, if that is inappropriate, then, normally, he would hold the hearing and presumably would

appoint counsel.

We don't think that 2255 is simply an extension of the criminal case per se. What we think it is is a particularized method by which Congress sought to permit attack collaterally upon convictions. Because 2255 still provides that if the relief is insufficient or unavailable that the habeas corpus might provide a proper remedy.

Now, this Court has pointed out on more than one occasion that the relief under 2255 is the substantial equivalent of the relief under habeas corpus. I think it might be a serious problem to consider 2255 simply an extension of the criminal case. Then I presume it could be argued that relief under the habeas statutes would still be available.

Q The whole point was, I didn't think you had to go that far.

A I agree. I think that 2255 is a particularized method set up by Congress to deal with post-conviction alleged constitutional defects.

In civil discovery the vital developments of the facts that stem from the pre-trial examination are primarily to afford a wait-out perhaps for an out-of-court settlement either by agreement of the parties or through summary judgment. Alternatively, if the case need go to trial discovery provides a way to assure that no relevant facts in either party's case are hidden at the trial.

In other words, civil litigation wholly unrelated to a pre-existing criminal conviction, the benefits thus derived are deemed to outweigh the time expended in such deposition and cross-deposition practice. But such practice is wholly at odds with the scheme and definite present situation of Section 2255. And it raises the danger of embarking upon time-consuming, possibly irrelevant investigation, better spent at a hearing.

Perhaps most significantly from our point of view is the automatic adoption of the deposition and interrogatory rules of civil discovery in collateral proceedings would, we think, remove from the sentencing Judge, or tend to remove fro the sentencing Judge, direct and immediate control of the proceedings. We think the empahsis of Townsend and Sain, Fay and Noia and the Sanders case is that the habeas judge, sentencing Judge is to exercise close control over the proceedings.

Deposition discovery under the civil rules is governed by entirely different criteria. It is partly focused with the Judge settling the dispute as to the particulars of the discovery after the fact. It is only after a notice of deposition or written interrogatories is served that he may decide to limite the fact-finding on a showing of good cause. Indeed, in most instances under the Federal Civil Rules, depositions and discovery may be sought without leave of the Court as we read the rules. The Government's control is

essentially as a referee.

We think to grant such broad range discovery proceedings as automatic attribute in 2255 is to create a real danger of possible abuse of the writ. It is thus not unreasonable to forecast that even the most conclusory allegations would be followed by wide demands for interrogatories and deposition, Government prosecutors and investigators, et cetera.

Of course, the Court may prevent this procedure. But only after the delay and harassment which, it seems to us, wholly at odds with the prompt resolution of the question of unconstitutional restraint that 2255 talks to.

In short, whatever benefit may be derived from the deposition and discovery in a particular case, these benefits, we think, are wholly disproportionate to the delay, opportunity for harassment, collateral investigation, uncertainty and loss of direct control by the sentencing Judge over the proceedings.

If testimonial facts need development they can appropriately be developed at the hearing or by the evidentiary deposition route. Any change in this regard, we think, should come from the rule-makers or principally from Congress.

I would like to add a word as to our view on the question of power independent from the rules.

We do not think that question is necessarily raised in this case by virtue of the 9th Circuit, as we read the opinion, essentially finding that there was no authority under

the Federal Civil Rules and no specific authority under 2246. The opinion did not touch beyond that. Nevertheless, since the issue has been argued and briefed and we have indicated in our brief that we have a position on this, we believe such a power does exist.

I would summarily like to state our views in this regard. We think this power is part of the equity power of the sentencing or habeas judge that this Court has recognized in Fay and Noia and Brown against Allen and in the language that this Court has used in recent decisions in Sanders and Townsend against Sain, that the Judge is "Free to adopt any appropriate means through inquiry into the legality of the prisoner's detention and the power of inquiry on Federal habeas is plenery."

In answering your question, Mr. Justice Fortas, the Government's position is that the power exists, however, we think that the power should be used quite sparingly only in the rarest of circumstances, since the 2255 route provides the basic framework for resolving these issues.

An illustration of a possible fact-finding situation, I think, is Machabroda, where the facts, 368 U.S., where the facts were that claim was made that a defendant had spoken to Government counsel on three occasions in prison. The Government counsel, in effect, coerced the plea of guilty. And the question rose whether the prisoner was needed to be present at a hearing.

And Mr. Justice Stewart pointed out that the sentencing Judge could use his common sense. That was the kind of thing where the facts were not in dispute, were outside the record but easily available and the prisoner would not need to be at such a hearing.

