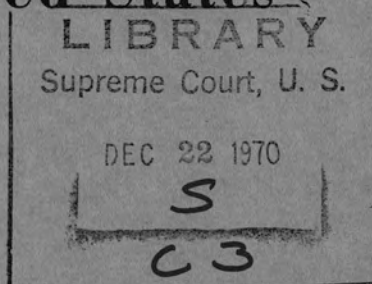


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 95

----- X  
THE STATE OF WISCONSIN, :  
Appellant, :  
VS. :  
NORMA GRACE CONSTANTINEAU, :  
Appellee :  
----- X

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Place Washington, D. C.

Date December 10, 1970

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TABLE OF CONTENTS

ARGUMENT OF:

P A G E

Benjamin Southwick, Assistant Attorney  
General of Wisconsin, on behalf  
of Appellant

2

S. A. Schapiro, Esq., on  
behalf of appellee

31

\* \* \* \* \*

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

-----  
THE STATE OF WISCONSIN,

Appellant

vs

No. 95

NORMA GRACE CONSTANTINEAU,

Appellee  
-----

The above-entitled matter came on for argument at  
2:15 o'clock p.m. on Thursday, December 10, 1970.

## BEFORE:

WARREN E. BURGER, 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  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

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On behalf of Appellant

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Milwaukee, Wisconsin 53203

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 95 with Wisconsin against Constantineau.

Mr. Southwick, you may proceed whenever you are ready.

ORAL ARGUMENT BY BENJAMIN SOUTHWICK,  
ASSISTANT ATTORNEY GENERAL OF WISCONSIN,  
ON BEHALF OF APPELLANT

MR. SOUTHWICK: Mr. Chief Justice and may it please the Court: my name is Benjamin Southwick and I am an Assistant Attorney General with the State of Wisconsin and I am here today representing the State of Wisconsin in this case, which came up from a decision of a three-judge panel in the Eastern District of Wisconsin.

The issue before this Court is whether sections of the Wisconsin statutes, which I will discuss in a moment, meet the requirements of procedural due process. The lower court decided this question by a two-to-one decision against the state that the statutes were, in fact, unconstitutional, with a dissent by the United States Senior Circuit Judge F. Ryan Duffy.

These statutes which are Sections 176.26 and 176.28 Sub 1. of the Wisconsin Statutes state, and which are set forth in pages 116 and 117 of the Appendix, state in essence that a series of local officials, including the wife



1 of any individual and including the chief of police of any  
2 city, that these series of local officials which are set forth  
3 in the statute, when they make a finding according to certain  
4 standards which are set forth in the statutes and these  
5 standards essentially relate to the exposing of an individual  
6 or his family to want or the town or village to which he lives  
7 to liability for his support or the injuring of the indivi-  
8 dual's health or the endangering of the personal safety and  
9 comfort of any member of his family or the endangering the  
10 security of the property of any person or becoming dangerous  
11 to the peace of any community, when any of these local  
12 officials, including the wife of an individual, make a finding  
13 and their finding is made without notice of intention to make  
14 it and without a hearing, when these standards are met, then  
15 these empowered local officials can send notice to the effect  
16 to any person and it's normally persons within that jurisdic-  
17 tion, that the person against whom this standard was found,  
18 is forbidden to purchase alcoholic beverages or to be given  
19 alcoholic beverages for a period of one year. And the statute  
20 provides that a copy of this notice shall be sent to the  
21 person who has been what we calle "posted," and the punitive  
22 section: Section 176.28 (1) provides that any person who  
23 knowingly serves an individual alcoholic beverages who has  
24 been so posted, shall be subject to certain criminal penal-  
25 ties.

1 Q Mr. Southwick --

2 A Mr. Justice --

3 Q The plaintiff here is a woman. I fail to  
4 note the presence of the word "husband" in the statute,  
5 although the word "wife" is there. Under the Wisconsin system  
6 could a husband post his wife?

7 A Not under this statute, Your Honor.

8 Q Does this raise an equal protection argument?

9 A I think there may be some problems with that  
10 but I don't believe they are present in this case.

11 Q May I ask whether -- am I correct in my  
12 impression that Wisconsin has a dram shop statute?

13 A Not to my knowledge, Your Honor. Perhaps  
14 I am not totally well-versed in other aspects of the Wisconsin  
15 regulation --

16 Q I was fairly certain it did have one and I  
17 my question was that -- you know what a dram shop statute is  
18 in a Midwestern sense, anyway --

19 A I believe that imposes liability on a bar-  
20 tender --

21 Q Yes, for sale to one obviously intoxicated;  
22 usually arises in the automobile -- context.

23 A It is my opinion that Wisconsin, Mr.  
24 Justice Blackmun, does not have --

25 Q Does not have one.

1           A           This case arose, if I may continue -- did  
2 I hear another question?   Mr. Justice White?

3           Q           I was just wondering, are there any of the  
4 findings as to this Petitioner that you said, must precede  
5 the sending of a notice?

6           A           Those findings are not set forth, no;  
7 there is no --

8           Q           Nowhere in the record?

9           A           There is nothing in the record, although a  
10 deposition was taken later on of the lady, the Appellee, Mrs.  
11 Constantineau, who was --

12          Q           I gather from what you told us the scheme  
13 requires the police chief or some other official to make these  
14 findings before the notice is sent; isn't that so?

15          A           He makes those in his own mind because he  
16 doesn't have to --and this is the problem in the case before  
17 the Court, is that there is no provision for a hearing or for  
18 any setting forth of the statute --

19          Q           No, but where -- where does it appear that  
20 he, in fact, made any findings?

21          A           Well, he made the finding in the sense that  
22 he did issue the notice to the bartenders in the City of  
23 Hartford, Wisconsin.

24          Q           And we are therefore to assume that he must  
25 have made the necessary findings --

1                   A       That is correct; that is correct, Mr. Justice  
2 Brennan.

3                   Q       You mean the findings are implicit in the  
4 conclusion?

5                   A       That's correct, Mr. Chief Justice.

6                   Q       What do you think is the purpose of the  
7 statute?

8                   A       The purpose of the statute is, I think a  
9 very legitimate one, which is to regulate and to limit the  
10 noxious effects which alcoholic beverages can have upon an  
11 individual.

