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VOLUME 386

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1966

JANUARY 26 THROUGH MAY 8, 1967

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, 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.

RETIRED.

STANLEY REED, Associate Justice.

RAMSEY CLARK, Attorney General.*
THURGOOD MARSHALL, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

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*Mr. Clark, who had been Acting Attorney General since October 3, 1966, was nominated by President Johnson on February 28, 1967, to be Attorney General; the nomination was confirmed by the Senate on March 2, 1967; he was commissioned on the same date; and he took the oath on March 10, 1967. He was presented to the Court on March 14, 1967. (See *post*, p. v.)

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

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

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

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

October 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

PRESENTATION OF THE ATTORNEY GENERAL.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, MARCH 14, 1967.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

Mr. Solicitor General Marshall presented the Honorable Ramsey Clark, Attorney General of the United States.

THE CHIEF JUSTICE said:

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

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1964 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

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(D) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1966.

MILLER *v.* PATE, WARDEN.

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

No. 250. Argued January 11–12, 1967.—Decided February 13, 1967.

Petitioner was tried and convicted for rape-murder. A crucial element of the circumstantial evidence against him was a pair of men's underwear shorts, allegedly petitioner's, bearing stains identified by prosecution testimony as blood of the victim's blood type. The judgment of conviction was upheld on appeal. In a subsequent habeas corpus proceeding petitioner was first allowed to have the shorts subjected to chemical analysis, which revealed that the stains were not blood, but paint. It was further established that the prosecution knew of the paint stains at the time of trial. The District Court, for another reason, ordered petitioner's release or prompt retrial. The Court of Appeals reversed. *Held:* The Fourteenth Amendment cannot tolerate a state criminal conviction secured by the knowing use of false evidence. *Mooney* v. *Holohan,* 294 U. S. 103, followed. Pp. 2–7.

342 F. 2d 646, reversed and remanded.

Willard J. Lassers argued the cause for petitioner. With him on the briefs were *Arthur G. Greenberg* and *Harry Golter.*

Richard A. Michael, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *William G. Clark,* Attorney General.

Maurice Rosenfield argued the cause for Radio Station WAIT (Chicago) et al., as *amici curiae*. With him on the briefs was *William R. Ming, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On November 26, 1955, in Canton, Illinois, an eight-year-old girl died as the result of a brutal sexual attack. The petitioner was charged with her murder.

Prior to his trial in an Illinois court, his counsel filed a motion for an order permitting a scientific inspection of the physical evidence the prosecution intended to introduce.[1] The motion was resisted by the prosecution and denied by the court. The jury trial ended in a verdict of guilty and a sentence of death. On appeal the judgment was affirmed by the Supreme Court of Illinois.[2] On the basis of leads developed at a subsequent unsuccessful state clemency hearing, the petitioner applied to a federal district court for a writ of habeas corpus.[3] After a hearing, the court granted the writ and ordered the petitioner's release or prompt retrial.[4] The Court of Ap-

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[1] "Comes now the defendant, Lloyd Eldon Miller Junior, by William H. Malmgren, his attorney, and hereby moves the Court to enter an order permitting defendant to make, or cause to be made, upon such terms and conditions as to the court seems necessary to adequately insure the interests of the parties, a scientifice [*sic*] examination of the physical evidence to be introduced by the People in this cause and, to that end, enter an order requiring the People, by their attorney, to produce and make available all of said evidence for such an examination.

"For cause, movant says that such an examination is necessary to adequately prepare the defense herein."

[2] 13 Ill. 2d 84, 148 N. E. 2d 455.

[3] An earlier federal habeas corpus application had been unsuccessful. *Miller* v. *Pate*, 300 F. 2d 414.

[4] 226 F. Supp. 541.

peals reversed,[5] and we granted certiorari to consider whether the trial that led to the petitioner's conviction was constitutionally valid.[6] We have concluded that it was not.[7]

There were no eyewitnesses to the brutal crime which the petitioner was charged with perpetrating. A vital component of the case against him was a pair of men's underwear shorts covered with large, dark, reddish-brown stains—People's Exhibit 3 in the trial record. These shorts had been found by a Canton policeman in a place known as the Van Buren Flats three days after the murder. The Van Buren Flats were about a mile from the scene of the crime. It was the prosecution's theory that the petitioner had been wearing these shorts when he committed the murder, and that he had afterwards removed and discarded them at the Van Buren Flats.

During the presentation of the prosecution's case, People's Exhibit 3 was variously described by witnesses in such terms as the "bloody shorts", and "a pair of jockey shorts stained with blood." Early in the trial the victim's mother testified that her daughter "had type 'A' positive blood." Evidence was later introduced to show that the petitioner's blood "was of group 'O.' "

Against this background the jury heard the testimony of a chemist for the State Bureau of Crime Identification. The prosecution established his qualifications as an expert, whose "duties include blood identification, grouping and typing both dry and fresh stains," and who had "made approximately one thousand blood typing analyses

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[5] 342 F. 2d 646.

[6] 384 U. S. 998.

[7] The petitioner has relied upon several different grounds for reversal of the judgment of the Court of Appeals. In deciding the case upon only one of those grounds, we intimate no view as to the merits of the others.

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while at the State Bureau." His crucial testimony was as follows:

> "I examined and tested 'People's Exhibit 3' to determine the nature of the staining material upon it. The result of the first test was that this material upon the shorts is blood. I made a second examination which disclosed that the blood is of human origin. I made a further examination which disclosed that the blood is of group 'A.' "

The petitioner, testifying in his own behalf, denied that he had ever owned or worn the shorts in evidence as People's Exhibit 3. He himself referred to the shorts as having "dried blood on them."

In argument to the jury the prosecutor made the most of People's Exhibit 3:

> "Those shorts were found in the Van Buren Flats, with blood. What type blood? Not 'O' blood as the defendant has, but 'A'—type 'A.' "

And later in his argument he said to the jury:

> "And, if you will recall, it has never been contradicted the blood type of Janice May was blood type 'A' positive. Blood type 'A.' Blood type 'A' on these shorts. It wasn't 'O' type as the defendant has. It is 'A' type, what the little girl had."

Such was the state of the evidence with respect to People's Exhibit 3 as the case went to the jury. And such was the state of the record as the judgment of conviction was reviewed by the Supreme Court of Illinois. The "blood stained shorts" clearly played a vital part in the case for the prosecution. They were an important link in the chain of circumstantial evidence against the petitioner,[8] and, in the context of the revolting crime with

[8] In affirming the petitioner's conviction, the Supreme Court of Illinois stated that "it was determined" that the shorts "were stained

which he was charged, their gruesomely emotional impact upon the jury was incalculable.[9]

So matters stood with respect to People's Exhibit 3, until the present habeas corpus proceeding in the Federal District Court.[10] In this proceeding the State was ordered to produce the stained shorts, and they were admitted in evidence. It was established that their appearance was the same as when they had been introduced at the trial as People's Exhibit 3. The petitioner was permitted to have the shorts examined by a chemical microanalyst. What the microanalyst found cast an extraordinary new light on People's Exhibit 3. The reddish-brown stains on the shorts were not blood, but paint.

The witness said that he had tested threads from each of the 10 reddish-brown stained areas on the shorts, and that he had found that all of them were encrusted with mineral pigments ". . . which one commonly uses in the preparation of paints." He found "no traces of human blood." [11] The State did not dispute this testimony, its counsel contenting himself with prevailing upon the witness to concede on cross-examination that he could not swear that there had never been any blood on the shorts.[12]

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with human blood from group A," and referred to the petitioner's "bloody shorts." 13 Ill. 2d, at 89 and 106, 148 N. E. 2d, at 458 and 467.

[9] People's Exhibit 3 was forwarded here as part of the record, and we have accordingly had an opportunity to see it with our own eyes.

[10] At the state clemency hearing, some additional evidence was adduced to show that the shorts had not belonged to the petitioner.

[11] There were two other discolored areas on the shorts, one black and the other "a kind of yellowish color." A thread from the first of these areas contained material "similar to a particle of carbon." "[N]o particulates showed up" on the thread taken from the other.

[12] The witness pointed out, however, that "blood substances are detectable over prolonged periods. That is, there are records of researches in which substances extracted from Egyptian mummies have been identified as blood."

It was further established that counsel for the prosecution had known at the time of the trial that the shorts were stained with paint. The prosecutor even admitted that the Canton police had prepared a memorandum attempting to explain "how this exhibit contains all the paint on it."

In argument at the close of the habeas corpus hearing, counsel for the State contended that "[e]verybody" at the trial had known that the shorts were stained with paint.[13] That contention is totally belied by the record. The microanalyst correctly described the appearance of the shorts when he said, "I assumed I was dealing . . . with a pair of shorts which was heavily stained with blood. . . . [I]t would appear to a layman . . . that what I see before me is a garment heavily stained with blood." [14] The record of the petitioner's trial reflects the prosecution's consistent and repeated misrepresentation that People's Exhibit 3 was, indeed, "a garment heavily stained with blood." The prosecution's whole theory with respect to the exhibit depended upon that misrepresentation. For the theory was that the victim's assailant had discarded the shorts *because* they were stained with blood. A pair of paint-stained shorts, found in an abandoned building a mile away from the scene of the crime, was virtually valueless as evidence against the petitioner.[15] The prosecution deliberately misrepresented the truth.

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[13] "Now, then, concerning the paint on the shorts, the petitioner yesterday introduced scientific evidence to prove that there was paint on the shorts, a fact that they knew without scientific evidence. Everybody knew, in connection with the case, whoever looked at the shorts, and I think that the Court can look at them now and know there is paint on them. This is not anything that was not disclosed to anybody. It is very obvious by merely looking at them . . . ."

[14] See n. 9, *supra*.

[15] The petitioner was not a painter but a taxi driver.

More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan,* 294 U. S. 103. There has been no deviation from that established principle. *Napue* v. *Illinois,* 360 U. S. 264; *Pyle* v. *Kansas,* 317 U. S. 213; cf. *Alcorta* v. *Texas,* 355 U. S. 28. There can be no retreat from that principle here.

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

It is so ordered.

FLORIDA EAST COAST RAILWAY CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 715. Decided February 13, 1967.

256 F. Supp. 986, affirmed.

A. Alvis Layne for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Raymond M. Zimmet* for the United States et al.; *Richard A. Hollander* for Seaboard Air Line Railroad Co.; and *Thomas C. Britton* and *St. Julien P. Rosemond* for Dade County et al., appellees.

PER CURIAM.

The motion of Dade County et al. to join Seaboard Air Line Railroad Company in its motion to affirm is granted.

The motions to affirm are granted and the judgment is affirmed.

D'AMICO *v.* PENNSYLVANIA ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 858. Decided February 13, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WOODINGTON *v.* WISCONSIN.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 801. Decided February 13, 1967.

31 Wis. 2d 151, 142 N. W. 2d 810, 143 N. W. 2d 753, appeal dismissed and certiorari denied.

Jack R. De Witt for appellant.

Bronson C. La Follette, Attorney General of Wisconsin, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WEISS ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 904. Decided February 13, 1967.

263 F. Supp. 184, vacated and remanded.

William D. Zabel and *Melvin L. Wulf* for appellants.

Solicitor General Marshall for appellees.

PER CURIAM.

The judgment of the court below is vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint as moot.

FENSTER *v.* LEARY, COMMISSIONER OF POLICE OF THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 905. Decided February 13, 1967.

264 F. Supp. 153, affirmed.

Emanuel Redfield for appellant.

J. Lee Rankin for Leary, and *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General, for Koota, appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

RISCH *v.* RISCH.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 963, Misc. Decided February 13, 1967.

395 S. W. 2d 709, appeal dismissed and certiorari denied.

Ted Musick for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

STONEHAM *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 18, Misc. Decided February 13, 1967.

389 S. W. 2d 468, appeal dismissed.

Charles E. Benson for appellant.

PER CURIAM.

The appeal is dismissed.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS would reverse the judgment of the court below for the reasons stated in the opinion of THE CHIEF JUSTICE in *Spencer* v. *Texas*, 385 U. S. 554, 569.

BEER *v.* ATTORNEY GENERAL OF CALIFORNIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 858, Misc. Decided February 13, 1967.

Affirmed.

PER CURIAM.

An application for a stay addressed to MR. JUSTICE DOUGLAS, and by him referred to the Court, is denied.

The judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

MILANI *v.* ILLINOIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 414, Misc. Decided February 13, 1967.

Certiorari granted; 34 Ill. 2d 524, 216 N. E. 2d 816, reversed.

Petitioner *pro se.*

William G. Clark, Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Illinois is reversed. *Douglas* v. *California,* 372 U. S. 353.

DALE *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1030, Misc. Decided February 13, 1967.

Appeal dismissed and certiorari denied.

Peter D. Bogart for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ALLISON *v.* UNITED STATES.

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

No. 454, Misc. Decided February 13, 1967.

Certiorari granted; 358 F. 2d 60, vacated and remanded.

Petitioner *pro se.*

Solicitor General Marshall for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit with instructions to grant the petitioner an appeal with counsel.

HOLMES *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1063, Misc. Decided February 13, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

RUNDLE, CORRECTIONAL SUPERINTENDENT *v.* JOHNSON.

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

No. 14. Decided February 13, 1967.

Certiorari granted; 349 F. 2d 416, reversed and remanded.

Frank P. Lawley, Jr., for petitioner.

Leonard J. D. Myers for respondent.

PER CURIAM.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Third Circuit is reversed, *Spencer* v. *Texas,* 385 U. S. 554, and the case is remanded to that court for consideration of the unresolved issues.

MR. JUSTICE DOUGLAS dissents from the reversal of the Court of Appeals in *United States* v. *Rundle,* 349 F. 2d 416, which affirmed *United States* v. *Rundle,* 243 F. Supp. 695, 700, where the District Court granted the petition for habeas corpus since the introduction of the accused's "prior criminal record for obstructing a railroad was so fundamentally unfair as to deny him due process of law."

ZUCKERMAN ET AL. *v.* GREASON.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

No. 71. Decided February 13, 1967.

Certiorari granted; 23 App. Div. 2d 825, 259 N. Y. S. 2d 963, vacated and remanded.

Leonard Feldman for petitioners.

Samuel Greason, respondent, *pro se.*

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for reconsideration in light of *Spevack* v. *Klein,* 385 U. S. 511.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART would affirm the judgment below for the reasons set forth in MR. JUSTICE HARLAN's dissenting opinion in *Spevack* v. *Klein,* 385 U. S., at 520.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Garrity* v. *New Jersey,* and *Spevack* v. *Klein,* 385 U. S., at 530.

BARLOW *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 109. Decided February 13, 1967.

398 S. W. 2d 933, appeal dismissed.

Alto B. Cervin for appellant.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Charles B. Swanner,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS would reverse the judgment of the court below for the reasons stated in the opinion of THE CHIEF JUSTICE in *Spencer* v. *Texas,* 385 U. S. 554, 569.

KAYE *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 300. Decided February 13, 1967.

Certiorari granted; 24 App. Div. 2d 345, 266 N. Y. S. 2d 69, vacated and remanded.

Morton Liftin for petitioner.

Angelo T. Cometa for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, First Judicial Department, for reconsideration in light of *Spevack* v. *Klein,* 385 U. S. 511.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART would affirm the judgment below for the reasons stated in the dissenting opinions of MR. JUSTICE HARLAN in *Spevack* v. *Klein,* 385 U. S., at 520, and *Garrity* v. *New Jersey,* 385 U. S. 493, 500.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Garrity* v. *New Jersey,* and *Spevack* v. *Klein,* 385 U. S., at 530.