This is the kind of fact-finding, I think, that exists in the sentencing Judge under 2255. For example, there might be a case where some very extensive scientific records or examinations, physical examinations, on a claim of mental incompetency. And the sentencing Judge may feel that, while these may be or not in the actual record, he may feel that the opportunity of defense counsel to examine them prior to the actual hearing might be appropriate to advance the purposes of the hearing.

What we are really saying is, yes, there is power sparingly to be employed, very sparingly to be utilized and under the direct control of the sentencing Judge. I might emphasize that we recognize the dangers of extensive deposition and other interrogatory pre-trial proceedings. And we do not think that the Judge, as a matter of course, should take this route.

On the contrary, we think it should be the rare, very unusual instance. We also think that the basic way the facts are to be developed is at the 2255 hearing that is spelled out in the statute.

Q How about this case with respect to the point you are now making? After all, we are dealing here with a concrete case. You say that you would submit that there is some kind of inherent power because of the broad discretion generally in this sort of a collateral proceeding, but that power should be very sparingly exercised. To what result would that lead you in this case?

A I think in this case, as I read the record, the District Judge did not exercise any power except the automatic application of the rules.

Q How do we know?

A The only argument made by the Government in the record, I believe it is at page 38, the only response by the Government, by the State of California, was that the Court had no power under rule 81(a)(2) -- I am looking for the point in the record -- had no power under rule 81(a)(2) to grant discovery. There was no discussion at all concerning any additional power and there is no indication -- it is true, the District Judge didn't indicate upon what he based his decision. There is no indication that there was any suggestion the Court was exercising discretion in this case.

Q Well, except by the act of granting the interrogatories the Court was exercising his discretion. It says he was fully advised of the premises and he ordered the interrogatories.

A But the argument was that the civil rules of discovery do not apply at all. Petitioner deposed as if the rules automatically applied, presumably if the rules automatically apply the Judge would have very little discretion. And it would seem to me that it is hard to tell on this record precisely what he did.

But the suggestions seem to go that he relied on the automatic application.

Q Well, whatever the District Judge thought he was doing in this case, I don't know that I have gotten the answer to my question.

A The answer is I think this is the kind of case where this can be very fairly developed at hearing. As you pointed out, Mr. Justice Stewart, this is the kind of information that would be perhaps available to the officer who made the arrest. He could be called as a witness at the hearing.

Q So it is your submission that the judgment of the Court of Appeals in this case should be affirmed?

A Yes.

Q That is what I thought.

A Thank you.

Q Why are we limited to that ground or that reason? I don't quite get that.

A I don't quite get your question, Mr. Justice.

Q Well, what you are saying is we have power, the

Court has power, the Court has power, we have power, inherent power to do this. You say they asked him to do it under a statute and the Court simply held that they couldn't do it under that statute. What has been held is that they couldn't do it, isn't it?

A The effect is that it has been held that they couldn't do it. All I was suggesting is that the issue of inherent power as opposed to the question of statutory power was not fully developed below. This is essentially what I am directing my argument to.

And in response to the second part of Justice Stewart's question, I said that in this case it seemed to me that it would be appropriate to determine these facts at a hearing. I find difficulty in finding that the District Judge or the Court of Appeals really dealt with the question of inherent power at all. Sure, the order determination indicated that we had power, the District Court had power. But the District Court never really indicated that it was exercising any inherent power.

Q You are just asking us to exercise self-restraint. We have plenty of power, but don't do it?

A I think that -- no ---

Q If one takes that up, if we have the power, why isn't it our duty to do it if it is a good thing to do?

A I think that the power does exist. I do think,

however, that there is specific statutory procedures which provide the normal and traditional way of resolving these issues.

I have talked to 2255 which deals in terms with these procedrues. All I am suggesting is that, as opinions of this Court has repeatedly suggested in Brown against Allen and Fay and Noia, Townsend and Sain, that in the last analysis the habeas or the sentencing Judge must exercise equitable discretion in the premise. All I am suggesting is ---

Q That is about what kind of rules you will have for taking evidence. I have seen a lot of rules on this, a lot of statutes. They cover many pages in very great detail as to who will do it and as to how it shall be done. Is that what you say we have power to do?

A I view it said that the power exists. I think the power exists to be used very sparingly in light of the existence of these detailed and specific statutes setting forth procedures.

Q You mean there is such power in addition to whatever may be the scope of 2246?

A I would have to say, yes, it would be some power.