12                  Q       Do you think it is protective of the indi-  
13 vidual posted, as well as the community and --

14                  A       I would certainly say that that's the case,  
15 Mr. Justice Blackmun; certainly of the family and of the  
16 community in which he is -- resides as well.

17                  Q       Do you know of any other states which have  
18 a comparable statute?

19                  A       I have set forth in the Appendix E of my  
20 original statement, Mr. Justice Blackmun, there are 15 other  
21 states which have similar statutes which do not provide, as  
22 this case does not, this statute in Wisconsin does not pro-  
23 vide for a hearing or a notice of intention to post to the  
24 individual.

25                  Q       When you talk about findings here, what you



1 mean -- do I understand it correctly: the finding of the wife  
2 or, in this case -- who made the findings?

3 A The local official in this case, Mr. Justice  
4 Harlan, was the chief of police who made the finding, and as  
5 I say, in his own mind he made the finding --

6 Q In his own mind.

7 A This is shown by the fact that he sent the  
8 notice out to --

9 Q But if you take the average case the wife  
10 could make the finding against her husband; is that right?

11 A That is correct.

12 Q Did the copy of the notice that's required  
13 to be given, is that precede the posting of the --

14 A Well, that is the posting, and I think the  
15 word posting is used in the sense of the word "mailing,"  
16 perhaps and not in the sense of posting on a bulletin board,  
17 which is a point I hope to get to later.

18 Q But the recipient doesn't get it before  
19 the notice and whatever legal effect it has, takes effect;  
20 does it?

21 A The recipient gets it contemporaneously with  
22 all of the bartenders and the bar owners.

23 Q Is an individual who has been thus posted,  
24 guilty of any criminal act --

25 A No, there are no criminal penalties,

1 whatsoever against the person who has been posted, and as I  
2 pointed out in the brief. As the statutes from the other  
3 states, as set forth in the jurisdictional statement indi-  
4 cate that some of the other states do provide criminal penal-  
5 ties for the person posted, but the Wisconsin statute does  
6 not --

7 Q Does it anywhere appear, Mr. Southwick, the  
8 powers of the Chief -- anywhere in the record?

9 A No, it does not appear, Mr. Justice Brennan.  
10 But facts and the nature of the lady's circumstances do appear  
11 in the record and the deposition that was taken --

12 Q Is that in the record?

13 A It is in the record; yes, but it has not  
14 been reprinted in the Appendix and I am begging, of course,  
15 pardon, for that oversight. Certain portions of it --

16 Q Well, Mr. Southwick, what can the posted  
17 man do once he gets the notice?

18 A Beg your pardon?

19 Q Once he gets the notice that everybody else  
20 gets, what under the sun can he do? If he is a tee-totaler.

21 A He has numerous alternatives, Mr. Justice  
22 Marshall. If, as suggested, he is a tee-totaler, he can bring  
23 an action as Mrs. Constantineau has done against --

24 Q In the Federal Courts?

25 A In the Federal Courts or in the state

1 courts.

2 Q But there is no machinery set up by the  
3 state --

4 A There is no machinery in the statute for  
5 any sort of hearing.

6 Q He has no due process at all. Do we agree  
7 on that?

8 A That is correct, Your Honor, Mr. Justice  
9 Marshall.

10 Q And then once these are all mailed out is  
11 there any way to get them mailed back?

12 A Well, the two judges in the Federal District  
13 tell me that they are doing it, and I don't mean to be  
14 facetious, Mr. Justice Marshall, when I say that, but there is  
15 no provision in the statute for "unposting".

16 Q Is there anything in the statute that  
17 prevents the bartender from pasting this notice up on his  
18 mirror in his bar so that God and everybody else can see it?

19 A It is not all stated in the statute, Mr.  
20 Justice Marshall, what the person receiving the notice should  
21 do with it, of course, and this is a point I intend to make,  
22 that the statutes are not on their face, unconstitutional be-  
23 cause they don't provide -- they merely provide for this notice  
24 to go to the various bartenders and not that they set them up  
25 on the walls, or that they publish them in any way --

1 Q We are all clear that there is no semblance  
2 of due process in this at all?

3 A Absolutely.

4 Q Before or after a man's name is put up any-  
5 place anybody wants to put it up?

6 A I would vigorously contest the assumption  
7 of the question, Mr. Justice Marshall, that it is put up  
8 somewhere. The statute don't provide it and as I said earlier,  
9 that this be published at all --

10 Q What I'm saying is that there is no protec-  
11 tion at all to prevent anybody from --

12 A There is no protection in the statute against  
13 the arbitrary --

14 Q So that if a wife tells her husband, "You  
15 either give me a mink coat for Christmas or you get posted on  
16 January 1," he's in trouble. Is that right?

17 A He's in trouble in the sense that he could  
18 be posted by the wife; that's correct.

19 Q But he says, "If you don't give me one I'm  
20 going to have you posted." She would get the mink coat  
21 wouldn't she?

22 A Well -- there is a problem in the statute,  
23 I think, although not one raised by this case, Mr. Justice  
24 Marshall, that the wife is given powers which the husband is  
25 not. But, I don't think, along a similar vein, Mr. Justice



1 Marshall, that the concept of empowering a private individual  
2 is at all unique in this situation in the whole area of the  
3 state's regulation of alcoholic beverages and I cite the  
4 example of a bartender is forced to make a determination that  
5 an individual is of the sufficient age to drink, at least 21  
6 years old.

7 Or in the case of the dram shop act mentioned by  
8 Mr. Justice Blackmun, that the bartender is given the onus of  
9 making a decision of whether somebody is intoxicated or not,  
10 and I simply would suggest that these delegations to private  
11 individuals in this whole area of law, regulating the field  
12 of alcoholic beverages, is because these private individuals  
13 are often people who are closest to the problems and to the  
14 situations involved and this, of course --

15 Q All the regulations that he's talking  
16 about are regulating the dram shops, not the shoppees, or the  
17 shoppers. This goes to the shopper not the shop.

18 A Correct, Justice Marshall, and I think in  
19 the cases and I really hadn't anticipated arguing this case  
20 purely from the analysis of looking at it in terms of the so-  
21 called right to obtain alcoholic beverages, but I think that's  
22 a very minimal right and I think the states --

23 Q And it certainly can be controlled?

24 A Certainly it can be greatly controlled be-  
25 cause I think the states have a great amount of power in this

1 area, especially since the passage of the 21st Amendment.