CHAPMAN ET AL. *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 95. Argued December 7–8, 1966.—Decided February 20, 1967.

Petitioners were convicted following a California state criminal trial during which the prosecutor, as then permitted by a state constitutional provision, extensively commented on their failure to testify. The trial judge also charged the jury that it could draw adverse inferences from such failure. After the trial, but before petitioners' appeal was considered, the state constitutional provision was invalidated by *Griffin* v. *California,* 380 U. S. 609. Though admitting that petitioners had been denied a federal constitutional right, the California Supreme Court, applying the State Constitution's harmless-error provision, upheld the convictions. *Held:*

1. This Court has jurisdiction to formulate a harmless-error rule that will protect a defendant's federal right under the Fifth and Fourteenth Amendments to be free from state penalties for not testifying in his criminal trial. Pp. 20–21.

2. Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was harmless beyond a reasonable doubt. Pp. 21–24.

3. The State in this case did not demonstrate beyond a reasonable doubt that the prosecutor's repetitive comments to the jury, and the trial court's instruction concerning the petitioners' failure to testify did not contribute to their convictions. Pp. 24–26.

63 Cal. 2d 178, 404 P. 2d 209, reversed.

Morris Lavine argued the cause and filed briefs for petitioners.

Arlo E. Smith, Chief Assistant Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners, Ruth Elizabeth Chapman and Thomas LeRoy Teale, were convicted in a California state court

upon a charge that they robbed, kidnaped, and murdered a bartender. She was sentenced to life imprisonment and he to death. At the time of the trial, Art. I, § 13, of the State's Constitution provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Both petitioners in this case chose not to testify at their trial, and the State's attorney prosecuting them took full advantage of his right under the State Constitution to comment upon their failure to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom.[1] The trial court also charged the jury that it could draw adverse inferences from petitioners' failure to testify.[2] Shortly after the trial, but before petitioners' cases had been considered on appeal by the California Supreme Court, this Court decided *Griffin* v. *California,* 380 U. S. 609, in which we held California's constitutional provision and practice invalid on the ground that they put a penalty on the exercise of a person's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the

[1] Excerpts of the prosecutor's argument are reproduced in the Appendix to this opinion.

[2] The trial judge charged the jury:

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. . . ."

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United States Constitution and made applicable to California and the other States by the Fourteenth Amendment. See *Malloy* v. *Hogan,* 378 U. S. 1. On appeal, the State Supreme Court, 63 Cal. 2d 178, 404 P. 2d 209, admitting that petitioners had been denied a federal constitutional right by the comments on their silence, nevertheless affirmed, applying the State Constitution's harmless-error provision, which forbids reversal unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." [3] We granted certiorari limited to these questions:

> "Where there is a violation of the rule of *Griffin* v. *California,* 380 U. S. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" 383 U. S. 956–957.

In this Court petitioners contend that both these questions are federal ones to be decided under federal law; that under federal law we should hold that denial of a federal constitutional right, no matter how unimportant, should automatically result in reversal of a conviction, without regard to whether the error is considered harmless; and that, if wrong in this, the various comments on petitioners' silence cannot, applying a federal standard, be considered harmless here.

I.

Before deciding the two questions here—whether there can ever be harmless constitutional error and whether the error here was harmless—we must first decide whether

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[3] Cal. Const., Art. VI, § 4½:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

state or federal law governs. The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the "guardians of those rights." [4] Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.

II.

We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a hold-

[4] "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

ing, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111.[5] None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

III.

In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What

[5] 28 U. S. C. § 2111 provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Fed. Rule Crim. Proc. 52 (a) provides:

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

See also Fed. Rule Civ. Proc. 61.

harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.

The federal rule emphasizes "substantial rights" as do most others. The California constitutional rule emphasizes "a miscarriage of justice," [6] but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of "overwhelming evidence." [7] We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy* v. *Connecticut*, 375 U. S. 85. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.*, at 86–87. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived

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[6] The California statutory rule, like the federal rule, provides that "[a]fter hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." Cal. Pen. Code § 1258.

[7] The California Supreme Court in this case did not find a "miscarriage of justice" as to petitioner Teale, because it found from "other substantial evidence, [that] the proof of his guilt must be deemed overwhelming." 63 Cal. 2d, at 197, 404 P. 2d, at 220.

[8] See, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge).

of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.[9] There is little, if any, difference between our statement in *Fahy* v. *Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test,[10] it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.

IV.

Applying the foregoing standard, we have no doubt that the error in these cases was not harmless to petitioners. To reach this conclusion one need only glance at the prosecutorial comments compiled from the record by petitioners' counsel and (with minor omissions) set forth in the Appendix. The California Supreme Court

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[9] See generally 1 Wigmore, Evidence § 21 (3d ed. 1940).

[10] Cf. *Woodby* v. *Immigration Service,* 385 U. S. 276.

fairly summarized the extent of these comments as follows:

> "Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime." 63 Cal. 2d, at 196, 404 P. 2d, at 220.

Thus, the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, 63 Cal. 2d, at 197, 404 P. 2d, at 220, it was also a case in which, absent the constitu-

tionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. See, *e. g., Payne* v. *Arkansas,* 356 U. S. 560. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Argument and Comments by the Prosecutor on the Failure of the Defendants to Take the Witness Stand

"Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves.

. . . . . .

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once again, the only

person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both.

. . . . . .

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know, I wasn't out there, you were not out there. You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that they couldn't testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are—you or I or anyone else is not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes.

"So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point

them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity.

. . . . . .

"Now whether or not Mr. Teale had any other money at the time or was in the habit of concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas Leroy Teale. Ladies and gentlemen, he has not seen fit to tell you about that. But certainly we know that bogus checks are being written, and as I recall we know that—I don't—we may infer, if you wish to believe there is an inference which Mr. Teale could have cleared up, that that was all the money that he had, and he didn't clear it up, so you may draw an adverse inference from that, that that was all the money he had, or in fact that he—at that time he was in desperate need of funds, and you know that through some kind of a discussion between these two defendants in regard to Mr. Teale shooting dice, that this was all he had.

. . . . . .

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on why

these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentleman that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen, besides this that I mentioned to you before, that since you have no testimony from the stand, you must surmise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court. . . .

"So, we know, ladies and gentlemen, that they had the motive, we know that they had the means, we know that they had the opportunity. We also know that they were at that scene, ladies and gentlemen, they were with that man just a matter of minutes before he was shot in the head three times with a gun similar to People's Exhibit No. 12. Now, if they weren't there, and I think the evidence clearly shows they were, scientific evidence,

that we'll talk about a little later. Once again, why don't they come up and raise their right hand and tell you about it?

"To me they are charged with serious crimes, ladies and gentlemen. They can come up and testify and then it will be evidence for you to consider in this case. If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination.

. . . . . .

"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, therefore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer.

. . . . . .

"So you can see that whichever one of these defendants shot him, and once again, ladies and gentlemen, here is an area that I don't know who shot him, and you don't know who shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right

hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him.

. . . . .

"We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard, and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't, because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote that name, and why that five was changed to a six. We could have it. But we don't, because either one or both of the defendants, neither one, have even seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination.

. . . . .

"We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows a consciousness of guilt.

. . . . .

"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each one of you can certainly infer as to what it very readily could mean, especially if one has in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means, then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand. She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—

. . . . . .

"He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professional and they know what they are doing and one of them had a gun out and he never had an opportunity

to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they are under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it. I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him and it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is.

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition, and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that

you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you you can draw an adverse inference.

. . . . . .

"Photographs. You've seen them, ladies and gentlemen, but as you recall the doctor now is pointing, and this is the picture of the deceased, the back of his head, as to where he was shot in the back of the head, you recall the other one as to where he was shot in the side of the head, right here on the left in the general area of where the glasses would be, I think it's a most reasonable inference, ladies and gentlemen. Now, once again we have had no testimony except what would seem clearly logical from the experts, the way the body was found, where he'd been shot, what he'd been shot with, and the position of the glasses in relation to the body at the death scene, we had no other testimony. Certainly none from the defendants in this case.

. . . . . .

". . . Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence.

. . . . . .

"You have two box lids, two of them, and you've heard the questions concerning them, they would indicate that they were sent to a Mrs. Howard Smith at 2206 Castle Avenue, St. Joseph, Missouri, and I believe it was on

the 11th of October, says from Thomas Teale, 1105 Del Norte, Eureka, California, they both say essentially the same thing, 10-11, there's no year, but I think we can surely infer it was in 1962, and apparently from Reno.

"Now, ladies and gentlemen, there's been a lot of talk, suggestion, and whatever you want to call it, I'll call it a smoke screen, in reference to these two lids that came off, and we'll assume there was a box underneath them, I don't think there's any question about that. Where have you ever heard from that witness stand, ladies and gentlemen, what was ever in those boxes? Now, you've heard some self-serving declarations that are not admitted into evidence because they come through someone else who in some fashion gets testimony before you, but no cross-examination of the original party who is giving that kind of testimony, and you can't consider it.

. . . . .

"Thank you, Your Honor. Counsel has interjected himself into this, and he'll have every opportunity to make his own comments, and I'm sure he'll most adequately express himself when the time comes. I'm telling you, ladies and gentlemen, that the only evidence that you have is that you have two box tops. Now, he's just suggested to you, so I'll answer this ahead of time, but the evidence is clear that Mr. Sperling packed these boxes, but you will recall Mr. Sperling was not at the original scene when they were taken. Maybe it isn't unusual to infer there may have been clothes, but what I'm getting at is this is what clothing? You don't even know there was clothing in them when they were shipped. It could have been other household articles. And even if we assume it was clothing, and that's not unreasonable because basically these are the items we found and brought back with us to Lodi, we don't know which clothing she shipped at this time. Couldn't this be cleared up for us, though? It could be cleared up so

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easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.

. . . . .

"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense. Mr. Fransen said in the beginning that what happened in this case is not as the prosecution described it. That the facts will show an entirely different version. Well, I haven't heard any facts, ladies and gentlemen, that show an entirely different version.

. . . . .

"We went through a business with a—dress. We held it up, and then we pointed out the one that she's wearing now, and frankly, ladies and gentlemen, the only one in the Court room that can tell you whether or not it is the same dress is Ruth Elizabeth Chapman, because you know from the evidence no one has ever had an opportunity to examine that dress to see whether it has been dry cleaned, whether or not it was purchased—when

it was purchased or the labels on it or anything else. All that has been done in this thing is to wear a blue knit dress, ladies and gentlemen, which is similar to the one that—she in fact apparently wore on that night.

"So, I suppose that just through the wearing of it, having it in Court, it is hoped that you will draw something from it, which I have heard no testimony on the stand, except that it looks like or is similar to it. . . .

"But what she told that doctor is not evidence in this case, and yet you know that repeatedly and over and over and over again Mr. Johnson in every way that he could, he would get the story again before you. Now, why? You know why. He did it because he hopes that you wouldn't forget it, although he could put it and make it evidence in this case, which it is not, and if you put Ruth Elizabeth Chapman up on that stand to testify, so it is one way of doing, ladies and gentlemen, if you are going to be taken in by it, indirectly what you can't do directly, because there is no other way that he can get that thing before you without putting her up on that stand.

. . . . . .

"But she gave a story on the night of the 17th and early hours of the 18th. She was in San Francisco. Now, why pick on that date so specifically if you are not—if not to beware of that date, that you want to beware. Well, he says, 'You have given two different stories. Do you have problems with blackouts or excessive drinking', and she says 'No.' And I tell you, ladies and gentlemen, that anybody, and there is no evidence to the contrary in this case, if you don't honestly remember what occurred and you know, you are in a situation where there is a fugitive warrant and you have just been arrested and you in all honesty don't remember where you were, that is the first thing that you are going to say. You're not going to sit up and trump up excuses

and make out a story which you know to be a lie about specific dates and times. And, ladies and gentlemen, there is no legal evidence before you that it is anything to the contrary, because the only one now that can come up and tell you has not seen fit to do so.

. . . . . .

". . . Mr. Johnson would have you believe that everything she said was the truth. I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman. Now, as Mr. Ferguson told you, it is their constitutional right, and I won't go into that again, because I think he handled it very clearly as well as the others, but that is within her right to do as she sees fit. But, you can consider it for the purposes and under the circumstances that Mr. Ferguson indicated a number of times.

. . . . . .

"Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, which ever way you want to look at it, psychiatrically or otherwise, seems to have backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Dr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, the sanctity and

worthiness of evidence would have to come from her lips, hers on the stand here. Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Who said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, it's an interesting thing that the only witnesses who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all. They don't have to take the stand. That's been gone over many times, but you know it would be a fine thing, very fine deed if persons who perpetrated offenses gave a story, put a story on by somebody else, have somebody else speak for you—wouldn't it? It would be a very interesting thing. You would never have the benefit of evaluating their credibility. This is what Mr. Johnson would have you believe that we should have done. Monday morning quarterbacking. And I submit to you—you know, you—you have heard much about lawyers being referred to as 'mouthpieces.' It's actually a very rare thing, really, that that type of appellation is applicable to lawyers really. But, I think you have seen a demonstration here, and I'm not saying it in rancor, not anything of it at all, because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson. A 'mouthpiece.'

. . . . .

"Maybe there is another reasonable one, other than the fact that it was Adcock's blood, because all three who were in the car had type A. Maybe there is, but

you haven't heard it. You haven't heard any reasonable explanation of that. So, you can draw an adverse inference that it was Billy Dean Adcock's blood. . . .

"Mr. Johnson said these several things which I will go over again. The evidence showed here that she bought two guns for Teale. What evidence? No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself. This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all.

. . . . . .

"So far as the motive is concerned for the murder in a perpetration of a robbery, the motive was set, to gain for their own desires and lusts and so forth, to gain from it. It was a crime of gain, and perhaps another thing too, in deciding—we don't know who pulled the trigger—we may never know. The defendants haven't indicated it, except through Teale in one—Mr. Vowell's testimony, as to what Mr. Teale said, but that is not admissible

against, and you shouldn't consider it against, Ruth Elizabeth Chapman, but maybe the circumstances of who pulled the trigger might have been a factor that might have been important to you. Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too.

. . . . .

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too.

. . . . .

"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort [*sic*]. You don't know that as far as pulling the trigger. But, this is

a factor which has not been brought to light, and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that.

. . . . . .

"I have gone into the statement here and why it hasn't been presented. If you are going to decide things such as character and sympathy, the law says you may take into consideration, how can you do it by a statement? Now, we are talking about this phase of the case. This now. You like to know that persons get—if there is something about their character that they can tell you, or something about their background that they can tell you, you like to hear it from them, because you have a very serious and difficult task, and the fact that they chose to rest upon whatever evidence there is here in the case in chief is something that you can consider in deciding whether or not they had been fair with you.

"This is the chance that they take by not having taken the stand."

MR. JUSTICE STEWART, concurring in the result.

In devising a harmless-error rule for violations of federal constitutional rights, both the Court and the dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were "harmless." Illustrations of the principle are legion.