Q But doesn't the Government also argue that in any event the extent of any power of the premise is that which is granted by 2246? Does the Government argue that?

A The Federal Government argues essentially that

the statutory scheme set forth in 2255 provides the traditional normal way of dealing with 2255 proceedings.

Q Any bearing of 2246; is it all on 2255?

A I think 2246 further supports the view that there is very narrow use to be made of any power outside of the statutory scheme.

Q Let's take just the State prisoner, then, where we are dealing with only 2246. You say as to the State prisoner there is a power in the Federal habeas Court in addition to any powers under 2246?

A I would have to say that the power, yes, does exist.

Q And that is the inherent power?

A I think I would rather talk in terms of the equitable power necessary to ---

Q In any event, whatever it is, it doesn't have a statutory source? It is something in addition?

You don't suppose it could be argued here, speaking now for the moment only for the State prisoner, that Congress has set the limits in 2246 and having set the limits there is no room for any additional power in the Court?

A It could be argued ---

Q But you don't argue?

A And the State has argued ---

Q The state has, but the Federal Government itself?

A The Federal Government doesn't argue it.

Q I think that the Federal Government has a very big stake in this. After all, these Federal habeas proceedings of State prisoners, as you pointed out, are in the thousands a year now. And that is a burden on the Federal District Judge, isn't it?

A Yes, it is.

Q Yet you don't share with California the view that 2246 is the limit of any power to premise?

A No.

Q But the fact is ---

A May I add, in response to the question, that this is, we say that the power is spelled out in the statute that essentially there should be a hearing as provided by the statute. All we are suggesting is that there may be a case where a sentencing Judge or a habeas Judge deems it appropriate for that particular case, in the interest of justice, and finds it essential to hold some pre-trial discovery.

Q Beyond anything that is authorized by 2246?

A Beyond anything that is authorized.

Q That is what I thought you said.

Q But 2255 doesn't have to prescribe any procedures to the extent that is prescribed for a state habeas. And there is a cross-reference to the habeas corpus procedure for some purposes, but not for others. There is no cross-

reference, no general statement that the procedure on 2255 shall be as prescribed for habeas petitions. And I would assume that there may be some room for arguing that there is some flexibility in the 2255 procedure which is not present from the state habeas.

A Yes. Essentially our argument is directed to a 2255. It could be argued that the provisions dealing with habeas corpus are more detailed and set forth the complete power and don't permit the exercise of inherent power.

Q Certainly the limitation is on a Federal Court to grant state habeas that are contained in the statutes with respect to habeas corpus, which are not applicable at all.

A I agree, there are problems of federalism and a host of other problems that aren't applicable to 2255.

Now, perhaps I overspoke in terms of the Government's interest as essentially the 2255, and basically the 2255---

Q I am really surprised at that, Mr. Feit. I would think that, really, that the Government's interest is as great or greater in the procedures that govern state prisoner applications in Federal Courts. Certainly in terms of a burden of collateral proceedings on Federal District Courts is much larger in the area of the state prisoner than it is of the Federal prisoner under 2255. You told us that at the outset.

A Yes. And all I am suggesting is that this is further reason not to utilize any of this additional existing

power.

Q If one prisoner should have it, why shouldn't all of them have it if it is needed?

A Well, to the extent that the statute ---

Q That is what I don't understand about your argument. That is approaching a denial of equal protection of the law. The laws are supposed to be general to provide all a like circumstance, all these prisoners in jail. Are you going to say that some of them, at a Judge's discretion, can get it; others, if a Judge has a different discretion, can't?

A I am suggesting that 2255 spells out certain procedures under the habeas corpus statutes other than 2255 spells out more detailed procedures.

Essentially my argument is that there is an equitable power beyond the language of the statutes to be sparingly exercised. But out essential focus is on 2255. We think perhaps the answer is the ---

Q Are you saying that none should get it under 2255?

A I would think it would have to depend upon the particular case and the particular needs faced by the sentencing Judge. I cannot say that none should get it under 2255.

Q Needs faced by the Judge or the needs faced by the prisoner?

A Needs that the Judge deems appropriate to resolve the issue of unconstitutional restraint.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Pottinger?

REBUTTAL ARGUMENT OF J. STANLEY POTTINGER

ON BEHALF OF THE PETITIONER

MR. POTTINGER: May I first correct Mr. Feit in his assertion that there is nothing in the record, at least that he has seen, to indicate that the inherent power authority was raised below. In fact, it was raised and cited in the brief of respondent below, that is Judge Harris below, and it was so interpreted by the State and in the second part of their brief in the 9th Circuit, their supplemental brief, they have dealt with the issue by citing the statement that an examination of all authorities other than the rule indicates that there was not appropriate power. So the issue is presently and properly before this Court.