2 Q I think there was something in your brief  
3 as I recall it, that you said that if the recipient of one  
4 of these notices thought these findings were improvidently  
5 made, they could get it reviewed by common-law writ?

6 A Common law writ of certiorari, Mr. Justice  
7 Harlan.

8 Q In Wisconsin?

9 A That is correct, but I will point out that  
10 this is not -- it's discretionary with the court to grant such  
11 a review.

12 Q Is it a procedure that is utilized or --

13 A I never heard of any litigation under the  
14 statute prior to this case.

15 Q Never.

16 Q But at best, it's not a review of right; it's  
17 a discretionary review; that's all.

18 A That is correct.

19 Q Well, why would you call it a review -- I  
20 mean how do you need to limit it to a review? Couldn't you  
21 bring an independent action for an injunction?

22 A I suggest --

23 Q In the Wisconsin state courts and sue the  
24 police chief and the -- and tell him to revoke this --

25 A That's certainly true, Mr. Justice White.

1 Of course, the Appellee in this case has chosen --

2 Q Probably as effective as a common law to  
3 certiorari -- it would be more effective. At least you would  
4 get a decision on it.

5 A I would think that it would be more effective;  
6 yes. And, of course, the Appellee, Mrs. Constantineau  
7 in this case, has chosen the Federal forum but she could have  
8 as well chosen the state forum. And I don't think the  
9 statute can contemplate, really, any arbitrary and malicious  
10 activity by a local official under the statute. I don't think  
11 that the fact that such an activity could occur is a point  
12 to make the statute unconstitutional.

13 Q Well, as a matter of fact, they ruled on the  
14 statute on its face, didn't they?

15 A That's correct, Mr. Justice Marshall.

16 Q Yes. As I read the opinion the statute on  
17 its face was unconstitutional, period.

18 A That's what the court said, Mr. Justice  
19 Marshall.

20 Of course, what's happened in this case is that  
21 Mrs. Constantineau has been posted by the Chief of Police of  
22 the City of Hartford, Wisconsin and the -- Mrs. Constantineau  
23 brought an action in the Federal Court, alleging two causes  
24 of action. In the first cause of action, which was against  
25 the chief of police for acting maliciously and arbitrarily

1 this was the cause of action in which she mentioned and dis-  
2 cussed the right of reputation and the right to be free of  
3 public defamation.

4 The second cause of action, which is the cause of  
5 action before this Court in which she sought an injunction:  
6 the right of reputation was never mentioned, the right to be  
7 free from public defamation. The state made motions to  
8 separate the two causes of action and to intervene as a party  
9 defendant and the motions were granted. And at the hearing  
10 on the constitutionality of the statute, counsel for Mrs.  
11 Constantineau never mentioned the right of Mrs. Constantineau  
12 to be free from public defamation and to be free of reputation  
13 and the state sought to produce witnesses on this point and  
14 subpoenaed Mrs. Constantineau as the record shows, but Judge  
15 Reynolds of the majority in the lower court refused the motion  
16 of the state to produce witnesses and in the questioning which  
17 appears in the Appendix at page 113, of Judge Reynolds of the  
18 majority in the lower court, of myself, who was representing  
19 the state. Judge Reynolds said:

20 Judge Reynolds said, and I quote: "The fact that  
21 being held up to ridicule for reasons which the party may not  
22 have any -- may not know why, I think that is the right which  
23 has not been mentioned which bothers me more than anything  
24 else in this case."

25 Q Well, what's publicly defamatory about



1 it, supposedly? There is no posting, is there?

2 A Well, that's exactly my point in this Court,  
3 Your Honor, Mr. Justice White, is that there is nothing  
4 publicly defamatory about the actions which can be taken under  
5 the statute and that --

6 Q Except that the people to whom the notices  
7 are mailed, and I suppose it's more than one, know that the  
8 police chief has an opinion that here's someone who shouldn't  
9 drink.

10 A Well, all that the notice says and it does  
11 appear in the record -- all that the notice says, and I quote  
12 from the one sentence of the notice: -- I beg your pardon,  
13 Mr. Chief Justice. "You are hereby forbidden to sell or give  
14 away to Grace Norma Constantineau any intoxicating liquors  
15 of whatsoever kind for a period of one year from date under  
16 payment of penalties set forth in the related sections."

17 Q But they know what the statute says?

18 A Well, the punitive section which applies to  
19 the recipient of the notice, the punitive section is then set  
20 forth in the notice, or least it was in this particular case.

21 Q But they know what triggers a notice like  
22 that? The recipients of that notice are aware of what  
23 triggers a notice like that?

24 A I don't know; it would be purely speculative  
25 on my part as to whether a bartender in the State of Wisconsin

1 would be familiar with it?

2 Q Well, I would think so. They know their  
3 business.

4 Q So, what does this statement of Judge  
5 Reynolds mean, Mr. Southwick? I'm looking at page 115 of the  
6 appendix.

7 "On January 23, Defendant Grager in his capacity  
8 as chief of police, and acting," and so forth, "posted a  
9 notice in the retail liquor outlets in the City of Hartford,  
10 Wisconsin."

11 A It is my contention, Mr. Justice --

12 Q I mean, what did Judge Reynolds, do you think  
13 mean by that?

14 A I think that these statutes are familiarly  
15 known in Wisconsin as the Alcoholic Posting Statutes, and I  
16 think posting could mean mailing. I suppose the posting --  
17 as opposed to posting -- because the chief of police could  
18 easily serve his notice by mail, I would think, on the various  
19 bartenders.

20 Q What's the point in putting it in the mail?

21 A There is no point in the statutes in which  
22 there is a requirement that they be put up on a bulletin board.

23 Q Is she subject to a notice now?

24 A She is subject only in the statutes to  
25 receive the notice contemporaneously with the bartender

1 receiving the same notice.

2 Q Well, I mean is she subject to this original  
3 notice? The force of that has expired, hasn't it?

4 A Well, it would be -- the lower court ordered  
5 that the notices be retracted, Mr. Justice Harlan.

6 Q Mr. Southwick, what efforts were made to  
7 utilize state proceedings or administrative proceedings to  
8 deal with this problem by Mrs. Constantineau?