When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt. As we stated in *Lynumn* v. *Illinois,* 372 U. S. 528, 537, the argument that the error in admitting such a confession "was a harmless one . . . is an impermissible doctrine." That conclu-

sion has been accorded consistent recognition by this Court. *Malinski* v. *New York,* 324 U. S. 401, 404; *Payne* v. *Arkansas,* 356 U. S. 560, 568; *Spano* v. *New York,* 360 U. S. 315, 324; *Haynes* v. *Washington,* 373 U. S. 503, 518–519; *Jackson* v. *Denno,* 378 U. S. 368, 376–377. Even when the confession is completely "unnecessary" to the conviction, the defendant is entitled to "a new trial free of constitutional infirmity." *Haynes* v. *Washington, supra,* at 518–519.[1]

When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U. S. 60, 76. That, indeed, was the whole point of *Gideon* v. *Wainwright,* 372 U. S. 335, overruling *Betts* v. *Brady,* 316 U. S. 455. Even before trial, when counsel has not been provided at a critical stage, "we do not stop to determine whether prejudice resulted." *Hamilton* v. *Alabama,* 368 U. S. 52, 55; *White* v. *Maryland,* 373 U. S. 59, 60.

A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. *Tumey* v. *Ohio,* 273 U. S. 510, 535. To try a defendant in a community that has been exposed to publicity highly

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[1] None of these decisions suggests that the rejection of a harmless-error rule turns on any unique evidentiary impact that confessions may have. *Haynes* v. *Washington,* 373 U. S. 503, specifically contradicts that notion. In addition to the confession found inadmissible by this Court, the defendant in *Haynes* had given two prior confessions, the admissibility of which was not disputed, and "substantial independent evidence" of guilt existed. The Court accepted the prosecution's contention that the inadmissible confession played little if any role in the conviction.

adverse to the defendant is *per se* ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him. *Sheppard* v. *Maxwell,* 384 U. S. 333, 351–352; cf. *Rideau* v. *Louisiana,* 373 U. S. 723, 727. See also *Estes* v. *Texas,* 381 U. S. 532, 542–544; 562–564 (WARREN, C. J., concurring); 593–594 (HARLAN, J., concurring).

When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict. *Bollenbach* v. *United States,* 326 U. S. 607, 614–615. Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. *Stromberg* v. *California,* 283 U. S. 359, 367–368; *Williams* v. *North Carolina,* 317 U. S. 287, 292. In a long line of cases leading up to and including *Whitus* v. *Georgia,* 385 U. S. 545, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant.

To be sure, constitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another. I would not foreclose the possibility that a harmless-error rule might appropriately be applied to some constitutional violations.[2] Indeed, one source of my disagreement with the

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[2] For example, quite different considerations are involved when evidence is introduced which was obtained in violation of the Fourth and Fourteenth Amendments. The exclusionary rule in that context balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence. The resolution of these values with interests of judicial economy might well dictate a harmless-error rule for such violations. Cf. *Fahy* v. *Connecticut,* 375 U. S. 85, 92 (dissenting opinion).

Court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.

But I see no reason to break with settled precedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of *Griffin* v. *California,* 380 U. S. 609.[3] The adoption of any harmless-error rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.

A rule of automatic reversal would seem best calculated to prevent clear violations of *Griffin* v. *California.* This case is one in which the trial occurred before the *Griffin* decision but which was not final on appeal until afterwards, so the doctrine of prospectivity announced in *Tehan* v. *Shott,* 382 U. S. 406, does not reach it. But the number of such cases is strictly limited. Prosecutors are unlikely to indulge in clear violations of *Griffin* in the future, and if they do I see no reason why the sanction of reversal should not be the result.

For these reasons I believe it inappropriate to inquire whether the violation of *Griffin* v. *California* that occurred in this case was harmless by any standard, and accordingly I concur in the reversal of the judgment.

MR. JUSTICE HARLAN, dissenting.

The Court today holds that the harmlessness of a trial error in a state criminal prosecution, such error

[3] Earlier this Term, in *O'Connor* v. *Ohio,* 385 U. S. 92, we reversed a conviction on the basis of *Griffin* v. *California,* 380 U. S. 609, without pausing to consider whether the comment on the defendant's silence might have been harmless error under the rule the Court announces today, or any other harmless-error rule.

resulting from the allowance of prosecutorial comment barred by the Fourteenth Amendment, must be determined under a "necessary rule" of federal law. The Court imposes a revised version of the standard utilized in *Fahy* v. *Connecticut,* 375 U. S. 85, on state appellate courts, not because the Constitution requires that particular standard, but because the Court prefers it.

My understanding of our federal system, and my view of the rationale and function of harmless-error rules and their status under the Fourteenth Amendment, lead me to a very different conclusion. I would hold that a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment. Believing this to be the situation here, I would dismiss the writ. *Viator* v. *Stone,* 336 U. S. 948.

I.

The key to the Court's opinion can, I think, be found in its statement that it cannot "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights," and that "in the absence of appropriate congressional action" the Court must fashion protective rules. The harmless-error rule now established flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself. The Court appears to acknowledge that other harmless-error formulations would be constitutionally permissible. It certainly indicates that Congress, for example, could impose a different formulation.[1]

I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal

[1] For myself, I intimate no view on congressional power with respect to state courts in this regard.

constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found. The Fourteenth Amendment guarantees individuals against invasions by the States of fundamental rights, *Palko* v. *Connecticut,* 302 U. S. 319, and under more recent decisions of this Court some of the specifics of the Bill of Rights as well. See, *e. g.,* in the context of this case, *Malloy* v. *Hogan,* 378 U. S. 1; *Griffin* v. *California,* 380 U. S. 609. It thus serves as a limitation on the actions of the States, and lodges in this Court the same power over state "laws, rules, and remedies" as the Court has always had over the "laws, rules, and remedies" created by Congress. This power was classically described by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch 137, 178:

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. . . ."

Nothing in the Fourteenth Amendment purports to give federal courts supervisory powers, in the affirmative sense of *McNabb* v. *United States,* 318 U. S. 332, over state courts. See *id.,* at 340–341. Moreover, where the constitutional power described by Marshall has been invoked, the Court has always been especially reluctant to interfere with state procedural practices. See *Spencer* v. *Texas,* 385 U. S. 554. From the beginning of the federal Union, state courts have had power to decide issues of federal law and to formulate "authoritative laws, rules, and remedies" for the trial of those issues. The primary responsibility for the trial of state criminal cases still rests

upon the States, and the only constitutional limitation upon these trials is that the laws, rules, and remedies applied must meet constitutional requirements. If they do not, this Court may hold them invalid. The Court has no power, however, to declare which of many admittedly constitutional alternatives a State may choose.[2] To impose uniform national requirements when alternatives are constitutionally permissible would destroy that opportunity for broad experimentation which is the genius of our federal system.

Even assuming that the Court has the power to fashion remedies and procedures binding on state courts for the protection of particular constitutional rights, I could not agree that a general harmless-error rule falls into that category. The harmless-error rules now utilized by all the States and in the federal judicial system are the product of judicial reform early in this century. Previously most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts through the efforts of Baron Parke, and held that any error of substance required a reversal of conviction. See Orfield, Criminal Appeals in America 190. The reform movement, led by authorities like Roscoe Pound and Learned Hand, resulted in allowing courts to discon-

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[2] Cases in which lower federal courts, acting under the authority of the Fourteenth Amendment, as expanded by this Court's decision in *Reynolds* v. *Sims,* 377 U. S. 533, have promulgated their own reapportionment plans may superficially be thought to support such a power. *E. g., Reynolds* v. *State Election Board,* 233 F. Supp. 323. But such cases are quite apart from the present one because they arise from a situation where some positive constitutional action is a necessity and thus require the exercise of special equity powers. Here the ordinary remedy of striking down unconstitutional harmless-error rules and applications is sufficient to deal with any problem that may arise. There is no necessity for a State to have a harmless-error rule at all.

tinue using reversal as a "necessary" remedy for particular errors and "to substitute judgment for the automatic application of rules . . . ." 4 Barron, Federal Practice and Procedure § 2571, at 438. This Court summarized the need for that development in the leading case of *Kotteakos* v. *United States,* 328 U. S. 750, 759:

> "§ 269 [a federal harmless error provision] and similar state legislation grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after § 269 had become law, that courts of review 'tower above the trials of criminal cases as impregnable citadels of technicality.' . . . [C]riminal trial became a game for sowing reversible error in the record."

Holding, as is done today, that a special harmless-error rule is a necessary remedy for a particular kind of error revives the unfortunate idea that appellate courts must act on particular errors rather than decide on reversal by an evaluation of the entire proceeding to determine whether the cause as a whole has been determined according to properly applicable law. In this case, California has recognized the impropriety of the trial comment here involved, and has given clear direction to state trial courts for the future. Certainly this is the appropriate remedy for the constitutional error committed. The challenged decision has no direct relation to federal constitutional provisions, rather it is an analysis of the question whether this admittedly improper comment had any significant impact on the outcome of the trial. In *Kotteakos, supra,* this Court described the "material factors" in harmless-error determinations as "the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole . . . ." *Id.,*

at 762. None of these factors has any relation to substantive constitutional provisions, and I think the Court errs in conceiving of an application of harmless-error rules as a remedy designed to safeguard particular constitutional rights.[3] It seems clear to me that harmless-error rules concern, instead, the fundamental integrity of the judicial proceedings as a whole.

As indicated above, I am of the opinion that the validity of a challenged state harmless-error rule itself is a federal constitutional question. Harmless-error rules may, as the Court says, "work very unfair and mischievous results." And just concern can be expressed over the possibility that state harmless-error decisions may result in the dilution of new constitutional doctrines because of state hostility to them. However, the record is barren of any showing that the California courts, which have been in the vanguard in the development of individual safeguards in criminal trials,[4] are using their harmless-error rule to destroy or dilute constitutional guarantees. If the contrary were the case and the harmless-error rule itself were shown to have resulted in a course of convictions significantly influenced by constitutionally impermissible factors, I think it clear that constitutional due process could not countenance the continued application

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[3] The Court indeed recognizes, as does my Brother STEWART in his concurring opinion, that errors of constitutional dimension can be harmless, a proposition supported by ample precedent. See *Snyder* v. *Massachusetts,* 291 U. S. 97; *Motes* v. *United States,* 178 U. S. 458; *Haines* v. *United States,* 188 F. 2d 546; *United States* v. *Donnelly,* 179 F. 2d 227. Presumably all errors in the federal courts will continue to be evaluated under the single standard of 28 U. S. C. § 2111 as interpreted today. Certainly there is nothing in the substantive provisions of the Bill of Rights which suggests any standard for assessing the impact of their violation.

[4] See, *e. g., People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905; *People* v. *Dorado,* 62 Cal. 2d 338, 398 P. 2d 361.

of the rule.[5] And individual applications of a permissible rule would still be subject to scrutiny as to the tenability of the independent and adequate state ground. See *Thompson* v. *Louisville,* 362 U. S. 199; *Terre Haute & Indianapolis Railroad Co.* v. *Indiana ex rel. Ketcham,* 194 U. S. 579; Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375.

I thus see no need for this new constitutional doctrine.[6] Decision of this case should turn instead on the answers to two questions: Is the California harmless-error provision consistent with the guarantee of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment? See *Palko* v. *Connecticut, supra.* Was its application in this instance by the California Supreme Court a reasonable one or was the rule applied arbitrarily to evade the underlying constitutional mandate of fundamental fairness? These issues will now be considered.

II.

The California harmless-error rule is incorporated in that State's constitution. It was first adopted by a vote of the people in 1911 and readopted as part of the revised constitution in 1966. While its language allows reversal only where there has been a "miscarriage of justice," a long course of judicial decisions has shaped the rule in a manner which cannot be ignored. California courts

[5] It is clear enough that this is not the rationale that the Court is employing. The Court would leave California free to apply its harmless-error rule to errors of state law and must thus consider the rule itself consistent with constitutional due process. This leaves the anomalous situation where the impact of a particular piece of evidence is to be assessed by a different "constitutional" standard depending only on whether state law or federal constitutional law barred its admittance.

[6] *Fahy* v. *Connecticut,* 375 U. S. 85, should not be deemed dispositive on such a far-reaching matter, which was entirely passed over in the Court's opinion in that case.

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will not allow a conviction based upon an improperly obtained confession to stand. See, *e. g., People* v. *Dorado,* 62 Cal. 2d 338, 398 P. 2d 361; *People* v. *Sears,* 62 Cal. 2d 737, 401 P. 2d 938. Nor will the fact that sufficient evidence to support the conviction is present absent the tainted evidence preclude a reversal. See, *e. g., People* v. *Patubo,* 9 Cal. 2d 537, 71 P. 2d 270; *People* v. *Mahoney,* 201 Cal. 618, 258 P. 607. And reversal will be required when the tainted evidence is introduced in intentional violation of constitutional standards. See *People* v. *Sarazzawski,* 27 Cal. 2d 7, 161 P. 2d 934. Thus the California rule and the "federal rule" today declared applicable to state adjudication are parallel in these special instances[7] and their divergence, if any,

[7] Some special limitations on harmless error have always been respected by this Court and seem to me essential to the fundamental fairness guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. These limitations stem from what I perceive as two distinct considerations. The first is a recognition that particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless. *E. g., Payne* v. *Arkansas,* 356 U. S. 560 (confessions); see *Fahy* v. *Connecticut, supra,* at 95 (dissenting opinion of HARLAN, J.); cf. *Bollenbach* v. *United States,* 326 U. S. 607 (independently sufficient evidence). The second is a recognition that certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. *E. g., Berger* v. *United States,* 295 U. S. 78 (prosecutorial misconduct). Although they have never been viewed in this light, I would see violations of *Gideon* v. *Wainwright,* 372 U. S. 335, as falling in the first category, and violations of *Tumey* v. *Ohio,* 273 U. S. 510, as falling in the second. However, as I understand my Brother STEWART's opinion concurring in the result, he would read all such limitations into the content of the Due Process Clause and limit the application of harmless-error rules with respect to constitutional errors to an undefined category of instances. I think it preferable to resolve these special problems from an analysis of the nature of the error involved rather than by an attempt to discover limitations in

arises from the general formulation found in the opinions of the California Supreme Court.

In *People* v. *Watson,* 46 Cal. 2d 818, 299 P. 2d 243, the California Supreme Court undertook a general discussion of the application of the state harmless-error rule. It declared that the "final test" was "the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered." Reversal would be required only when "it is reasonably probable that a result more favorable to the appealing party would have been reached," and this judgment "must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." 46 Cal. 2d, at 835–837, 299 P. 2d, at 254–255. This formulation may sound somewhat different from that announced today, but on closer analysis the distinction between probability and possibility becomes essentially esoteric. In fact, California courts have at times equated the California standard with the standard utilized by this Court in *Fahy* v. *Connecticut, supra.* See, *e. g., People* v. *Jacobson,* 63 Cal. 2d 319, 331, 405 P. 2d 555, 563.

Similarly, members of this Court have used a variety of verbal formulae in deciding questions of harmless error in federal cases, ranging from today's "reasonable doubt" standard to the ability to "say with fair assurance . . . that the jury was not substantially swayed . . . ." *Fiswick* v. *United States,* 329 U. S. 211, 218. And the circuit courts have been equally varied in their expres-

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the policy underlying the substantive constitutional provisions. The latter course seems to me to blur analysis and lead to distinction by fiat among equally specific constitutional guarantees.

sions. See *United States* v. *Brown,* 79 F. 2d 321; *United States* v. *Feinberg,* 140 F. 2d 592; *United States* v. *McMaster,* 343 F. 2d 176.

Against this background the California rule can hardly be said to be out of keeping with fundamental fairness, and I see no reason for striking it down on its face as a violation of the guarantee of "due process." [8]

III.

A summary of the evidence introduced against the petitioners and the events of the trial will make it apparent that the application of the California rule in this case was not an unreasonable one. California courts have not hesitated to declare that comment has caused a miscarriage of justice when that conclusion has been warranted by the circumstances, see, *e. g., People* v. *Keller,* 234 Cal. App. 2d 395, 44 Cal. Rptr. 432; *People* v. *Sigal,* 235 Cal. App. 2d 449, 45 Cal. Rptr. 481, but the posture of this case minimized the possible impact of the comment.