The respondent has suggested that there is a need for the special Congressional authorization for the use of discovery techniques in habeas corpus. But I think he fails to recognize that Congress has already dealt with the subject.

He tends to argue, I read his argument to say that there is no room for any application of any of the rules of civil procedure to habeas corpus, that this was the intent of the framers that

Of course Rule 81(a)(2) on its face shows very clearly that at least some of the rules are to apply because very clearly it says to the extent that certain conditions are met the Federal Rules of Civil Procedure are to apply to habeas corpus.

The question is not whether any of the rules are to apply or not to apply, but which rules are to apply. And that is the test that we have addressed ourselves to here and in our briefs.

Secondly, I think it is important to note that Congress has never attempted to regulate the whole of habeas corpus by statute.

On the contrary, Sections 2241 through 54, that the habeas corpus statutory scheme has a very skeletal framework. Essentially it codified the common law procedure which was a very widespread and well developed procedure in habeas corpus.

But it does not pretend to regulate all the procedures. If it did and if respondent's position were adopted this Court would have to find, for instance, that the appointment of counsel in habeas corpus is no longer permitted, because there is nothing in Congressional authority to suggest that counsel can be appointed in habeas corpus. That has been done through the traditional exercise of the Court's power.

There are similar other exercises that the Court has taken traditionally in habeas corpus to facilitate the ultimate

resolution of fact issues. In interrogatories, appropriate interrogatories such as the ones in this case, are really no different in quality or in burden from those procedures that the Court has been permitted to adopt without controversy for many years.

Finally, respondent relies on the case of Miner against Atlas for the proposition that this Court should look strictly to Congressional authority because in that case the Court looked to Congressional authority before extending the use of discovery depositions in admiralty proceedings. Yet it is perfectly clear from the face of Miner against Atlas that there was in admiralty proceedings a blanket exclusion adopted in the rules, that is to say a blanket exclusion of all of the Federal rules to admiralty proceedings.

On the contrary, in habeas corpus such a blanket exclusion was considered by Congress, by the framers of the rules and explicitly rejected. And we have put in our addendum to our reply brief the indication that this was the case. And in place of this blanket exclusion Congress did adopt 81(a (2) which clearly does extend appropriate Federal rules to habeas corpus proceedings.

There are other reasons why this Court in Miner and Atlas decided that it could not use discovery in admiralty proceedings which do not apply in the present case. One of which was in the Congressional adoption of the certain Federal rules

to be included in the general admiralty rules, Congress considered discovery and explicitly rejected discovery. And for that reason this Court noted in Miner against Atlas that there was an explicit rejection of discovery in admiralty which was tantamount to a Congressional expression of will. There is no expression of will in habeas corpus.

On the contrary, as I have just mentioned, it is clear that 81(a)(2) does extend certain of the Federal Rules of Civil Procedure.

Finally, I think it is important to note that we consider this case of the utmost importance to habeas corpus proceedings and petitioners throughout the country. For if it is clear that Townsend against Sain and the other decisions of this Court which have interpreted the common law practice and the skeletal framework that Congress has set forth require a Court to develop issues of fact, it is clear that interrogatories should be permitted in this case and appropriately in other cases as well.

I would like to close by pointing out that in this particular case there is no doubt that the evidentiary hearing that Mr. Walker will ultimately come to will turn greatly upon the information that we have requested in these interrogatories. Without this information it will be virtually impossible for counsel to know what witnesses to call at that hearing. It would be impossible for him to know how to resolve the conflicting

testimony that took place in the preliminary examination and in the trial which led to a finding of probable cause, but which since that trial has indicated that it was incorrectly stated.

Q What I have difficulty with, Mr. Pottinger, is this: Why can't you get all that right at the hearing? You have to make, as has been pointed out, explicit allegations of the denial of the basic constitutional rights in your habeas corpus application. And the District Court, as I understand it, has already granted your motion for an evidentiar hearing.

A Yes, that is correct.

Q Why do you need to get all of this in advance of the hearing? Why isn't the hearing the place for that under the provisions of 2246?

A The short answer to that, Mr. Justice, is that we need the information for all the reasons that civil litigants need discovery to prepare a trial in a civil case.

Q The issue here, as I understand it, is whether or not there was probable cause for a search of a hotel room across the bay, across San Francisco Bay?

