

LURK *v.* UNITED STATES.

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

No. 669. Argued May 4-5, 1961.—Decided May 29, 1961.

Petitioner applied to a Federal Court of Appeals for leave to appeal *in forma pauperis* from his robbery conviction, on the ground, *inter alia*, that it was unconstitutional because his trial in a Federal District Court was presided over by a retired judge of the Court of Customs and Patent Appeals, who had retired before 1958. Leave was denied by the Court of Appeals without opinion. *Held*: The judgment is reversed and the case is remanded on the authority of *Ellis v. United States*, 356 U. S. 674.

Reversed and remanded.

*Eugene Gressman* argued the cause and filed a brief for petitioner.

*Oscar H. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Cox*, *Assistant Attorney General Miller*, *Beatrice Rosenberg* and *Philip R. Monahan*.

By special leave of Court, *Francis M. Shea* argued the cause for the Judges of the Court of Claims, as *amici curiae*. With him on the brief was *Richard T. Conway*.

*Bennett Boskey* filed a brief for Mark Coppedge, Jr., as *amicus curiae*, urging reversal.

## PER CURIAM.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. *Ellis v. United States*, 356 U. S. 674.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

In my view *Ellis v. United States*, 356 U. S. 674, on the basis of which the case is sent back to the Court of

Appeals, does not fit the facts and circumstances of this case.

In support of his contention that he was wrongfully denied the right to appeal *in forma pauperis*, petitioner presents for our consideration two grounds for reversal of his conviction of robbery in the United States District Court for the District of Columbia. The first contention, concerning the admission at his trial of allegedly prejudicial evidence, is so lacking in merit as to be plainly frivolous. It would not justify an appeal *in forma pauperis*. But petitioner also raises a jurisdictional question, *viz.*, whether he could constitutionally be tried by a court presided over by a retired judge of the Court of Customs and Patent Appeals. This question, therefore, would have warranted review by the Court of Appeals.

Solution of this problem will call into consideration a number of subsidiary questions. What are the characteristics of an Article III court? Is the Court of Customs and Patent Appeals an Article III court? If so, when did it become such a court? Assuming *arguendo* that the Court of Customs and Patent Appeals has been an Article III court only since 1958 (when Congress enacted legislation conferring that status), what is the bearing of this fact on the status of a judge who retired from the court prior to that time?

These are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. They do not involve the evaluation of evidence or the application of rules of local law or special familiarity and experience with the materials and the underlying considerations on which judgment must be based. On the contrary, the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court. Indeed, the questions posed would be entirely suitable for certification to this Court by a lower

FRANKFURTER, J., dissenting.

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appellate court. See 28 U. S. C. § 1254. Cf. *United States v. Mayer*, 235 U. S. 55. Furthermore, the administration of justice in the federal courts demands a speedy disposition of this dispute. Until it is settled, assignment of retired judges to help clear dockets in federal courts under a litigious cloud will be hampered by uncertainty.

Nothing could be more obvious than that the Court of Appeals, no matter how it may decide the question now put in its keeping, will have it only temporarily. The inevitable final destination of the case is this Court. Decision here should not be delayed by wastefully time-consuming remand to the Court of Appeals of a question that is already before us.