Petitioners were tried for the murder of a night club bartender in the course of a robbery of the club. The State established that petitioners were the last customers remaining in the club on the night of the murder. Three people with descriptions matching those of Chapman, Teale, and the victim were seen leaving the club together. The club had been ransacked and its condition indicated that the victim had been forced out of it. He was later shot from close range with a .22-caliber weapon and left beside a country road. It was shown that Chapman had purchased a similar weapon five days before the murder and this weapon was in Teale's possession when he was arrested. Blood matching the type of the victim was found on the floormat of the vehicle in which Chapman and Teale had been traveling. Other scientific testimony

[8] The rule was upheld by the Ninth Circuit in *Sampsell* v. *California,* 191 F. 2d 721, against an attack on its constitutionality.

established that the victim had been in petitioners' car. Blood (untypable) was found on Chapman's clothes, and blood matching the victim's was found on her shoes. Similar evidence connected Teale with the murder.

After his arrest Teale made admissions, amounting almost to a full confession, to a fellow prisoner and these were introduced against him. The jury was cautioned to disregard them as against Chapman. Petitioners pleaded not guilty, but offered no defense on the merits. The only defense witness was a Dr. Sheuerman who was called by Chapman in an effort to establish a defense of lack of capacity to form the requisite intent because of "disassociative reaction."

The prosecutor's comment on petitioners' failure to explain away or challenge the evidence presented against them was admittedly extensive.[9] The California Supreme Court found it harmless error for a number of reasons. First the court noted the convincing and unchallenged evidence presented by the State. It next observed that the jurors were certain to take notice of petitioners' silence whether or not there was comment since the evidence itself cried for an explanation. I think this point crucial, since it seems to me that this Court has confused the impact of petitioners' silence on the jury with the impact of the prosecution's comment upon that silence. The added impact of that comment would seem marginal in a case of this type where the jury must inevitably look to petitioners for an explanation of the innuendo of the real evidence and in Teale's case of his damaging admissions. Finally the California Supreme Court noted that Chapman, against whom the

[9] The decision in *Griffin* v. *California*, 380 U. S. 609, was not announced until after the trial of the case. Hence the trial was conducted according to what was, at the time, constitutional California law. No implication of prosecutorial misconduct can be drawn from these circumstances.

evidence was less strong, had keyed her defense to evidence of her mental defect, a subject upon which the comment had not touched. From this discriminating analysis it was concluded that another result was not "reasonably probable" absent the erroneous comments.

I cannot see how this resolution can be thought other than a reasonable, and therefore constitutional, application of the California harmless-error rule.

IV.

When we consider how little is empirically known about the workings of a jury, see Kalven & Zeisel, The American Jury, *passim,* it seems to me highly inappropriate for this Court to presume to take upon itself the power to pass directly on the correctness of impact evaluations coming from 50 different jurisdictions. Juries must invariably react differently to particular items of evidence because of local predispositions and experience factors. The state courts, manned by local judges aware of and in touch with the special factors affecting local criminal trials, seem the best, and the constitutionally required, final authority for ruling on the effect of the admission of inadmissible evidence in state criminal proceedings, absent the application of a fundamentally unfair rule, or any unreasonable application of a proper rule manifesting a purpose to defeat federal constitutional rights. Once it appears that neither of these factors is present in a state harmless-constitutional-error decision, federal judicial responsibility should be at an end. This decision, however, encompasses much more. It imposes on this Court, in cases coming here directly from state courts, and on the lower federal courts, in cases arising on habeas corpus, the duty of determining for themselves whether a constitutional error was harmless. In all but insubstantial instances, this will entail a *de novo* assessment of the entire state trial record.

For one who believes that among the constitutional values which contribute to the preservation of our free society none ranks higher than the principles of federalism, and that this Court's responsibility for keeping such principles intact is no less than its responsibility for maintaining particular constitutional rights, the doctrine announced today is a most disturbing one. It cuts sharply into the finality of state criminal processes; it bids fair to place an unnecessary substantial burden of work on the federal courts; and it opens the door to further excursions by the federal judiciary into state judicial domains. I venture to hope that as time goes on this new doctrine, even in its present manifestation, will be found to have been strictly contained, still more that it will not be pushed to its logical extremes.

I respectfully dissent.

COOPER *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 103. Argued December 8, 1966.—Decided February 20, 1967.

Petitioner was convicted of a narcotics violation in a California state court partly through evidence which the police seized in a warrantless search of his car a week after his arrest. Pending forfeiture proceedings the car had been impounded "as evidence" pursuant to a statutory provision for the seizure and forfeiture of vehicles used in violation of the narcotics laws. The state appellate court, in a decision which the supreme court declined to review, held the search and seizure unconstitutional under *Preston* v. *United States,* 376 U. S. 364, but held the evidentiary error harmless under the State Constitution's harmless-error provision. *Held:* Under the circumstances of this case, the police did not violate the Fourth Amendment by making a search, closely related to the reason petitioner was arrested, of a car which they validly held for use as evidence in a forfeiture proceeding. *Preston, supra,* distinguished. Pp. 59–62.

234 Cal. App. 2d 587, 44 Cal. Rptr. 483, affirmed.

Michael Traynor, by appointment of the Court, 384 U. S. 948, argued the cause and filed briefs for petitioner.

Albert W. Harris, Jr., Assistant Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, and *Edward P. O'Brien,* Deputy Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was convicted in a California state court of selling heroin to a police informer. The conviction rested in part on the introduction in evidence of a small piece of a brown paper sack seized by police without a warrant from the glove compartment of an automobile which police, upon petitioner's arrest, had impounded and were holding in a garage. The search occurred a week after the arrest of petitioner. Petitioner appealed his convic-

tion to the California District Court of Appeal which, considering itself bound by our holding and opinion in *Preston* v. *United States,* 376 U. S. 364, held that the search and seizure violated the Fourth Amendment's ban of unreasonable searches and seizures. That court went on, however, to determine that this was harmless error under Art. VI, § 4½, of California's Constitution which provides that judgments should not be set aside or reversed unless the court is of the opinion that the error "resulted in a miscarriage of justice." 234 Cal. App. 2d 587, 44 Cal. Rptr. 483. The California Supreme Court declined to hear the case. We granted certiorari along with *Chapman* v. *California, ante,* p. 18, to consider whether the California harmless-error constitutional provision could be used in this way to ignore the alleged federal constitutional error. 384 U. S. 904. We have today passed upon the question in *Chapman,* but do not reach it in this case because we are satisfied that the lower court erroneously decided that our *Preston* case required that this search be held an unreasonable one within the meaning of the Fourth Amendment.

We made it clear in *Preston* that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U. S., at 366–367. In *Preston* the search was sought to be justified primarily on the ground that it was incidental to and part of a lawful arrest. There we said that "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.,* at 367. In the *Preston* case, it was alternatively argued that the warrantless

search, after the arrest was over and while Preston's car was being held for him by the police, was justified because the officers had probable cause to believe the car was stolen. But the police arrested Preston for vagrancy, not theft, and no claim was made that the police had authority to hold his car on that charge. The search was therefore to be treated as though his car was in his own or his agent's possession, safe from intrusions by the police or anyone else. The situation involving petitioner's car is quite different.

Here, California's Attorney General concedes that the search was not incident to an arrest. It is argued, however, that the search was reasonable on other grounds. Section 11611 of the California Health & Safety Code provides that any officer making an arrest for a narcotics violation shall seize and deliver to the State Division of Narcotic Enforcement any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics, such vehicle "to be *held as evidence* until a forfeiture has been declared or a release ordered." [1] (Emphasis supplied.) Petitioner's vehicle, which evidence showed had been used to carry on his narcotics possession and transportation, was impounded by the officers and their duty required that it be kept "as evidence" until forfeiture proceedings were carried to a conclusion. The lower court concluded, as a matter of state law, that the state forfeiture statute did not by "clear and express language"

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[1] Cal. Health & Safety Code § 11610 provides:

"The interest of any registered owner of a vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited, or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof or which is used to facilitate the unlawful possession of any narcotic by an occupant thereof, shall be forfeited to the State."

authorize the officers to search petitioner's car. 234 Cal. App. 2d, at 598, 44 Cal. Rptr., at 491. But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," *ibid.*, the reason for and nature of the custody may constitutionally justify the search. Preston was arrested for vagrancy. An arresting officer took his car to the station rather than just leaving it on the street. It was not suggested that this was done other than for Preston's convenience or that the police had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car. This case is not *Preston,* nor is it controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own

protection, to search it. It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States* v. *Rabinowitz*, 339 U. S. 56, 66. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.[2]

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

When petitioner was arrested, his auto was seized by officers, pursuant to the California Health & Safety Code, § 11611. That section authorizes a state officer making an arrest for violation of the narcotics laws to seize a "vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept," and directs the officer to deliver the vehicle to the Division of Narcotic Enforcement "to be held as evidence until

[2] Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit.

a forfeiture has been declared or a release ordered." About a week after petitioner's arrest, a state agent searched the car, which was stored at a towing service, and discovered a piece of brown paper which appeared to have been torn from a grocery bag. This piece of paper was introduced at the trial, along with two bundles of heroin, which petitioner allegedly sold an informer, and the brown paper in which the heroin had been wrapped.[1] Petitioner was indicted and convicted of selling heroin. A judgment of forfeiture of petitioner's car was entered the day after the termination of his trial.

The California District Court of Appeal held that the piece of paper bag was the product of an illegal search, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483. First, the state court held that the State could not rely on the subsequent forfeiture to justify the search. It realistically noted that the State's title could not relate back to the time of the seizure until after a judicial declaration of forfeiture. Since the forfeiture judgment was not entered until after petitioner's trial, the State could not rely on it to justify the search. *Id.*, at 596–597, 44 Cal. Rptr., at 489–490. Second, the court held that although the automobile was in the lawful custody of the officers at the time of the search, § 11611 of the Health & Safety Code did not authorize the officers to search the car. *Id.*, at 597, 44 Cal. Rptr., at 490. Since the search was not pursuant to a warrant, and since it was not incidental to petitioner's arrest, it was illegal.

Hence the fact that the car was being held "as evidence" did not as a matter of state law give the officers more dominion over it than the officers in *Preston* v.

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[1] About four months after the arrest, another agent searched the car and found a marijuana seed, which was introduced at trial. There is no objection to this evidence since there was no jury and the trial judge indicated that the marijuana seed was irrelevant to the charge for which petitioner was being tried.

United States, 376 U. S. 364, had over the car in their custody.

In *Preston,* petitioner and others were arrested for vagrancy after they failed to give an acceptable explanation of their presence in a parked car late at night. They were taken to the police station, and the car was taken first to the station and then to a garage. After the men were booked, police officers went to the garage, searched the car without a warrant, and found evidence incriminating petitioner and the others of conspiracy to rob a federally insured bank.

In the instant case petitioner was arrested, his car taken to a garage and searched a week after his arrest, likewise without a warrant. As in *Preston,* the search cannot be justified as incidental to a lawful arrest. Nor can this case be distinguished from *Preston* on the ground that one car was lawfully in police custody and the other not. In *Preston,* the fact that the car was in lawful police custody did not legalize the search without a warrant. Since the California court held that the Health & Safety Code did not authorize a search of a car impounded under its provisions, the case is on all fours with *Preston* so far as police custody is concerned. If custody of the car is relevant at all, it militates against the reasonableness of the search. As the Court said in *Preston:* "[S]ince the men were under arrest at the police station and the car was in police custody at a garage, [there was no] danger that the car would be moved out of the locality or jurisdiction." 376 U. S., at 368. Moreover, the claim that the search was not illegal because the car had been forfeited to the State is foreclosed by the state court's holding that, under the circumstances, the forfeiture could not relate back to the date of the seizure. The state court's interpretation of its own statute will not be upset by this Court. *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509.

To repeat, this case is on all fours with *Preston*. For in each the search was of a car "validly" held by officers, to use the Court's expression. *Preston,* of course, was a federal case, while this is a state case. But the Fourth Amendment with all its sanctions applies to the States as well as to the Federal Government. *Mapp* v. *Ohio,* 367 U. S. 643.

I see only two ways to explain the Court's opinion. One is that it overrules *Preston sub silentio.* There are those who do not like *Preston.* I think, however, it states a healthy rule, protecting the zone of privacy of the individual as prescribed by the Fourth Amendment. These days police often take possession of cars, towing them away when improperly parked. Those cars are "validly" held by the police. Yet if they can be searched without a warrant, the precincts of the individual are invaded and the barriers to privacy breached. Unless the search is incident to an arrest, I would insist that the police obtain a warrant to search a man's car just as they must do when they search his home.

If the present decision does not overrule *Preston,* it can perhaps be rationalized on one other ground. There is the view that when the Bill of Rights is applied to the States by reason of the Fourteenth Amendment, a watered-down version is used. In that view "due process" qualifies all provisions of the Bill of Rights. Today's decision is perhaps explicable in those terms. But I also reject that view. "Unreasonable searches and seizures" as used in the Fourth Amendment, "self-incrimination" as used with reference to the Fifth, "freedom of speech" as used in the First, and the like, mean the same in a state as in a federal case.[2]

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[2] That view was expressly approved by the Court in *Malloy* v. *Hogan,* 378 U. S. 1, 10–11.

GILES ET AL. *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 27. Argued October 12, 1966.—Decided February 20, 1967.

Petitioners, who were convicted of rape and given death sentences which were later commuted to life imprisonment, brought this proceeding under Maryland's Post-Conviction Procedure Act alleging that they were denied due process of law by the prosecution's suppression of evidence favorable to them and by knowing use of perjured testimony. The evidence allegedly suppressed concerned (1) a proceeding in Prince George's County Juvenile Court pending prior to the alleged rape, in which a caseworker recommended probation for the complaining witness because she was beyond parental control, (2) an occurrence five weeks after the alleged rape, in which the girl had sexual relations with two men at a party and that night took an overdose of pills resulting in hospitalization in a psychiatric ward for nine days as an attempted suicide, and (3) a hearing in the Montgomery County Juvenile Court on the day of her release from the psychiatric ward which resulted in her commitment to a School for Girls. The Montgomery County Circuit Court ordered a new trial, holding that the proof did establish suppression of evidence which, although not in bad faith, constituted a denial of due process. The Maryland Court of Appeals reversed, holding that "for the nondisclosure of evidence to amount to a denial of due process it must be such as is material and capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense." *Held:* The judgment is vacated and the case is remanded to the Maryland Court of Appeals for further proceedings. Pp. 67–102.

239 Md. 458, 212 A. 2d 101, vacated and remanded.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS, without reaching the question of the extent of the prosecution's duty of disclosure, concluded that evidence of two police reports which were submitted to this Court but were not considered by the courts below in the post-conviction proceeding justifies a remand to the Court of Appeals for it to consider whether an inquiry should be ordered to determine the applica-

bility of the rule of *Napue* v. *Illinois,* 360 U. S. 264, where it was held that a conviction must fall when the prosecution, "although not soliciting false evidence, allows it to go uncorrected when it appears," even though the testimony may be relevant only to the credibility of a witness. Pp. 73–82.

MR. JUSTICE WHITE concluded that the case should be remanded to the Court of Appeals to obtain its views as to whether petitioners have been afforded a full and fair hearing on the issue of suppression of evidence concerning the mental condition of the complaining witness and the interrelated issues of her consent and credibility. Pp. 82–96.