A That is correct.

Q Whether or not one Francis somebody or other was a reliable informant.

A Right.

Q And that issue can be developed right there in

the hearing, can't it?

A No, I don't believe it can for this reason. And it is important to look at the reasons that exist in this case and which were argued to the District Court, because Chief Judge Harris asked precisely the question you are asking now and was convinced that interrogatories were essential.

The reasons are these: The preliminary hearing for Mr. Walker, there was testimony by the arresting officer that they had 20 prior arrests and convictions and on that ground and explicitly on that ground the Court found reliability and therefore found probable cause. At the petitioner's trial that same officer could only testify to two such occasions. One of those occasions turned out to be a lack of conviction. In fact, it indicates that perhaps the information was unreliable that was given by Miss Jenkins. The other occasion Miss Jenkins herself has sworn under penalty of perjury she did not give information to the police on it.

Now we have this direct conflict. And for that reason the Court saw that it very well may be that the informant who now contends, in effect, that she was not reliable to the same extent that the police contend the Court find that that issue must be resolved. If we have to wait until the police officer is called at that hearing, which is the last chance for Mr. Walker, and ask him at that time for the first time the same questions which we asked in those interrogatories,

we are simply going to have to take his answer. If he says, "I can't remember" or if he distorted or embellished the testimony on the first occasion, I am simply going to have to take that answer. I will have no way to know how to rebut it. I will have no way to know how to impeach him if necessary. I will have no way to know what other witnesses he should call or I should call.

Q I would suggest that you are even going to be more limited on your interrogatories because when you are asking the Warden these questions, the honest answer to your questions is, "I don't know."

A Perhaps if that defect, or that technicality is controlling, we will have to resolve it by addressing the interrogatories directly to the state under the theory that the state is the real party in interest. And for that reason we will nonetheless secure these answers directly from the police officer.

But I consider the law to take care of that particular question at the present time because the real party in interest theory would seem to us to allow us to get behind the Warden to the real party in interest under present standards.

Q When was the rule of discovery authorized in civil cases?

A In civil cases?

Q Yes.

A There was a type of discovery available, as the Court is aware under equity Rule 58.

Q That is right, equity; but I am talking about civil cases, just the general rule like you have now.

A I believe in 1938 ---

Q Where you can notify a man one day in Maine to meet you out in California the next day. When was that rule adopted? What I am getting at is that was a serious question of policy, wasn't it?

A Yes.

Q I may say that I don't mean to usher in this, but I have heard more criticism of the indignity of the suffering under that rule of discovery than any other civil rule that has been adopted. It is a question of policy, isn't it?

A I believe in the initial instance it was.

Q You don't think it is now?

A Well, I believe that the policy question has been answered with regard to habeas corpus.

Q It has been answered in reference to those it has been answered in reference to, yes.

A Which includes habeas corpus.

Q Well, you say then that the rule applies?

A That is correct.

Q That is your argument that the rule applies

and we don't have to make up any out of our inherent power to legislate?

A We don't believe so, Mr. Justice Black, but we believe that in the event that the Court is of a different mind that certainly inherent power is a second alternative, one that is undisputed and one which flows not only from ex parte Peterson, but from the explicit nature, the implications of Townsend against Sain, which was to command the Court to inquire into issues of fact and to give the petitioner a full and fair hearing.

And we believe that in this case, as I have just explained, and in other cases, it will be impossible to give him a full and fair hearing without appropriate discovery.

Now, I believe that ---

Q You have made a good argument for him.

A I believe with regard to the civil rules, however, to answer your question directly, that the policy decision was made in 1938 when rule 81(a)(2) was adopted and that decision did include not only an application of the Federal Rules to general civil proceedings, but also to habeas corpus. And, properly interpreted, the language of Rule 81(a)(2) would lead the Court to that conclusion.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Pottinger, before you sit down, I would like to say to you that on behalf of the

Court we appreciate your acceptance of the assignment by this Court to represent this indigent defendant. We consider that a public service of real magnitude. We always appreciate it when lawyers appear in that sense.

This has been an important case and with an important issue, albeit an opaque one. But it has been very well argued on both sides in this case. We appreciate what you have done. And we appreciate, Mr. Granberg, your diligent and fair representation of the interest of the State. And, Mr. Feit, we also appreciate your interest in representing the interest of the Government.

MR. POTTINGER: Thank you, Your Honor. The honor is mine.

(Whereupon, at 2:00 p.m., the hearing in the above-entitled matter was concluded.)