9 A Well, Mrs. Constantineau, Mr. Chief Justice,  
10 chose the Federal forum --

11 Q You mean she didn't try anywhere else?

12 A No, Mr. Chief Justice, not to my knowledge.  
13 She chose the Federal forum and brought the two causes of  
14 action: one for an injunction which is the cause of action  
15 here; and there is -- the first cause of action is still  
16 pending for damages, in the Eastern District.

17 The majority in the lower court and both sides in  
18 the lower court took the so-called "balancing test," approach  
19 to this case which is -- starts with the Joint Anti-Fascist  
20 Refugee Committee, Mr. Justice Frankfurter's concurring  
21 opinion and the later cases of Cafeteria Workers versus  
22 Mc Elroy and Goldberg versus Kelly, took this approach of,  
23 in determining the requirements of due process to any given  
24 situation, of balancing the interests of government on the  
25 one hand and the interests of the individual on the other hand.

1 And both the majority and the dissent in the lower court  
2 agreed that when we look at this case solely in terms of the  
3 right of the state to regulate alcoholic beverages, both the  
4 majority and the dissent agreed that clearly the statute was  
5 constitutional and that due process did not require any notice  
6 of hearing.

7 But, the majority --

8 Q Mr. Southwick, I notice at page 113 --

9 A Of the appendix, Mr. Justice Brennan?

10 Q And the colloquy between you and Judge  
11 Reynolds, you said something about the mere fact that the  
12 plaintiff has been drinking outside the City of Hartford, on  
13 the date when she was posted -- now, when you used the word  
14 in what sense -- did you use it as a synonym for mailing?

15 A I used it in the familiar, I think, Mr.  
16 Justice Brennan, because in the State of Wisconsin these  
17 statutes are referred to as the Alcoholic Posting Statutes,  
18 and I don't think I was thinking --

19 Q What I'm asking you is: were you using that  
20 term and was Judge Reynolds also using it as a synonym for  
21 the word "mailing?"

22 A I would assume -- that's the only explanation  
23 -- that's the explanation I would offer to this Court.

24 Q You weren't using it any way in the terms of  
25 some notice being posted in public --



1 A Certainly not, Mr. Justice White; certainly  
2 not.

3 Q If you won this case, since you -- so that  
4 the notice has to be returned, is given effect, isn't the  
5 notice now funde sufficio(?)?

6 A Well, we --

7 Q It could last for a year, couldn't it?

8 A That's true, but another of the statute  
9 too provides, Mrs. Justice Harlan, that sections can be renewed  
10 for an additional year.

11 Q But you would have to give her a new one;  
12 wouldn't you?

13 A That is correct.

14 Q But, so far as this notice is concerned,  
15 no matter what happens to this case, the notice has spent  
16 itself; hasn't it?

17 A That's correct, but the -- of course, the  
18 state is concerned with upholding the statutory scheme.

19 Q I know, but what I'm raising is: is there  
20 any question of mootness in the case?

21 A I would say not, Mr. Justice Harlan.

22 Q Why not?

23 A Because, under the statute this lady could  
24 be reposted --

25 Q Well, that's another notice.

1                   A        But the statutory scheme --

2                   Q        If she's become a teetotaler she wouldn't

3       -- there wouldn't be any basis for giving her a notice.

4                   A        Well, you still could under the statute --

5                   Q        I suppose that's a good way to make a person

6       a teetotaler.

7                   Q        Anyway, today she's perfectly free to buy

8       all the liquor she wants?

9                   A        Yes, Mr. Justice Brennan and it is our con-

10       tention in the lower court that she was perfectly free to buy

11       them other than --

12                   Q        Well, she said that she was busily buying

13       it outside of Hartford.

14                   A        Well, I had been --

15                   Q        Was there any injunction entered against

16       the enforcement of this statute?

17                   A        Yes. That order is --

18                   Q        Generally, or just as to Mrs. Constantineau?

19                   Q        That was declared unconstitutional; wasn't

20       it?

21                   A        That is correct; yes. And the order appears

22       on page 124 of the Appendix.

23                   Q        Well, isn't that rather relevant to the

24       mootness of it?

25                   A        The lower court found that the statutes were

1 unconstitutional on their face.

2 Q Well, more than that they --

3 Q Well, wouldn't the police chief be in  
4 violation of this order if he posted anybody?

5 A That, I --

6 Q They are enjoined from enforcing the  
7 provisions of the statute.

8 A I would say that if he posted anyone else  
9 he would be; yes.

10 Q Well, it's hardly moot, then.

11 A It is my contention, if it please the Court:  
12 in this Court and in the lower Court that the whole question  
13 of the right of reputation and to be free from public defama-  
14 tion was never -- was not present in this balancing process  
15 between the rights and interests on the government on the one  
16 hand and the interests of the individual on the other hand,  
17 and the --

18 Q The District Court didn't reach that, did  
19 it?

20 A Well, Mr. Justice Stewart, the only finding  
21 that we have in the lower court is the statement of Judge  
22 Reynolds of the majority in the lower opinion, when he says,  
23 and I quote from page 119 of the appendix, "It would be naive  
24 not to recognize that such posting or characterization of an  
25 individual expose him to public embarrassment and ridicule,"

1 so that despite the failure in this cause of action of Mrs.  
2 Constantineau to allege any damage to injury as a cause for  
3 the statutes to be unconstitutional on their face and despite  
4 the court's forbidding the state from calling any witnesses  
5 in this case, the Judge made that assumption purely on his own  
6 that it would be naive and the submission of the state to this  
7 Court is that this whole question of reputation is not present  
8 in the operation of these statutes. It's not present in the  
9 record of this case and the deposition which is in the record  
10 in which repeat, I'm embarrassed to say it was not reprinted  
11 in the appendix, shows that the only point to which Mrs.  
12 Constantineau was hurting her reputation was the statement that  
13 she made in the court in the disposition that she was em-  
14 barrassed by the operation of the statutes.

15 Later on she said that she didn't know her own  
16 reputation in this small city of Hartford for any matter ex-  
17 cept that she knew that people knew that she drank a lot.  
18 That's the only point on which she knew what her reputation  
19 was in this city and she didn't know whether it had changed or  
20 not since the posting.