MR. JUSTICE FORTAS concluded that the judgment should be vacated because the State did not carry out its obligation to disclose all information which was specific and concrete, which was not merely cumulative or embellishing, and which might have exonerated the defendants or been of material importance to the defense. Pp. 96–102.

Joseph Forer argued the cause for petitioners. With him on the briefs was *Hal Witt.*

Donald Needle, Assistant Attorney General of Maryland, and *Robert C. Murphy,* Deputy Attorney General, argued the cause for respondent. With them on the brief was *Thomas B. Finan,* Attorney General.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join.

In December 1961, petitioners, who are brothers, were convicted of rape of a 16-year-old girl after trial by jury in the Circuit Court for Montgomery County, Maryland. In May 1964, petitioners brought this proceeding under Maryland's Post-Conviction Procedure Act, Md. Ann. Code Art. 27, § 645A (1966 Supp.).[1] Their peti-

[1] Petitioners had previously appealed unsuccessfully from the convictions, *Giles* v. *State,* 229 Md. 370, 183 A. 2d 359, appeal dismissed, 372 U. S. 767, and from the denial of a new trial, *Giles* v. *State,* 231 Md. 387, 190 A. 2d 627.

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tion alleged that the prosecution denied them due process of law in violation of the Fourteenth Amendment by suppressing evidence favorable to them, and by the knowing use of perjured testimony against them. An evidentiary hearing was had before Montgomery Circuit Judge Moorman who, in an unreported opinion, ruled that the proofs did not sustain the allegation of bad faith or knowing use of perjured testimony by the prosecution, but did establish the suppression of evidence which, although not in bad faith, constituted a denial of due process. He therefore ordered a new trial. The Court of Appeals of Maryland, sitting *en banc*, reversed, two judges dissenting. *State* v. *Giles*, 239 Md. 458, 212 A. 2d 101. We granted certiorari. 383 U. S. 941. We would vacate the judgment of the Maryland Court of Appeals and remand to that court for further proceedings.

The rape allegedly occurred about midnight, July 20, 1961, near Rocky Gorge, a swimming and fishing spot on the Patuxent River, in a secluded, wooded area of Montgomery County. The petitioners swam and fished there from early evening with Joseph Johnson [2] and John Bowie. The prosecutrix came there by automobile shortly before midnight with her date, Stewart Foster, and two other young men. Their car ran out of gasoline near Bowie's parked car. The girl and Foster remained in the car while the other young men went for gasoline.

The girl and Foster were the State's principal witnesses. They testified that they had been sitting in the back seat of the car for some 15 minutes after the two young men left when a noise near Bowie's car attracted

[2] Johnson was tried and convicted of rape of the girl at a separate trial in the Circuit Court for Anne Arundel County. His application for post-conviction relief is being held in abeyance pending disposition of this case.

their attention. They saw petitioners and their companions loading something into Bowie's car. Bowie drove away and petitioners and Johnson approached the stranded car. Foster rolled up the windows and locked the doors. The girl and Foster testified that the three demanded his money and his girl and smashed the car windows with rocks to open the car doors. Foster unlocked the door on his side and told the girl to get out her side and run while he held off the three. Foster was knocked unconscious when he left the car. The girl ran into the woods followed by John Giles who caught up with her when she tripped and fell. Petitioner James Giles and Johnson joined them a few minutes later. She testified that, when one of the trio attempted to remove her clothes, she disrobed herself below the waist and submitted to all three youths without resistance because of fear.

Both petitioners testified in their own defense. Their version of the events was that the three young men approached the car and asked Foster for a cigarette, that Foster responded with epithets and reached down as if to pick up a gun or other weapon, and that they broke the windows to prevent his getting it. They said that they did not know it was a girl who fled into the woods. Petitioner John Giles testified that when he caught up with her, she offered to submit to him if he would help her escape from the others but that he declined. Petitioner James Giles testified that when he and Johnson joined the couple, the girl told the three that she had had relations with 16 or 17 boys that week and two or three more wouldn't make any difference, that she disrobed herself and invited all three of them to have relations with her, and that he and Johnson, but not petitioner John Giles, had relations with her. Both petitioners testified that the girl said that if they were

caught in the woods she would have to say she had been raped because "she was on a year's probation" and "was in trouble."

The credibility of the witnesses was thus important to the outcome of the case. The Court of Appeals recognized this in affirming the convictions on direct review: "There was some evidence tending to indicate consent on the part of the prosecuting witness, which, if believed by the trier of facts, would have been a complete defense to the charge of rape." *Giles* v. *State*, 229 Md., at 381, 183 A. 2d, at 364.[3] Credibility was also critical on the issue whether, in any event, petitioner John Giles had relations with her, as she testified, or had not, as the petitioners testified.

The evidence allegedly suppressed consisted first, of the fact that in a proceeding pending on June 20 in the Juvenile Court for Prince George's County, a caseworker had recommended probation for the girl because she was beyond parental control. Also allegedly suppressed were the facts concerning an occurrence in Prince George's County at a party on the night of August 26, 1961, five weeks after the alleged rape, and over three months before the trial. The girl had sexual relations with two men at the party, and later that night took an overdose of pills and was hospitalized in a psychiatric ward of Prince George's General Hospital for nine days as an attempted suicide. She told a friend who visited her at the hospital that the two men had raped her. The friend told her parents who reported this to Montgomery County Police Lieutenant Whalen, head of the investigation for the State's Attorney into the charge against

[3] "With respect to the presence or absence of the element of consent, it is true, of course, that however reluctantly given, consent to the act at any time prior to penetration deprives the subsequent intercourse of its criminal character." *Hazel* v. *State*, 221 Md. 464, 469, 157 A. 2d 922, 925.

petitioners. Lieutenant Whalen advised the mother that he had no jurisdiction of Prince George's County offenses, after which the girl's father filed a formal charge of rape against the two men with the Prince George's County authorities. A Prince George's County police officer, Sergeant Wheeler, interviewed the girl at the hospital. She refused to say she had been raped. She told the officer she had previously had relations with one of the men and also that in the previous two years she had had sexual relations with numerous boys and men, some of whom she did not know.

Finally, the prosecution allegedly suppressed facts concerning a hearing conducted in the Montgomery County Juvenile Court on September 5, 1961, apparently the day after the girl's release from her nine-day confinement in the psychiatric ward at Prince George's General Hospital, and three months before the trial. The hearing resulted in the commitment of the girl to the Montrose School for Girls where she remained for some time. Lieutenant Whalen testified that he had arranged this hearing with the Montgomery County Juvenile Court authorities, although the girl was a resident of Prince George's County. He testified that the girl's mother had complained to him that "the boys in Prince George's County were harassing the girl, driving back and forth past the house all hours," and that he arranged the proceeding "to place the girl in some place for protective custody." The Montgomery Juvenile Court record discloses, however, that the hearing also inquired into the necessity for the girl's confinement as a juvenile "out of parental control and living in circumstances endangering her well-being." The girl testified at the hearing that she had taken pills because she felt that "she wanted to die and there was nothing to live for."

The petitioners' contention was that all of this evidence tended to support their testimony and discredit

that of the girl and Foster and might, therefore, have produced an acquittal or, at least, a reduction of penalty.[4] They also argued that knowledge of it by the defense would have provided valuable leads to evidence supporting a conclusion that the girl testified falsely in denying that she consented to relations.

The petitioners were represented at the trial by appointed counsel.[5] He testified at the post-conviction proceeding that he knew nothing before the trial of the incidents of August 26, the girl's suicide attempt, her confinement in the hospital, the psychiatrist's diagnosis of her mental illness, or of her commitment to the Montrose School for Girls. He testified that he had tried, before August 26, to interview the girl at her home but that her mother told him "she talked to Lt. Whalen and he told her not to discuss the case with us." He also testified that, based on petitioners' story to him that the girl had told them she was on probation, he inquired of the Juvenile Courts of both Prince George's County and Montgomery County whether there were any proceedings in those courts concerning the girl and was told records of such proceedings were not released.

Judge Moorman found "that the State withheld from the defense and suppressed both the evidence concerning

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[4] If the jury which finds an accused guilty of rape adds to its verdict the words "without capital punishment," the court may not impose the death penalty but only imprisonment for not exceeding 20 years in the penitentiary. Md. Ann. Code Art. 27, § 463 (1957). If the jury does not add such words to its verdict, the court, at its discretion, may impose the death sentence, a life sentence, or a sentence in the penitentiary for not less than 18 months nor more than 21 years. Md. Ann. Code Art. 27, § 461 (1957). The jury did not add to its verdict the words "without capital punishment," and the trial judge imposed death sentences. Governor Tawes subsequently commuted the sentences to life imprisonment.

[5] Other counsel are representing them in the post-conviction proceedings.

the second rape complaint of the prosecutrix and the evidence relative to her alleged attempted suicide and emotional disturbance." He ordered a new trial, despite the absence of a pretrial request by defense counsel for disclosure of the evidence suppressed. See *Brady* v. *Maryland,* 373 U. S. 83, 87.

The Court of Appeals read Judge Moorman's opinion to hold that nondisclosure of evidence by the prosecution denies the accused due process if the evidence could reasonably be considered admissible and useful to the defense. The Court of Appeals viewed that formulation to be incomplete, holding that "for the nondisclosure of evidence to amount to a denial of due process it must be such as is material and capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense." 239 Md., at 469–470, 212 A. 2d, at 108. The court found the evidence allegedly suppressed did not meet that test and held that in any event "the failure of the prosecution to disclose the information relating to the alleged rape of August 26th and the subsequent suicidal attempt was not prejudicial to . . . [petitioners] and did not therefore warrant the granting of a new trial on the basis of the denial of due process." 239 Md., at 471, 212 A. 2d, at 109.

The facts found by Judge Moorman do not include elements present in earlier decisions which determined that the suppression of evidence constituted the denial of due process of law. See *Mooney* v. *Holohan,* 294 U. S. 103; *Pyle* v. *Kansas,* 317 U. S. 213; *Alcorta* v. *Texas,* 355 U. S. 28; *Napue* v. *Illinois,* 360 U. S. 264; *Miller* v. *Pate, ante,* p. 1; compare *United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815; *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763; *Barbee* v. *Warden,* 331 F. 2d 842. Thus the case presents the broad ques-

tions whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial. We find, however, that it is unnecessary, and therefore inappropriate, to examine those questions. In *Napue* v. *Illinois, supra,* 360 U. S., at 269, we held that a conviction must fall under the Fourteenth Amendment when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears," even though the testimony may be relevant only to the credibility of a witness. We now have evidence before us, which neither Judge Moorman nor the Court of Appeals considered, which in our view justifies a remand to the Court of Appeals for its consideration whether that court should order an inquiry to determine whether such a situation arose at petitioners' trial. The evidence consists of two police reports, not part of the record, which came to our attention when the State at our request supplied the material considered by the trial judge in imposing sentence.

On the morning after the alleged rape, July 21, 1961, Montgomery County police officers, including Lieutenant Whalen and Detective Collins, conducted interviews with the girl and Foster. The interviews were written up in one of the police reports. In an effort to prove the allegations of the petition, defense counsel moved during the post-conviction proceedings that Lieutenant Whalen be directed to produce the report for inspection. The motion was denied; Judge Moorman ruled the report was a police "work product" and therefore not producible under Maryland's Rules of Procedure.

There can be little doubt that the defense might have made effective use of the report at the trial or in obtaining further evidence. In the first place, the report attributes statements to the girl and Foster that appear inconsistent with their trial testimony. The report quotes

both as stating they were engaged in sexual relations when they were distracted by the noise at Bowie's car, and that the girl dressed before petitioners and Johnson approached. They testified at trial, however, that they were merely "sitting" in the back seat of the car from the time their companions left until their attention was drawn to the presence of the four men at Bowie's car, and Foster buttressed this testimony on cross-examination by answering "No" to the question whether he "didn't take her out there to have sexual relations with her, yourself . . . ?" Finally, neither Lieutenant Whalen nor Detective Collins mentioned, in their summaries at trial of what each person involved in the incident had told them, the fact that the girl and Foster had stated they were engaged in sexual relations when they heard the three men.

The testimony of the girl and Foster is open to the construction that these key witnesses deliberately concealed from the judge, jury, and defense counsel evidence of the girl's promiscuity.[6] While under the law of Maryland specific acts of misconduct are inadmissible to impeach a witness' credibility, *Rau* v. *State*, 133 Md. 613,

[6] The dissenting judges in the Court of Appeals were of the view that the extensive evidence of the girl's reputation for unchastity presented in the post-conviction record, added to the evidence of her emotional instability, might support a defense that she suffered from an uncontrollable weakness that petitioners might reasonably have mistaken for consent. The majority apparently were also of the view that under some circumstances suppression of evidence pertaining to a witness' mental condition might amount to a deprivation of due process. If this is so, the conclusion of the majority that no such evidence existed or was suppressed in this case is open to question, since the post-conviction court prevented all attempts of counsel to introduce evidence of the girl's condition (including a psychiatric diagnosis and evidence presented at a juvenile proceeding) or of the fact that Montgomery County police officials knew of such evidence. If a new hearing is held in the state courts, an inquiry into these matters might be deemed appropriate.

105 A. 867, and specific acts of intercourse are inadmissible to establish the prosecutrix' consent, *Humphreys* v. *State,* 227 Md. 115, 175 A. 2d 777, prior inconsistent statements and evidence of general reputation for unchastity are admissible to impeach a witness' credibility, see *Giles* v. *State,* 229 Md. 370, 183 A. 2d 359. And to the extent credibility could have been effectively attacked in this case, resolution of the issue of consent necessarily would have been affected since it turned wholly on credibility.

The report could also have been used in connection with an issue which has been in this case from its inception. At the original trial, counsel sought in numerous ways to establish that John Giles had not had intercourse with the victim. At the trial the girl said all three had raped her. She admitted, however, that she had testified at the preliminary hearing and had told the police immediately after being attacked that only two of the three had intercourse with her. Detective Collins testified, on the other hand, that he "questioned the girl at the station and she said all three of the boys had intercourse with her." With specific reference to John Giles, Collins stated that the girl "was asked if she knew anybody in this line-up and she walked over and pointed to the defendant, John Giles, and stated to us, in his presence, that he was the first . . . that had intercourse with her . . . ." Lieutenant Whalen denied that the girl had told him "that only two of these boys had intercourse with her on that evening . . . ."

Counsel at the post-conviction proceedings continued to attempt to prove John Giles was innocent of rape. He introduced newspaper articles from the Washington Evening Star and the Washington Post attributing to Lieutenant Whalen a story that the girl had said only two men had raped her. When Whalen said these stories were incorrect, counsel asked: "would your interview

report of this interview show what . . . [she] said about the number of men who attacked her?" Whalen answered that it would. Counsel thereupon moved for the production of the report, but the court refused to allow him to see it because of the work-product rule. Counsel also asked the girl how many men she originally claimed had raped her and, unlike her testimony at trial, she said she had told the police all three had raped her.

In contrast to much of this testimony the police report states that, both when interviewed and at a police lineup later that day, the girl identified petitioner John Giles not as the first to have intercourse with her, as Detective Collins testified, but as "the one that tried to have intercourse with her but was unable to do so," "the man that tried to rape her . . . ." The contents of the report thus go, not only to the credibility of the State's witnesses, but also to the issue at trial whether John Giles had raped the girl. Yet nothing appears in the trial transcript to show what, if any, action was taken by the prosecution to correct or explain the inconsistencies between the testimony of the state witnesses and the report.[7]

Only the most strained reading of the materials before us can explain away the questions raised by the report without the aid of further inquiry. A second report, filed by Sergeant Duvall who was first at the scene of the incident, far from proves that John Giles penetrated the girl. His report recites that the girl "stated that two of the . . . males had entered her and that the third had tried but gave up when he saw lights coming."

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[7] The record before us affirmatively demonstrates that both Detective Collins and Mr. Kardy, who supervised the prosecution, had read the report before trial. Collins testified at the trial that he wrote up the report and had read it the night before. At the post-conviction hearing Kardy was asked: "[Y]ou saw the police report prior to trial, of course? A. Yes."

While this statement would seem to indicate that John Giles, who was the first to attempt intercourse, penetrated the girl, it must be read in light of the fact that Duvall's report is a two-page, third-person summary, representing what had transpired during the tense and hectic moments immediately after the incident, when the girl was nearly hysterical according to police testimony. The other report, in contrast, is 22 pages long, was put together over at least a three-day period, and contains extensive quotations of the girl's story taken down in the relative calm of the police station after the girl had been treated and fed, including her reaction in personally identifying John Giles as the one who failed to have intercourse. Moreover, Duvall's report does state that the girl told him that only two of the men entered her, and therefore provides no explanation for the officers' testimony that she had said all three had entered her. In fact, far from explaining the police testimony, the report raises a serious question as to the accuracy of Sergeant Duvall's testimony at the original trial that he never discussed with the girl the number of boys who had had intercourse with her.[8]

The State attempted in the post-conviction proceedings to explain the girl's inconsistent statement at the preliminary hearing by contending that she was unaware of the difference between the meaning of intercourse and emission, which caused her to testify at first that only two of the men had had intercourse with her. The state

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[8] The testimony was as follows:

"Q. Did you have a discussion with this girl about how many boys had had intercourse with her? . . .

"A. No.

"Q. You say you did not?

"A. No, sir.

"Q. You never did discuss that with her?

"A. No, sir."

witness who propounded this theory did not offer it at the original trial, in which he participated, although the girl's explanation then was that she was confused about the names of the defendants, not about the difference between intercourse and emission.[9] And the report reveals no confusion on the latter point. She spoke there of intercourse as a "process," and at one point stated that the second of the youths "had intercourse for about ten minutes and reached a climax." [10] She said of John Giles, not that he failed to reach a climax, but that he failed to "insert" because he "could not get" an erection. Of course it is possible that she was confused despite this evidence, and that John Giles achieved penetration. But it is not our place to decide these issues, either for or against petitioners; we need only determine that the evidence raises an issue of sufficient substance to justify remanding this case for reconsideration rather than deciding the broader constitutional question.[11]

Original trial counsel testified at the post-conviction proceeding that he had seen the prosecution's file before

[9] "Q. Why are you telling a different story today than the story you told the police immediately after this happened, and the story you told at the preliminary hearing?

"A. Because I have thought about it.

"Q. What do you mean you have thought about it?

"A. Well at the time I was confused—people were giving names, and I had no idea of what the boys' names were.

"Q. Who was given names?

"A. After the line-ups; after I had identified all three of the men."

[10] The report recites that she was asked the following questions, apparently by Lieutenant Whalen, and gave the following answers:

"Q–W. How many of them had intercourse with you?

"A. The bigger one [John] tried first, then the other two.

"Q–W. Did any of them have an emission?

"A. Yes, the second one and maybe the third."

[11] Certainly the test cannot be, as is suggested, that a remand would be justified only if the evidence presented "necessarily excludes the conclusion that John Giles achieved penetration, however slight."

trial, including the police reports. Since the reports were not produced, it is pure speculation to conclude that trial counsel had in fact seen the reports now before us. And if it were proper to resolve this question against petitioners, the Court of Appeals might nevertheless regard an inquiry to be in order to ascertain trial counsel's reasons for not making use of the reports in support of the defense he was directing on behalf of petitioners. Finally, the determination of these questions against petitioners would still leave open the question whether the Court of Appeals might regard the situation as one in which the prosecution was under a duty to disclose the discrepancies to the trial judge; the court stated in its opinion that, where there is doubt as to what should be disclosed, "the trial court should decide whether or not a duty to disclose exists." 239 Md., at 471, 212 A. 2d, at 109.

In relying upon material not part of the record as a reason for remand, we follow our practice of noticing supervening matter in order to avoid deciding constitutional questions by allowing state courts to take action which might dispose of the case. See for example, *Patterson* v. *Alabama,* 294 U. S. 600; *Bell* v. *Maryland,* 378 U. S. 226. We follow this practice under varying circumstances, but the principle behind it has always been the same. This Court has "discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall,* 117 U. S. 241, 251.

It is not for us to direct what the Maryland courts will do in this case. The Court of Appeals may, for all we know, determine that the additional evidence demonstrates prejudice to the degree necessary under its previously applied standard to warrant a new trial. It may remand for a hearing free of the "work product" rule. It may reaffirm its judgment of reversal. Although relief may ultimately be denied, affording the state courts the opportunity to decide in the first instance is a course consistent with comity, cf. 28 U. S. C. § 2254, and a full and fair hearing in the state courts would make unnecessary further evidentiary proceedings in the federal courts. See *Townsend* v. *Sain,* 372 U. S. 293. We would remand because of our conclusion that the police reports, considered in the context of the record before us, raise questions sufficient to justify avoiding decision of the broad constitutional issues presented by affording the opportunity to the Maryland Court of Appeals to decide whether a further hearing should be directed. See *Henry* v. *Mississippi,* 379 U. S. 443.

The truism that our federal system entrusts the States with primary responsibility in the criminal area means more than merely "hands off." The States are bound by the Constitution's relevant commands but they are not limited by them. We therefore should not operate upon the assumption—especially inappropriate in Maryland's case in light of its demonstrated concern to afford post-conviction relief paralleling that which may be afforded by federal courts in habeas corpus proceedings [12]—that state courts would not be concerned to reconsider a case in light of evidence such as we have here, particu-

[12] See *Hunt* v. *Warden,* 335 F. 2d 936, 941–943 (C. A. 4th Cir., 1964); *Midgett* v. *Warden,* 329 F. 2d 185 (C. A. 4th Cir., 1964), and the other cases discussed in Note, 40 N. Y. U. L. Rev. 154, 193–195 (1965).

larly where the result may avoid unnecessary constitutional adjudication and minimize federal-state tensions.

We would therefore vacate the judgment of the Court of Appeals and remand to that court for further proceedings.

MR. JUSTICE WHITE, concurring in the judgment.

I concur in the judgment of the Court, although I am unable to join the opinion of my Brother BRENNAN. In my view, there was no violation of the rule of *Napue* v. *Illinois*, 360 U. S. 264. The argument is that at the trial the police officers testified that the complaining witness had said, all along, that three men had raped her, whereas the police reports supplied to the Court after oral argument clearly indicate that the complaining witness had told the officers at one point that only two men had raped her. Although the fact misstated by the police at trial bears primarily upon the credibility of the officers who testified, it might be argued that in addition the false testimony bore some relationship to the credibility of the prosecuting witness and to the question whether both of the petitioners had in fact committed rape. But these issues were not overlooked by petitioners' counsel at trial, who then confronted the complaining witness with the inconsistency in her allegations. Had petitioners' counsel been less diligent, the false testimony might rise to the level of a *Napue* violation.[1]

[1] The fact that petitioners' counsel at trial had knowledge of the police reports is of course relevant. At the post-conviction hearing the trial counsel, Mr. Prescott, was questioned concerning his knowledge of the police reports.

"Q. Mr. Prescott, after your appointment as counsel for the Giles boys in this case, did you come to see me, as State's Attorney, to discuss the case?

"A. I did.

"Q. And would you relate to His Honor what that discussion

Concerning the testimony given by Foster as to why he was with the complaining witness on the evening of the alleged rape there can be no argument under *Napue*, a point made clear by the opinion of my Brother HARLAN.

Nevertheless, for the reasons which follow I concur in the judgment remanding the case to the Maryland Court of Appeals for further consideration.

Petitioners here were appellees in the Maryland Court of Appeals, having prevailed in the trial court in their post-conviction attempt to win a new trial. In the Maryland appellate court, they sought to sustain the judgment not only on the grounds stated by the Circuit Court—suppression of evidence with respect to an alleged false rape claim and a suicide attempt—but on the additional ground that the State had suppressed other evidence, including evidence with respect to the rape victim's reputation for promiscuity and evidence with respect to her mental condition. The Maryland Court of Appeals apparently considered it appropriate and important to dispose of these additional suppression claims. With respect to reputation for unchastity the court acknowl-

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consisted of and what, if anything, I let you see and have in the case?

"A. You let me have your entire file as I recall. . . .

"Q. And by the entire file, did I let you read the police report in its entirety, sir?

"A. You did.

. . . . . .

"The Court: Mr. Prescott, I understood you to say that Mr. Kardy, while you were preparing for the trial and before trial, let you see his complete file, including the police reports?

"The Witness: That is correct, Your Honor.

"The Court: And you are satisfied that Mr. Kardy did show you the police reports, which he didn't have to do?

"The Witness: Well, I am not sure he didn't have to, but he did show them to me, Your Honor." Transcript of Post-Conviction Hearing, Vol. II, 11, 13.

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edged the admissibility of such evidence where consent is an issue. The court held, however, that the prosecution could not be charged with withholding reputation evidence since the defense itself had ample knowledge of the promiscuous conduct of the prosecuting witness. As to her mental condition, the court cited with approval *People* v. *Bastian,* 330 Mich. 457, 47 N. W. 2d 692 (1951), apparently conceding that evidence of "nymphomania"—which the court referred to as a "type of mental illness"—was admissible in a case such as this. But the court held (1) that the prosecution could be charged only with the knowledge that the mother of the victim had at one time taken her to a psychiatrist; (2) that there was nothing in the record to show that the victim was suffering from nymphomania; and (3) that even if she was so afflicted, "there is nothing to show that this made her incompetent as a witness or that she consented to the acts for which the appellees were convicted."

Of course, the court's ultimate result unavoidably followed from these factual determinations and it would appear that the evidence now in the record is consistent with these conclusions. But this does not end the matter in my view, if the inquiry permitted the petitioners in the trial court was not all that the Maryland law allows or that the constitution requires. And based on the record as it comes here, I am not at all sure that there has been a full airing of the suppression issue or that the petitioners are responsible for the obvious shortcomings in the evidence with respect to the mental condition of the rape victim and the prosecution's knowledge with respect to this matter. I am sufficiently unsure that I would remand for further consideration by the Maryland Court of Appeals.

To set in perspective those parts of the record which concern me, a brief summary of the facts is necessary.

In chronological order, this case involves the alleged rape by petitioners, a subsequent occasion upon which the complaining witness experienced sexual intercourse with two young men (which led to the so-called false rape claim), a suicide attempt by the complaining witness followed by temporary hospitalization in a psychiatric ward, a juvenile court proceeding as a result of which the complaining witness was sent away from her home, and finally the trial at which the petitioners were convicted. While the complaining witness was hospitalized, she was subjected to a psychiatric examination by Dr. Doudoumopoulis, who related his opinion to Dr. Connor, who in turn spoke with the parents of the complaining witness. In addition, and highly relevant to the issue of suppression, the record of the juvenile court proceedings reflects the fact that Lieutenant Whalen of the Montgomery County Police Department had discussed the matter of confinement of the complaining witness with Dr. Connor and had arranged for and participated in the juvenile court hearing.

The following excerpts from the post-conviction hearing transcript are the source of my concern with the record as it comes to us.

Dr. Connor testified that he had seen the complaining witness daily during her hospitalization following the suicide attempt.

> "Q. And on the subsequent days could you tell us what part of the hospital you saw her, which ward?
>
> "A. I saw her on A Wing, which is the psychiatric ward.
>
> "Q. Did you request Dr. Doudoumopoulis to make a psychiatric evaluation of Miss Roberts?
>
> "A. Yes, I did.
>
> "Q. And did he report to you his evaluation or diagnosis of her case?
>
> "A. Yes, he did.

"Q. Did you concur with him?

"A. Yes, I did.

"Q. Could you tell us what that diagnosis or evaluation was?

"Mr. Kardy: Just a minute, doctor. Object, Your Honor.

"The Court: Objection sustained."

Subsequently, Dr. Connor, who had not performed the psychiatric examination, was allowed to testify concerning his nonpsychiatric diagnosis of the patient, and his conclusion was "adolescent reaction." The failure of the hearing to produce, through Dr. Connor, any meaningful testimony regarding the psychiatric condition of the complaining witness might have been presaged by the testimony the same Doctor was allowed to give on deposition [2] prior to the post-conviction hearing, the contents of which follow:

"Q. Did you see [Joyce Carol Roberts] during the hospitalization?

"A. During the hospitalization, yes.

"Q. At that time did you have occasion to speak to Lieutenant Whalen of the Montgomery County Police Department about Joyce?

"A. I spoke to someone from the Montgomery County Police Department during that period. I don't know just exactly who it was or the exact date, but I do recall talking to someone about her.

"Q. And where did that conversation take place?

"A. I believe it was in my office at 4713 Berwyn Road, in College Park. My office was there.

"Q. Will you state the substance of that conversation?

"Mr. Kardy: I object.

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[2] The deposition was conducted by the same judge who presided at the post-conviction hearing.

"The Court: The objection is sustained.

"Mr. Witt: Your Honor, we are seeking to find out what information was given to the State about the credibility of this witness.

"The Court: He has not testified that he talked to anyone from the State; he said he talked to someone in Montgomery County.

"Mr. Witt: Montgomery County Police Department, Your Honor.

"The Court: He said, 'to someone,' as I heard his answer.

"Mr. Witt: Can we have the answer read back?

"The Court: Doctor, can you identify the person to whom you talked?

"The Witness: No, sir; I cannot. I recall there was someone from the police department.

"Mr. Kardy: Of Montgomery County?

"The Witness: Of Montgomery County.

. . . . .

"The Court: Counsel, do you proffer to show that from that conversation the State's Attorney had knowledge that there was evidence suppressed which would have been a defense to the crime?

"Mr. Witt: Yes, Your Honor.

"The Court: What specifically do you proffer to show?

"Mr. Witt: We proffer to show that the State had knowledge of this girl's psychiatric condition at the time.

"The Court: What difference would that make?

"Mr. Witt: It is under Napue against Illinois. Evidence respecting the credibility of a witness which is in the possession of the State at the time of the trial and which is suppressed by State is a violation of due process.

"The Court: I will sustain the objection.

. . . . .

"Q. Did you at that time have occasion to speak to either or both of Joyce's parents?

"A. Well, I was speaking to her mother on frequent occasions, and I spoke to her father on one or more occasions, I don't recall how often.

"Q. And did you discuss with them what should be done for Joyce?

. . . . . .

"A. Yes.

"Q. Will you state what was said?

"Mr. Kardy: Just a minute, Doctor. I object.

"The Court: Objection is sustained.

"Q. Did either of them tell you about any other alleged rape of Joyce?

"Mr. Kardy: I object.

"The Court: Sustained.

"Q. Did any member of Joyce's family tell you about any other alleged rape of Joyce?

"Mr. Kardy: I object.

"The Court: Sustained.

"Q. In the course of your treatment of Joyce during this period, did you have occasion to call in another doctor?

"A. Are you referring to hospitalization?

"Q. Yes.

"A. Yes, I did.

"Q. And who was that doctor?

"A. Dr. Doudoumopoulis.

"Q. Did you discuss Joyce with him after he had seen her?

"A. Yes, I did.