21 So, I don't think we have --

22 Q There were two causes of action here; weren't  
23 there?

24 A Yes. It is only the second cause of action.

25 Q And the first one was for damages?

1           A       Against the chief of police for acting  
2 arbitrarily under the statute --

3           Q       But not for defamation; not for causing  
4 her embarrassment or ridicule?

5           A       Yes. Her reputation was mentioned in the  
6 seventh paragraph of the first cause of action.

7           Q       And that has not yet been to trial?

8           A       That's correct; yes. That cause of action  
9 is still pending in the Eastern District.

10          Q       And I understood this passage in the court's  
11 opinion to which you referred simply that as a passing  
12 reference to some interest of Mrs. Constantineau being affected,  
13 the court apparently realizing that the interest in  
14 drinking alcohol is not a very much protected interest by  
15 virtue of the complete control that is given to the states  
16 over that matter and that it was necessary for the court to  
17 identify some interest that was affected by this?

18          A       I think the court had to find some interest  
19 which was affected in order to find the statutes unconstitutional,  
20 because it's clear as we look at this solely in terms  
21 of the regulations of alcoholic beverages that the statutes  
22 are constitutional so that the court had to come up with something  
23 and it came up with this point of reputation and it's  
24 my point to this Court, the State's point that this right of  
25 reputation is not at all in the operation of these statutes and



1 should not be accounted for in the balancing test.

2 Q The first count is --

3 A The first count is still pending in the  
4 courts; yes.

5 So, it's my point, if the Court please, before this  
6 Court, that this whole point of reputation is -- should not  
7 be put on the balancing scale of due process, if you please,  
8 for the one reason that it's not involved in the record of this  
9 case in any way; that the statutes in their operation by their  
10 own terms, don't in any way involve the right of reputation,  
11 and also as a matter of constitutional law if we look at the  
12 other cases, and I am thinking of Mr. Ramsey Clark the other  
13 day, before this very Court, talking about reputation. And  
14 there he was taking about a case where the man had been  
15 severely damaged.

16 There has been no concrete showing of any sort  
17 that the economic future or the economic interest of Mrs.  
18 Constantineau have in any way been affected by the operation  
19 of these statutes and that she does not have viable economic  
20 alternatives as a result and after the posting which took  
21 place under these statutes.

22 And --

23 Q -- of whatever he goes to a bar to get  
24 without a notice in the hearing, when the state can't have a  
25 law with which permits him to be deprived of his wages without

1 a notice --

2 A Well, I think wages are far more important  
3 on the balancing --

4 Q Is that all there is to it? Is that all  
5 there is to it?

6 A My point, Mr. Justice White, is that if you  
7 look at this balancing scale between the interests of the  
8 Government and the interests of the individual, if you look  
9 at it solely in terms of --

10 Q Well, the state can deprive him of what the  
11 state thinks is unimportant, but what he might think is very  
12 important?

13 A Well, not on -- Mr. Justice White, not  
14 only what the state thinks, but in my opinion, what the  
15 interests which have been affected in the other cases which I  
16 have cited in my brief, which are far more substantial in-  
17 terests than is involved in this case in the right to obtain  
18 alcoholic beverages.

19 I think the right -- the so-called right, it's not  
20 in the right privilege sense that I'm using it. I think when  
21 we compare the balancing in this case, the due process balan-  
22 cing, with the due process balancing which has occurred in other  
23 cases in which --

24 Q What if -- do you think the state could just  
25 post a man and say, and tell all of the department stores in

1 town: "Don't sell this many any more shoes?"

2 A I would say not shoes, but --

3 Q Well, why not?

4 A The right of the individual to --

5 Q Why not? Are those so important?

6 A Well, I think, Mr. Justice White, that the  
7 -- in this case the right of the individual to obtain alco-  
8 holic beverages is traditionally a very frail one in the con-  
9 stitutional sense.

10 Q Well, what if you posted, send the notices  
11 that tell the story: "Don't sell this man any more shotgun  
12 shells?"

13 A Then we have to go through the balancing  
14 process all over again.

15 Q Well, what about it? Would you say that --

16 A I say the state has a much diminished power  
17 to regulate shotgun shells than it does, Mr. Justice White,  
18 than it does --

19 Q You'd say you ought to have notice and a  
20 hearing before you could be deprived of buying shotgun shells?

21 A Well, I think each commodity would have to  
22 go through this balancing test itself and I couldn't say  
23 whether -- it's not up to me to say whether alcoholic be-  
24 verages or more or less important than shotgun shells, and I  
25 think the courts and the law traditionally, especially since

1 the passage of the 21st Amendment has shown that the right  
2 of the individual to obtain alcoholic beverages is a very  
3 frail right, and that if we look at these statutes purely in  
4 those terms, then clearly, even the majority in the lower court  
5 would --

6 Q You say you don't know of anyone who ever  
7 brought an action except this one?

8 A I couldn't find any cases under this statute  
9 in this state or any other state, which was talked about in  
10 terms of due process.

11 Q You mean in the state courts?

12 A Not to my familiarity, Mr. Chief Justice;  
13 no.

14 Q Don't you have to say that the right to  
15 regulate the sale of liquor is an absolute right in order to  
16 sustain your case?

17 A I don't think so, Mr. Chief Justice. I  
18 think if we look in terms of this balancing test that I've  
19 been talking about, the powers of the state to regulate is  
20 so great in the area of alcoholic beverages --

21 Q It's got to be absolute if you don't have  
22 to give any notice.

23 A I don't think, if Mr. Chief Justice please,  
24 that the other cases have shown that to be the case at all,  
25 that -- and I cited cases in the field of regulating business

1 interests, the right of business to be free from competition  
2 and the right of public employees to -- the right of an  
3 employee to continue in a job and the right of a public  
4 employee to continue in a job. All of these things, all of  
5 these interests which I submit to the Court are the much more  
6 significant interests than are involved in this case, have  
7 been taken away without notice and a hearing.

8 And I think there are rights that can be taken  
9 away without a notice of hearing and this brings me to the  
10 point which I ended the brief on --

11 Q Mr. Southwick, I have just one question on  
12 that point: suppose the statute said that the chief of police  
13 has a right to send the following notice: that Joe Doakes  
14 has been declared by me to be a public drunkard and for that  
15 reason you are ordered not to sell him any intoxicating  
16 beverages?