"Q. Did he diagnose her as a juvenile schizophrenic?

"Mr. Kardy: Just a minute; don't answer that. I object.

"The Court: The objection is sustained.

"Q. Did you discuss with Dr. Doudoumopoulis what treatment Joyce should receive?

"Mr. Kardy: I object. . . .

"The Court: I think it is immaterial. I will sustain the objection."

Immediately after Dr. Connor's deposition was taken, Lieutenant Whalen of the Montgomery County Police Department was put under oath. Lieutenant Whalen testified that he had contacted Mr. Kardy, the prosecutor, and that they arranged for a hearing in the juvenile court in Montgomery County on September 5, 1961. The reason for seeking protective custody for the girl was that, in Whalen's words: "[T]he boys in the area were harassing the girl so bad that she [the mother] would like to get some help for the girl. . . ."

"Q. Were you present throughout that juvenile court hearing of September 5, 1961?

"A. I was in and out of the courtroom. I was not there every second.

"Q. Let me go back a minute; isn't it a fact that prior to this hearing you had talked to Dr. Connor with respect to Joyce Roberts' mental condition?

"Mr. Kardy: I object.

. . . . . .

"Mr. Forer: . . . Your Honor, we had Dr. Connor on the stand earlier today, and Dr. Doudoumopoulis; we were trying to lay a foundation by showing that the girl's condition was such that it would have affected her credibility. Dr. Doudoumopoulis actually was qualified, as a qualified psychiatric expert, to say if it would have affected her credibility. It would have been relevant to whether or not she invited this intercourse or rejected it.[3] And with

[3] In the course of the post-conviction hearing, the defendants also attempted to probe the relationship between the mental condition

Dr. Connor we also brought out whatever the doctors discovered he had told some representatives from the Montgomery County police. But Your Honor excluded our questioning designed to go into the mental condition of the girl. Now, Your Honor is excluding my asking him whether he knew about it on the grounds that we have not established the significance of the mental condition.

"The Court: I will sustain the objection. I do not think it is proper in this procedure.

. . . . .

"Q. Now let us go back to this juvenile court hearing in Montgomery County, September 5, 1961. Was anything said at the juvenile court hearing about the fact that Joyce Roberts had attempted to commit suicide shortly before that date?

"Mr. Kardy: I object.

"The Court: I will sustain the objection."

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of the complaining witness and her credibility through questions put to Dr. Frederic Solomon, a qualified psychiatrist.

"Q. Doctor, do you have an opinion about how the mental illness, which you have described, would affect the credibility of a witness about the kind of circumstances which I described, that is, an intensely personal situation in which personal motivations were involved?

"Mr. Kardy: Object.

"The Court: You can answer it merely yes or no.

"The Witness: Yes.

"Mr. Witt: What is that opinion?

"Mr. Kardy: Object.

"The Court: Sustained.

"Mr. Witt: Your Honor, I offer to prove that his opinion would be that the mental illness which he has described would substantially affect the credibility of such a person about such an incident.

"The Court: Well, I never heard of such a rule. I sustained the objection. It's up to a jury to determine the credibility. How can we take and let a man, after a trial has occurred, come in and say the credibility was no good?" Transcript of Post-Conviction Hearing, Vol. II, 64.

The day before the post-conviction hearing began, Dr. Doudoumopoulis, although subject to a bench warrant, had "left for Maine" for two weeks. In all fairness to the presiding judge, it should be noted that he offered to continue the hearing until the Doctor could be reached for his testimony. But on the other hand, the counsel for petitioners perhaps had no reason to expect that the course of the post-conviction hearing would run any differently from that at the deposition proceeding in advance of the hearing,[4] where Dr. Doudoumopoulis, and the petitioners' counsel, could achieve only the following interchange.

"Q. Dr. Doudoumopoulis, on or about August 26, 1961, in the course of your practice, did you have occasion to see a girl by the name of Joyce Carol Roberts?

"A. I saw her on the 28th of August, 1961.

"Q. Where did you see her?

"A. At Prince George's Hospital.

"Q. What caused you to see her?

"Mr. Kardy: I object.

. . . . .

"The Court: I will overrule it. I will permit that.

"Q. You may answer.

"A. Dr. Charles D. Connor had asked me to make a psychiatric evaluation of her.

. . . . .

"Q. Did you interview her?

"A. Yes, I did.

. . . . .

"Q. Did you reach any conclusions about her condition?

"Mr. Kardy: Just a minute, Doctor. I object.

. . . . .

[4] This deposition proceeding was also conducted by the same judge who presided at the post-conviction hearing.

"Mr. Witt: Your Honor, we are seeking to discover what the doctor's diagnosis was, and then to link it up with the knowledge of the State with respect to that condition. That is the purpose.

"The Court: The objection is sustained.

"Q. Do you know Dr. Charles Connor?

"A. Yes.

"Q. Did you discuss Joyce with him?

. . . . . .

"A. Yes.

"Q. Did you tell him your conclusions—

"Mr. Kardy: I object.

"Q. —in respect to Joyce's condition?

"Mr. Kardy: I object.

"The Court: He can answer it yes or no.

"The Witness: Yes.

"Q. Did you discuss with him what should be done for Joyce?

. . . . . .

"A. Yes.

"Q. Will you tell us the discussion with respect to what should be done with Joyce at that time?

"Mr. Kardy: I object.

"The Court: Sustained.

"Q. Did you talk to Joyce's parents?

. . . . . .

"A. I think it was the mother that I talked to.

. . . . . .

"Q. Did you have any discussion with her with respect to what should be done for Joyce? . . . Did you discuss a hospitalization of Joyce?

"Mr. Kardy: I object.

. . . . . .

"The Court: The objection is sustained."

Because the record of the juvenile court proceeding clearly indicated that psychiatric evidence concerning

the complaining witness had flowed from the doctors into that hearing, the record of which also reflected the presence of Lieutenant Whalen, the petitioners' counsel sought to pursue their inquiry through Mr. Lynn Adams, an officer of the juvenile court who had been instrumental in the juvenile court proceedings. This inquiry was likewise cut short:

> "Q. Now, it is a fact, is it not, a Lieutenant Detective Whalen of the Montgomery County Police Department was also present at that hearing?
>
> "A. Yes, according to my information it was.
>
> "Q. It is a fact, is it not, that the charge against Joyce Roberts was that she was out of parental control and living in circumstances endangering her well-being?
>
> "Mr. Kardy: Object.
>
> "The Court: Sustained.
>
> "Q. Was it brought out at this hearing that Joyce Roberts had attempted to commit suicide shortly before the hearing?
>
> "Mr. Kardy: Just a minute, Mr. Adams. Object.
>
> "The Court: Sustained.
>
> . . . . .
>
> "Q. Was it brought out at this hearing that in late August of 1961 Joyce Roberts had accused two men of raping her?
>
> "Mr. Kardy (To the Witness): Just a minute. Object.
>
> "The Court: Sustained.
>
> . . . . .
>
> "Q. Did you speak, by telephone or otherwise, with a psychiatrist by the name of Dr. Alexander Doudoumopoulis?
>
> . . . . .
>
> "A. Yes.
>
> . . . . .

"Q. Did he give you any information regarding the mental condition or mental health of Joyce Roberts in this conversation that you had with him?

"A. Did he—yes, regarding the mental health, yes.

"Q. What was the information that he gave you regarding Joyce Roberts' mental health in this conversation?

"Mr. Kardy: Just a minute. Object, Your Honor.

"The Court: Sustained."

The presiding judge seems to have closed off Mr. Adams as a source of information on the ground that he had no other choice under Rule 922 of the Maryland Rules of Procedure governing juvenile causes. The rule specifies that:

> "A person having a direct interest in a case may examine any part of the record thereof, except medical and case histories and other reports which the court may designate confidential. Such a person may also examine such histories and confidential reports with prior written permission of the court. The court may, however, from time to time, designate by general orders persons or agencies who may inspect any record, or specific classes of records, without additional written permission. Except as provided herein, no other person may examine any juvenile record, including the docket, without prior written permission of the court." Md. Ann. Code, c. 900, Rule 922.

At the post-conviction hearing, the petitioners held an authorization of the juvenile court to examine the records concerning the September 5, 1961, hearing. The authorization included permission to "make available said records for use, including introduction into evidence . . . and to any persons with knowledge thereof to testify about any aspect of the proceedings . . . in-

volving said Joyce Carol Roberts." [5] The presiding judge in the post-conviction hearing was of the view that Rule 922 allowed the juvenile court only the power to make the record available for examination, not to "put it in evidence." See Vol. I, Post-Conviction Hearing Transcript, at 66. This, of course, does not explain why the judge himself did not examine the record, as he had expressly been authorized to do by the juvenile court. Had the judge made such an examination, he might have concluded that his decision regarding the admissibility of the record and of testimony by witnesses who had attended the hearing would require a more complete consideration of the purpose of and policies served by Rule 922. And in any event—although this is a matter of Maryland law about which I am not at all sure—the Rule would not seem to be a bar to testimony by those who had attended the juvenile court hearing when asked questions concerning information obtained outside the juvenile court hearing. If I am correct in this regard, the Rule could not stand in the way of testimony by Dr. Connor as to his conversations with Dr. Doudoumopoulis, or as to his conversations with the Montgomery County police officer, or as to any conversations either of the doctors might have had with Mr. Lynn Adams outside the juvenile court hearing. An additional matter raises my doubts further about the force which Rule 922 should have had at the post-conviction hearing. The State has since supplied this Court with what is apparently the complete file and record of the September 5, 1961, juvenile court proceedings involving the complaining witness. The State apparently no longer considers Rule 922 a bar to judicial consideration of these items. I do not wish to suggest that the presiding judge's exclusion of the juve-

[5] This document is included in the record at page 274.

nile court record, and of possible testimony of Adams, Whalen, Connor, and Doudoumopoulis was necessarily incorrect. But the duty to make that decision and the right to make it in the first instance belongs to the Maryland court, and my point simply is that the circumstances of the post-conviction hearing in this case compel a more complete consideration of the issue.

There is another matter for the consideration of the Maryland court: the prosecuting attorney of Montgomery County was not charged with the knowledge of Prince George's County officers but he was charged with what the police officers of Montgomery County knew. Was he also charged with the knowledge of other Montgomery County officials such as Lynn Adams, and, to the extent of their involvement with Montgomery County agencies, Dr. Connor and Dr. Doudoumopoulis?

In the end, any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense. It would seem that the Maryland Court of Appeals would reverse as unconstitutional a conviction in a trial that included suppression of evidence tending to prove nymphomania, or more comprehensively, suppression of evidence concerning the mental condition of the complaining witness and the interrelated issues of her consent and credibility. If such is the case, it would be helpful to have the Maryland Court of Appeals' views as to whether on this record the petitioners have been afforded a full and fair hearing on this issue.

MR. JUSTICE FORTAS, concurring in the judgment.

I concur in the Court's judgment in this immensely troubling case, but I do so for the reasons which led the Montgomery County Circuit Court to order a new trial.

On petitioners' motion for post-conviction relief, Judge Moorman of the Circuit Court sustained the claim that

the prosecution had violated their federally protected right to due process of law when it failed to disclose to defense counsel evidence, known to the prosecution, concerning two incidents which occurred about one month after the crime charged to them and four months prior to trial. These incidents were: (1) the prosecutrix' sexual encounter with two boys at a party, followed by the filing and eventual dropping of a rape charge; and (2) her attempted suicide within hours of the foregoing incident and her ensuing hospitalization for psychiatric examination. The Circuit Court ruled that this information could "be reasonably considered admissible and useful to the defense," that in consequence the prosecution was under a duty to disclose, and that its omission to do so required a new trial.

The Maryland Court of Appeals reversed. It held that, even if admissible, the evidence in question was insufficiently "exculpatory" to warrant a new trial. The attempted suicide was shunted aside on the ground that its "probative value" was not such as to affect either the competence or credibility of the prosecutrix as a witness. Both it and the rape claim were disposed of on the assertion that "specific acts of misconduct" are not admissible to impeach credibility, and that "the only possible use of the facts surrounding the alleged rape claim would be for purposes of showing the unchastity of the prosecutrix, a fact that was already known to the defense at the time of the rape trial."

Judges Oppenheimer and Hammond dissented. They noted that the alleged rape claim and its abandonment might well have been useful in corroborating the petitioners' account of what happened, that no Maryland evidentiary rule rendered inadmissible in a rape prosecution evidence that the prosecutrix suffered from a mental or emotional disturbance short of "insanity," and that in any event these bits of information might have fur-

nished the defense with important leads to other and more potent evidence. The dissenters asserted that the majority erroneously substituted its appraisal of the weight to be attached to the suppressed evidence for a jury's possible evaluation, and that it erred in applying too stringent a test of admissibility.

I do not agree that the State may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial.[1] The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.

This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information. But this is not that case. Petitioners were on trial for their lives. The information was specific, factual, and concrete, although its implications may be highly debatable. The charge was rape, and, although the circumstances of this case seem to negate the possibility of

[1] In *Griffin* v. *United States,* 336 U. S. 704, 707–709 (1949), this Court remanded a case for reconsideration of a ruling that certain evidence withheld by the prosecution was inadmissible. On remand, a new rule of admissibility was formulated and a new trial ordered. *Griffin* v. *United States,* 87 U. S. App. D. C. 172, 183 F. 2d 990 (1950).

consent, the information which the State withheld was directly related to that defense. Petitioners' fate turned on whether the jury believed their story that the prosecutrix had consented, rather than her claim that she had been raped. In this context, it was a violation of due process of law for the prosecution to withhold evidence that a month after the crime of which petitioners were accused the prosecutrix had intercourse with two men in circumstances suggesting consent on her part, and that she told a policeman—but later retracted the charge—that they had raped her. The defense should have been advised of her suicide attempt and commitment for psychiatric observation, for even if these should be construed as merely products of the savage mistreatment of the girl by petitioners, rather than as indicating a question as to the girl's credibility, the defense was entitled to know.

The story of the prosecutrix is a tragic one. But our total lack of sympathy for the kind of physical assault which is involved here may not lead us to condone state suppression of information which might be useful to the defense.

With regret but under compulsion of the nature and impact of the error committed, I would vacate the judgment of conviction and require the case to be retried. In view of the conclusions of my Brethren, however, I concur in the judgment of the Court sending this case back to the Court of Appeals for reconsideration.

ADDENDUM: My Brother HARLAN has addressed a section of his dissent to my concurring opinion. This discloses a basic difference between us with respect to the State's responsibility under the fair-trial requirement of the Fourteenth Amendment. I believe that deliberate concealment and nondisclosure by the State are not to be distinguished in principle from misrepresentation.

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This Court so held in *Brady* v. *Maryland,* 373 U. S. 83 (1963). MR. JUSTICE HARLAN concedes that the State may not knowingly use perjured testimony or allow it to remain uncorrected. He asserts that this satisfies "in full" the requirements of the Fourteenth Amendment, and suggests that an extension of these principles is neither necessary nor advisable. This suggests that the State is never obligated to take the initiative to disclose evidence unless its nature is such as to impeach evidence that the State has offered. I assume that MR. JUSTICE HARLAN would apply this principle, even though the information might, in the hands of defense counsel, spell the difference between death and exoneration of the defendant. I cannot subscribe to this. A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the State has caused to be given at the trial—the State is obliged to bring it to the attention of the court and the defense. For example, let us assume that the State possesses information that blood was found on the victim, and that this blood is of a type which does not match that of the accused or of the victim. Let us assume that no related testimony was offered by the State. I understand my Brother HARLAN's comments to mean that he would not require the State to disclose this information. He would apparently regard *Miller* v. *Pate, ante,* p. 1, as the outer limit of the State's duty. There the prosecution dramatically used a pair of shorts, misrepresented as saturated with blood, to secure a conviction. I cannot acquiesce that this is the end of the State's duty under the Constitution. Nondisclosure—deliberate withhold-

ing—of important information of the type described, which is in the exclusive possession of the State is, in my judgment, not reconcilable with the concept of a fair trial and with the Due Process Clause. I can readily see that differences of opinion might exist as to whether the nature of particular evidence is such that nondisclosure of it should result in setting aside a conviction. But I do not accept the notion that only where the effect of withholding evidence is to allow perjured testimony to stand uncorrected is there a duty to disclose. In my view, a supportable conviction requires something more than that the State did not lie. It implies that the prosecution has been fair and honest and that the State has disclosed all information known to it which may have a crucial or important effect on the outcome.