17 A I think that would differ from this in-  
18 stance, Mr. Justice Marshall.

19 Q With the exception of using the words,  
20 "declared by me a public drunkard," what is the difference?  
21 It's under Aa particular statute and can't I assume that  
22 every liquor dealer knows what the statute says?

23 A I don't know that you can make that assump-  
24 tion, Mr. Justice Marshall; clearly not by the terms of the  
25 statute can you make that assumption. The statute merely --



1 Q Well, what are the rules in which the chief  
2 of police can tell you that you can't serve liquor to Joe  
3 Doakes? What other possible reason could it be?

4 A Presumably it would only be for the reasons  
5 set forth and as set forth --

6 Q Well, that's just what I'm saying. My whole  
7 question was not a question of regulating this man or this  
8 woman in this case, drinking or regulating the selling of  
9 liquor to this man or woman; it's the publishing of their  
10 names.

11 A I don't know, Mr. Justice Marshall, that  
12 publishing takes place in the context which you --

13 Q Well, it's in the context of libel and  
14 slander. Publishing is when you give it to some third person;  
15 that's publishing. And you give it to all these third persons  
16 who are all the liquor dealers.

17 A Mr. Justice Marshall, I don't know that the  
18 notice as contemplated in these statutes in any way provides  
19 for any defamation in the sense that it merely says that  
20 they are forbidden to sell to this individual. Now, what  
21 conclusions the recipient might draw -- not within the terms  
22 of the statute itself --

23 Q You say that there is no place, if I under-  
24 stood you, in the Wisconsin courts that has dealt with any  
25 phase of this statute?

1           A           I'm not familiar with any litigation in  
2 Wisconsin about --

3           Q           Was there any suggestion made to the  
4 District Courts or the Federal Courts that they ought to  
5 abstain and send it back to get some kind of an interpretation  
6 in the state courts as to the statute?

7           A           There was no suggestion made to the courts,  
8 to my knowledge, Mr. Justice Harlan.

9           Q           Do you see any futility in that now?

10          A           I --

11          Q           They weren't even brought here -- with a  
12 statute which you say has ever been the subject of a state  
13 litigation. We don't know what the state courts would do  
14 with it.

15          A           I think the statute, by its terms, is  
16 reasonably unambiguous.

17          Q           Well, but that isn't the point; the  
18 question is whether a court, with or without a suggestion,  
19 ought to enter into this case before the state courts have  
20 undertaken to construe it.

21                   The question is why is this case here at all?

22          A           The motions to dismiss were made in the  
23 -- before the Eastern District --

24          Q           On that ground, on the ground that they  
25 should abstain? Is it articulated in that way?

1           A           I don't believe it was articulated in that  
2 way, although there are -- I have only been counsel for one  
3 of the two causes of action, Mr. Chief Justice.

4           I see that my time has expired.

5           MR. CHIEF JUSTICE BURGER: Counsel, if you would  
6 like to finish today you might bear in mind that the hour is  
7 quite late.

8           ORAL ARGUMENT BY S. A. SCHAPIRO, ESQ.

9           ON BEHALF OF APPELLEE

10          MR. SCHAPIRO: I will, Mr. Chief Justice, and may  
11 it please the Court:

12          My name is S. A. Shapiro. I represent Mrs.  
13 Constantineau, and I would like to just inform the Court as  
14 to the facts.

15          The chief of police went out like a process server  
16 went out and handed the notice to all the persons in town  
17 dealing with liquor.

18          Q           How many are there?

19          A           There are about 17 taverns and about 15,  
20 20 liquor stores --

21          Q           What do they do in Milwaukee when this  
22 arises? They probably have several thousand of them there.

23          A           Yes, Your Honor; I haven't known of it  
24 arising in Milwaukee. It's only used in the smaller communi-  
25 ties where there is probably a more feasible means of

1 controlling it.

2 Before the year ran out that this notice was  
3 posted for, the District Court stepped in and enjoined further  
4 action. We started this action in the Federal Court because  
5 we believed there was a substantial Federal question. There  
6 were rights of this lady under the Ninth Amendment, the First  
7 Amendment and the 14th Amendment Due Process Clause.

8 Q What happened to the Twentieth Amendment?

9 A Pardon me?

10 Q Didn't you think the Twenty-first Amendment  
11 had anything to do with it?

12 A If it did, Your Honor, Justice Black, it  
13 wouldn't be in favor of our case, and we did not plead anything  
14 with respect to the Twenty-first Amendment. That would be,  
15 if it was relevant, which the State has brought up, it would  
16 certainly be a factor on their behalf.

17 I think the counsel has been focusing the matter  
18 on procedural due process, but I think we should look at the  
19 nature of the State's action. Here the State is moving  
20 against a citizen who is not a public figure nor public  
21 official and the power to do this is vested in those people  
22 with merely discretionary powers.

23 An administrative official, administrative official  
24 -- in this case the chief of police, his discretion is almost  
25 unrestricted. A lessening of your estate, or the mispending

1 of your estate is one of the reasons that he can do this to  
2 this lady.

3 Q Have you published the state law on which  
4 he can exercise that power?

5 A Was it published?

6 Q Was it published in your brief?

7 A No; the State has done that in their  
8 appendix. They have published the law in their appendix and  
9 in their brief. That law is set out in full.

10 Q Well, on your constitutional right, while  
11 we are pausing for a moment, only last, in the 1969 term,  
12 less than a year ago, the pertinent Federal constitutional  
13 claims were raised by some people in the fishing business in  
14 Alaska. And this Court said that the District Court should  
15 have abstained from considering it until the state courts had  
16 construed, the State Courts of Alaska had construed their own  
17 statute.

18 Why shouldn't the District Court here have  
19 abstained until the State Courts of Wisconsin have decided  
20 what this statute meant?

21 A Because, Your Honor, Mr. Chief Justice, I  
22 think it is well established in the law that when a substan-  
23 tial Federal question is raised and a three-judge court is  
24 convened, that court can in its own discretion, listen to the  
25 issues presented.



1           Q       Well, but would you negate the abstention  
2 doctrine entirely?

3           A       Well, I would not negate it entirely, but  
4 I would rather put it in a discretionary manner with the  
5 United States District Courts, especially when there is a  
6 three-judge court. You know we can always run into the  
7 matters that if we had gone into the state courts first and  
8 exhausted our remedies there and then went to the Federal  
9 Courts, there is nothing but a revolving door process and the  
10 only one who is getting exhausted is the Petitioner of the  
11 Plaintiff and the Court; not the state remedies.

12               So, to facilitate what may ultimately be the end  
13 result we start out in the Federal Court where there is dis-  
14 cretion and where this three-judge court and Judge Reynolds,  
15 particularly, saw the reason to exercise that discretion.  
16 And there are cases which we cited in our brief that to the  
17 lower court and motions to dismiss that support our position  
18 that it is a discretionary function of the three-judge  
19 district court to hear the merits if there is a substantial  
20 Federal question.

21           Q       Sometimes when we think they don't exercise  
22 that discretion shrewdly enough we give them some help on it.

23           A       Yes, Your Honor; I would go with that  
24 statement. But we have to look at the nature of the state  
25 action as one of being a stigmatic identification of a citizen

1 who was not a public figure and not a public official and  
2 the effect on that is to single out the citizen with a spot-  
3 light with an unfavorable connotation.

4 Q Would it make any difference if this was the  
5 mayor of the town of Hartford, since you emphasized the public  
6 official. Would he have a different right from this lady?

7 A He would have -- there would be a right to  
8 criticize his actions, his behavior, because he is a public  
9 official under the New York Times rule.

10 Q Could you criticize him by posting him?

11 A Under this law the chief of police could if  
12 he dared to do so, but the liability of the chief of police  
13 might be different because the mayor is a public official and  
14 under the New York Times rule a public official is subject  
15 to criticism in any part of his life which is a public matter.

16 Q That might affect his direct damages, but I  
17 can't see what it would have to do with the constitutional  
18 issues involved here.

19 A Well, under the First Amendment, we have to  
20 remember, Mr. Chief Justice, that free speech and with respect  
21 to the criticism of public officials is something that is al-  
22 most, well it is the last thing next to something that is  
23 absolute.

24 The only thing that this Court has stated that only  
25 if an act is done maliciously and with reckless disregard for

1 the truth, can criticism for public officials be actionable. (?)

2 But he was singling out a private citizen who has  
3 a right to live her own life in her own quiet way and un-  
4 assuming way. And if that's her expression of life it's a  
5 matter of invasion of that expression of living and that, I  
6 submit, is an invasion of her privacy and her state of mind.

7 This Court recognized in Mapp and it recognized in  
8 Stanley versus Georgia that the physical enclosure of a home  
9 is sacred and the state can't go in there. And here the state  
10 is going beyond the enclosure; it is going into the heart and  
11 soul of the citizen herself. It's imposing a stigma on her,  
12 not only when she is in her home; it's in her heart and her  
13 soul and attached to her when she leaves her home.

14 Q Mr. Schapiro, aren't there limitations to  
15 what you just said, they won't be permitted, in most states,  
16 anyway, for being a waster of --

17 Q Well, he can be prosecuted in Wisconsin  
18 for nonsupport. If he is, then of course he is given a due  
19 process protection of hearing before a judicial forum where the  
20 facts are ~~allowed~~ and counsel is presented. There is a hearing  
21 before any findings are made; cross-examination is permitted.

22 Q If a state had a statute -- you say that you  
23 think that Wisconsin does not have the dram statute -- let's  
24 say that within a state which had a statute giving the bar-  
25 tender the power to decide that a given person has had enough,

1 or too much, then hasn't the state vested in that bartender,  
2 not only the power, but the duty to, in effect, stigmatize  
3 him by saying, "I'm not going to sell you any more."

4 A Well, it hasn't --

5 Q Those statutes would fall too, wouldn't they,  
6 under your theory?

7 A Not unless a public declaration of the fact  
8 would be made --

9 Q Well, it's pretty public if he says it in  
10 the bar with 29 people lined up at the bar, that "I'm not  
11 going to let you have any more drinks. You have had too much.

12 A But then, Your Honor, it's the citizen's  
13 own act of becoming intoxicated that's discredited himself;  
14 not the bartender.

15 Here is a woman that's a divorcee. She's got four  
16 children; she has never been convicted of a crime. She's  
17 never been convicted of being drunk and here the chief of police  
18 is going out on his own and trying to limit her rights without  
19 a notice of a hearing and in a manner calculated to cause her  
20 damage with the rest of the community with whom she lives.

21 Now, the bartender, if he says so, the one that's  
22 asking for the drink is responsible for his being refused by  
23 becoming intoxicated in the first place. Here the citizen is  
24 not responsible for doing anything wrong that brought about the  
25 particular action, except insofar as her displeasure existed



1 in the eyes of the chief of police.

2 Q Do you think that the state, under the  
3 Twenty-first Amendment, could pass a law saying that no liquor  
4 was to be served to any woman that had children?

5 A I don't think that that would be possible,  
6 Your Honor, Mr. Justice Harlan, because that would deprive  
7 that woman of the equal protection of the laws, whereas others  
8 in her family, others in her same position, without children  
9 would be permitted to consume liquor and having children would  
10 not be a valid criterion for denying it to her.

11 So, it would be my position that that would be a  
12 deprivation--

13 Q Mr. Schapiro, you heard the Attorney  
14 General's position about this word "posting," as it appears in  
15 the statute and as it is used. What is your idea of it?

16 A My idea is that the notice, since it was  
17 served in the manner of a process server serving a notice, is  
18 that it appears on the wall of the tavern to give notice to all  
19 persons that they cannot sell --

20 Q Is there anything in this record about being  
21 on the wall?

22 A No, there isn't, Your Honor, Mr. Justice  
23 Marshall; there isn't.

24 Q That appears to be what Judge Reynolds  
25 understood; page 112 of the appendix. "In every --"



1 city saloon in Madison she could have your name on the wall."

2 A Well, Your Honor, Mr. Justice Stewart,  
3 and when this case comes to trial those facts will be estab-  
4 lished and made part of the record.

5 Q Well, the case is over; isn't it?

6 A No, Your Honor --

7 Q As far as you're concerned it's over?

8 A It's not over at all, Mr. Justice --

9 Q On the constitutional issues?

10 A The constitutional issue has been decided  
11 and --

12 Q The judgment has been -- well that's over.

13 A Yes, but the question of whether or not the  
14 notice was actually placed on the wall or whether it was just  
15 handed, is not going to be decided. Those are issues of fact  
16 past which will be determined --

17 Q Well, why would you declare the statute to  
18 be unconstitutional on its face, then, until you find out how  
19 it's going to apply, because on its face it doesn't say anything  
20 about posting. It says "mailing a notice," and I think that  
21 your contention is that you must construe -- that the statute  
22 was validly declared unconstitutional on its face because you  
23 must assume these notices go on the wall.

24 A Well, they can be invalid without them  
25 actually being put on the wall because the fact that they

1 are disseminated throughout the community, a person has no  
2 chance to meet the inferences before they are disseminated.

3 Q Mr. Schapiro, would you be content if the  
4 Wisconsin statute now had incorporated in it a provision for  
5 hearing?

6 A No, I wouldn't, Mr. Justice Blackmun, for the  
7 reason that this statute is inherently aimed toward the poor  
8 in the community, because they are the ones who, the obvious  
9 ones who would be restricted because they are the ones who  
10 would be lessening their estates and leaving others to support  
11 them.

12 The wealthy in the community who could spend all  
13 they wanted and more and not have their estate lessened and  
14 others in the family deprived of their support would not be  
15 touched by this law. And therefore I feel it's discriminatory  
16 against the poor in the community.

17 Q Does this suggest that you have never placed  
18 a wealthy person under guardianship for tendencies of this  
19 kind?

20 A Well, a wealthy person, Your Honor, can be  
21 placed under guardianship, but I think that in any such event  
22 there would have to be a finding of incompetency by a tribunal  
23 with cross-examination rights of counsel, hearing and notice.

24 Q Has there been some reason why this first  
25 count has not come to trial?

1           A       Well, the reason, Your Honor, Mr. Justice  
2 Brennan, is that the state appealed this case to this Court  
3 and the stay of appeal in this case and the determination of  
4 the facts by this Court as to the constitutionality of the  
5 statute, that is the reason, I feel, the lower court has not  
6 further proceeded in this matter.

7           Q       Well, even if the statute were constitutional.  
8 I suppose that damage action might be possible for the  
9 manner in which it has been administered.

10          A       Yes, Mr. Justice White, it is our position  
11 that under those circumstances, nonetheless, it is state  
12 action involved here and any state action under the Civil  
13 Rights Act which this case is proceeding under, give rise to  
14 a cause of action.

15               There might be a difference if the law is uncon-  
16 stitutional and malicious or negligent in the posting of these  
17 notices, but the -- this case would, nevertheless, be allowed  
18 to proceed to trial.

19               It is our position, generally, and as a closing  
20 comment, that the rights of the Plaintiff, the Appellee here,  
21 are rights of privacy and rights to her own name and reputa-  
22 tion which are -- which could be included in the Ninth Amend-  
23 ment or in the Fourteenth Amendment Due Process Clause alone,  
24 or under the incorporation theory under the First Amendment.  
25 Because, her right to remain a nonpublic figure, to live her

1 own life in her own quiet way is generally an aspect of  
2 privacy, and the state forcing her to become a public figure  
3 is a deprivation of her right of privacy.

4 And we likewise have the question of reputation  
5 involved in this matter because -- I just want to make this  
6 as my closing comment -- I wanted to go into detail, but I  
7 will just say that the stigma attached to this creates an  
8 outcast group in society and that outcast group is forbidden  
9 by its own nature to have any associations with other groups  
10 in society. People will tend to shy away from these people,  
11 and as a result their rights of association are limited and  
12 this is not the right of association in a political group that  
13 petition the government for a redress; this is a -- such a  
14 basic right of association that it would inherently cause the  
15 posted person to be unaffiliatable and unassociatable with all  
16 segments of society, except those in the outcast group which  
17 she has involuntarily become a member of.

18 Q Is there any indication in the record at  
19 all as to how many people in the town were posted?

20 A It's not in the record, but out of the  
21 record, this is a common practice by the chief of police in  
22 this community. There are maybe seven or eight a year like  
23 this.

24 Q I suppose he could post everybody in town.

25 A Certainly, the discretion is almost



1 unlimited. The criteria is, as applied to this case, because  
2 this woman is not dangerous to the community, which is one  
3 grounds, which is the lessening of the estate, the misspending  
4 of money. And I think that in the hands of an administrative  
5 official without notice and hearing is one such instance of a  
6 violation of not only procedural, but substantive due process.

7 Q Why didn't you go into the state courts to  
8 try to get some relief?

9 A Well, we saw that there was no remedy by  
10 certiorari in the state courts. I looked into that matter  
11 and certiorari would only be permitted to review the actions  
12 of an administrative tribunal.

13 Q Have you got a declaratory judgment  
14 procedure in Wisconsin?

15 A Yes, sir, Mr. Justice Harlan, there is a  
16 declaratory judgment procedure, but that will not cause the  
17 chief of police to take the notices down.

18 Q What about an injunction?

19 A An injunction would.

20 Q And damage actions?

21 A An injunction and damage action would cause  
22 the notice to be taken down but the likelihood of success in  
23 the damage, Mr. Justice White, in the state courts would be  
24 much more difficult than it would under the Civil Rights Act  
25 where there is definite state action.



1 Under state law there would probably be a  
2 requirement of proving matters beyond state action and as a  
3 result it was our position that it would be an easier damage  
4 action to prove in a Federal action under the Civil Rights  
5 Act.

6 Q Is that deposition that Mr. Southwick  
7 mentioned, filed here?

8 A I don't know; he took that deposition, Mr.  
9 Justice Brennan.

10 Q May I ask him?

11 Has it been filed here?

12 MR. SOUTHWICK: It is in the record.

13 MR. JUSTICE BRENNAN: Thank you.

14 Q This posting is good for a year?

15 A Yes, Mr. Justice Douglas, but --

16 Q Before the year is up can the man who does  
17 the posting unpost him?

18 A He did in this case when the lower court  
19 ordered him to but whether or not he could, the statute  
20 doesn't provide any mechanism for him to do so and if it was  
21 it would be inherently his own discretion. And I could not  
22 answer your question further than that.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schapiro  
24 and thank you, Mr. Attorney General. The case is submitted.

25 (Whereupon, at 3:10 o'clock p.m. the argument in  
the above-entitled matter was concluded)