The newly amended Rule 16 of the Federal Rules of Criminal Procedure has little to do with the matter now before the Court. On its face, the Rule is directed to the relatively limited problem of *pretrial* discovery and inspection in the federal courts. Whether Rule 16 is adequate even for its purposes is the subject of differences of opinion. But it does not purport to exhaust the prosecution's duty. MR. JUSTICE HARLAN apparently finds no inconsistency between proscription of the prosecution's knowing use or acquiescence in the use of perjured testimony [2] and Rule 16's silence on that subject. I find none in the requirement, recognized by this Court in *Brady* v. *Maryland, supra,* that the State apprise the defendant of information of the sort described herein, and the Rule's omission of such a requirement. My point relates, not to the defendant's discovery of the prosecution's case for purposes of preparation or avoidance of surprise, which is dealt with in Rule 16, but with the State's constitutional duty, as I see it, voluntarily to

[2] *Alcorta* v. *Texas,* 355 U. S. 28 (1957); *Napue* v. *Illinois,* 360 U. S. 264 (1959); *Mooney* v. *Holohan,* 294 U. S. 103 (1935).

disclose material in its exclusive possession which is exonerative or helpful to the defense—which the State will not affirmatively use to prove guilt—and which it should not conceal. *Brady* involved neither the knowing use of perjured testimony nor acquiescence in its use. Nevertheless, both the Maryland Court of Appeals and this Court concluded that the prosecutor's conduct in withholding information material to guilt or punishment, information which defense counsel had unsuccessfully requested, violated due process. Although this Court included in its statement of the controlling principle a reference to counsel's request—"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . ." [3]—I see no reason to make the result turn on the adventitious circumstance of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK, MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

The disposition of this case, the product of three opinions, none of which commands the votes of a majority of the Court, is wholly out of keeping with the constitutional limitations upon this Court's role in the review of state criminal cases. For reasons that follow, I dissent.

On the basis of the trial record, it would be difficult to imagine charges more convincingly proved than were those against these three youths for raping this teenage

[3] 373 U. S., at 87.

girl.[1] Following conviction, information came to light which seriously reflected on the sexual habits of the girl and on the stability of her character. These revelations were made the basis of a state post-conviction proceeding, premised on the claim that in failing to disclose these data at the time of trial the prosecution had been guilty of a deliberate suppression of material evidence and the knowing use of perjured testimony. The post-conviction judge found against those claims, but nonetheless ordered a new trial, holding that the data, which he deemed would have been admissible and useful to the defense, should have been disclosed by the authorities. The Court of Appeals of Maryland, holding as a matter of state law that this material was not such as to justify a new trial, reversed. This Court, without finding any constitutional flaw in the state proceedings, and indeed expressly recognizing that upon the facts as found by the state courts, petitioners' nondisclosure claim gives rise to no federal question under existing law, now returns the case to the Maryland Court of Appeals for what amounts to nothing more than reconsideration.

The plurality and one of the concurring opinions urge entirely different reasons for remanding the case in this fashion, and will thus oblige the courts of Maryland to reconsider a series of wholly unrelated issues. The plurality opinion and my Brother WHITE's concurring opinion have only two common denominators: neither can identify any federal basis for this disposition, and both

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[1] "Consent" is of course the conventional defense in rape cases. In light of the forcible entry into the car occupied by the victim, the assault upon her companion, and her flight into the woods, it would have been extraordinary for the jury to have believed that this girl freely invited these youths to have sexual relations with her, still more that the petitioner John Giles, who was the first to pursue her into the woods (albeit allegedly not knowing that he was pursuing a female), refused the "invitation."

are concerned with questions which have been repeatedly considered by the state courts. Each of the three opinions requires discrete treatment, but I have concluded, for the reasons which follow, that none of them offers any basis on which the Court may properly return this case to the Maryland courts.

I.

I turn first to the reasons advanced by the plurality opinion. The unusual disposition made of this case by the plurality is bottomed upon materials entirely outside the record before us, furnished to this Court after the case was submitted, under the leverage of inquiries put from the bench during the argument. The materials are two pre-indictment police reports, the Montgomery County Officers' Report and the Supplementary Offense Report. It seems to me entirely improper for this Court to "retry" state criminal cases in its own courtroom, and then to return them for reconsideration in light of materials "discovered" outside the record during that process. Even apart from that regrettable practice, the remand of this case is the more remarkable because the materials on which the plurality relies are not in any sense newly discovered. The fact is that these police reports have played a significant role throughout the state court proceedings. They were made available to defense counsel at the original trial stage. They were given to and considered by the trial judge at the time of sentence. And although demanded by the new defense counsel in the post-conviction proceeding, their production was denied under a state procedural rule which apparently was not contested in the state appeal, and which is in no way now questioned by this Court from a federal standpoint. In consequence, the ultimate rationale for the plurality's disposition of the case is itself specious.

The use now made of these police reports is equally unsatisfactory. The discrepancies which the plurality finds between these reports and the trial testimony relate to two episodes. First, the girl, Joyce, and her companion, Foster, apparently initially told the police that they were having sexual intercourse in their car when they noticed the presence of the other car, whereas at trial Foster intimated that he and the girl were simply sitting in the rear seat. He denied elsewhere that he and his friends had brought Joyce out to the spot to have sexual relations with her. Second, one of the police reports is construed to suggest that Joyce had said that John Giles did not penetrate her, whereas her trial testimony was that all three men had raped her. The plurality argues that these discrepancies, if known to the defense, might have been used to establish the girl's reputation for promiscuity, to attack the credibility of prosecution witnesses, and possibly to exonerate petitioner John Giles entirely. It even suggests that the defense might have shown a deliberate suppression of evidence or a conscious failure to correct perjured testimony.

The short answer to all this is, of course, that the record makes plain that defense counsel at the trial was given access to these police reports [2] and thus must be taken to have been aware of the very discrepancies of which the plurality now undertakes to make so much. There is no basis whatever in the evidence before us for the plurality's intimation that the reports seen by counsel may not have been those given to this Court or for its thinly veiled suggestion that in not making use of the supplementary report counsel may have been incompetent or worse.

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[2] Counsel so stated three times at the post-conviction proceeding, twice under the judge's questioning. This colloquy has been reprinted in my Brother WHITE's opinion, *ante*, p. 82.

Beyond this, a more careful examination than the plurality has given these reports and the record will itself dissipate the aura of suspicion and conjecture with which this case has now been surrounded. The plurality first suggests that perjured testimony may have been knowingly utilized by the prosecution to establish penetration of the girl by John Giles. Joyce initially testified at a pretrial hearing that only Johnson and James Giles had intercourse with her.[3] Later in the same hearing she included John Giles, apparently with the explanation that she had first believed that rape requires emission as well as penetration. At trial she testified very specifically that John Giles had effected penetration. On cross-examination, she conceded that her first accounts both to the police and at the preliminary hearing indicated that only two men had intercourse with her. She again suggested that she had been confused. In contrast, the police officers testified at trial that Joyce had said in questioning on July 21 that John Giles had intercourse with her. The supposed inconsistencies among all these accounts were plain both to defense counsel and to the jury.[4]

Petitioners argued at the post-conviction proceeding that the police testimony was perjured, and that Joyce had initially said that John Giles did not attack her. They offered, in addition to Joyce's own admissions at trial, statements from petitioners' father, mother, and sister that a policeman had first mentioned only two assailants to them. In a deposition hearing, Joyce said that she did not recall ever conceding at trial that only two men had intercourse with her. Judge Moorman con-

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[3] We do not have before us the transcript of the preliminary hearing. An uncontested account of Joyce's testimony was however given at the post-conviction proceeding. See Transcript of Record 270–272.

[4] Counsel made an extended effort to discredit Joyce's testimony based on the alleged inconsistencies in her various accounts. See Transcript of Record 62–64.

cluded that Joyce's terminological confusion adequately explained the supposed discrepancies with the police testimony. Although petitioners have not argued this issue here, the plurality now points to the supplementary report to suggest again that the police evidence might have been perjured, and remands for what it quite evidently hopes will result in another hearing on that issue.

It seems apparent that the references to this issue in the supplementary report are entirely equivocal. The report contains only three references to Joyce's statements on this question. First, Joyce is reported to have replied, when asked how many had intercourse with her, that "The bigger one [John] tried first, then the other two." Again, the statement is attributed to her, in the third person, that John "tried to have intercourse with her but was unable to do so." Finally, she is reported to have said that John Giles "tried to insert" but "could not get" an erection. The report indicates that John Giles was the first to begin to remove Joyce's clothing, that he kissed her, and that he "tried" for some 10 minutes.[5]

It must first be plain that although these references are brief and imprecise, nothing in them necessarily excludes the conclusion that John Giles achieved penetration, however slight. Further, it must be recognized that the form and language of the supplementary report indicate quite clearly that it was prepared rapidly, under the urgency of the events, and without any expectation that its every word would now be weighed and balanced. Little wonder that the plurality's diligent pursuit of uncertainty has unearthed phrases which, so it supposes, permit some room for ambiguity.

Finally, it must be remembered that in the report, at the pretrial hearing, and at the trial itself, the police,

[5] It is important to note that the supplementary report does not, contrary to the apparent suggestion in the plurality opinion, state that John Giles "failed to 'insert.'"

the witnesses, and even counsel employed interchangeably various terms of very dissimilar meaning to describe the acts committed upon the girl by the defendants. The post-conviction proceeding court expressly found that Joyce for one was confused by this elusive terminology, and that this confusion explained any discrepancies in her various accounts of these events. This finding was not disturbed or even questioned by the Maryland Court of Appeals. Nonetheless, the plurality attempts to escape it with the suggestion, surrounded by cautious disclaimers, that it may possibly have been mistaken. The plurality offers three reasons for this suggestion. It first intimates that the finding may be mistaken because the State proffered this explanation only at the post-conviction proceeding. This is entirely unpersuasive; Joyce's confusion was apparent at least as early as the original preliminary hearing, and was not there offered by the State as an explanation, but instead became obvious to those present simply from the terms of Joyce's testimony. The plurality next suggests that Joyce at trial expressed confusion only as to the names of her assailants, and not about this terminology. This is twice deficient: it ignores that the terms of Joyce's testimony were perfectly well known to the state courts which made and accepted the finding, and it is bottomed on an unreasonable construction of the testimony.[6]

Lastly, the plurality contends that Joyce is not shown by the supplementary report to have been confused. There are two obvious answers. First, this assumes that the report precisely reproduces the words used by Joyce herself to describe these events, and that these words

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[6] Joyce did not simply suggest that she had been confused about the names of her assailants. Under defense counsel's persistent cross-examination she repeatedly affirmed that she was telling the full truth, and that she did not know "what I thought" at the time of her earlier accounts. Given her age and circumstances, this is scarcely improbable.

may therefore be sifted and weighed to establish Joyce's familiarity with this terminology. This is unsupported by the report itself, which contains no formal statements, and is instead an informal jumble of undigested information collected by the police as they conducted their investigation. At no point can the reader be entirely certain whether its words are the witness' or those selected by the police interrogators to digest the information given them. Finally, the plurality overlooks that there is uncontested testimony that Joyce was plainly and pertinently confused at the preliminary hearing. The plurality's speculation that she may or may not have been confused at one stage of this lengthy proceeding can scarcely vitiate the firm finding of the Maryland courts that she was confused at another and more crucial stage, and that this confusion explained any discrepancies in her accounts of these events. In sum, I find the plurality's oblique efforts to cast doubt on the finding of the state courts entirely unpersuasive.

Moreover, these references in the supplementary report must be viewed in light of the other police report furnished this Court, the Montgomery County Officers' Report. That report makes quite clear that Joyce indicated at the scene that John Giles "had entered her." [7] The plurality seeks to explain the terms of this report with two suggestions. First, it intimates that the report may be unreliable because it is a summary of Joyce's statements "immediately after the incident." I should have thought that it would therefore be all the more important. At most, the plurality's intimation is an acknowledgment of the weaknesses of both reports. Neither report was intended to serve as a formal and precise record; it is there-

[7] Montgomery County Officers' Report 1. The report indicates that Joyce said "two of the . . . males had entered her and . . . the third had tried but gave up when he saw lights coming." In the context of the other evidence the third man could only have been James Giles.

fore extraordinarily hazardous to pyramid, as the plurality has done, hypotheses upon strained constructions of the reports' most abbreviated references. This simply re-emphasizes the wisdom of the State's exclusionary rule, and the corresponding impropriety of the plurality's circumvention of that rule. Second, the plurality suggests that the report leaves unexplained the police testimony that Joyce had said that all three men had intercourse with her. This assumes first that the words "gave up" in the report indicate that Joyce meant that James Giles did not penetrate, when in light of the other accounts given by both James Giles and Joyce, it could only have meant that he did not reach emission. More important, the plurality overlooks that the only questions which have ever been even intimated about whether any of the three youths failed to penetrate the girl center entirely on John Giles, and this is a plain statement in the police reports that Joyce had informed the police at least once that John Giles penetrated her. The plurality opinion cannot, and does not, deny that this is the most unequivocal reference in either report to John's actions, and that it makes plain that Joyce reported that John had penetrated her. Given the ambiguity of the references to John Giles in the supplementary report, Joyce's clear statement in the Officers' Report that John Giles had penetrated, and the no less plain statements in the supplementary report from Joyce, James Giles and Johnson that James and Johnson also penetrated, I am again unable to understand how it can be thought that there might be some basis for the attribution of perjury on this score to the police witnesses.[8]

[8] The plurality's diversionary suggestion that Sergeant Duvall's testimony presents difficulties is wholly unpersuasive. His inexplicable failure to describe Joyce's statements to him served only to weaken the State's case, and certainly did not in any fashion prejudice petitioners. It offers no basis on which they would be entitled to relief.

The asserted discrepancies among the various accounts given of John Giles' participation by Joyce and the other prosecution witnesses have been forcefully argued at each stage of this case, they have been painstakingly considered by the state courts, and I can see no warrant for inviting those courts to examine the issue anew.

The plurality next suggests that the prosecution may also have been privy to the use of perjured testimony or guilty of a deliberate suppression of evidence in relation to what the girl and Foster were doing in the car just before their assailants came upon them. This is entirely insubstantial. Foster and the girl were never directly asked at trial, and did not volunteer, to describe what they had done while awaiting the return of their friends. They were not asked if they had intercourse. The question was only once even inferentially suggested. Foster was first asked "What did you three boys take Joyce out there for that night?" and replied "I told you we were going to meet some friends up there and go swimming." The next question was "You didn't take her out there to have sexual relations with her, yourself, did you?" and Foster replied "No." It would doubtless have been more forthright had Foster interjected that, whatever his original expectations, they had in fact had relations; nonetheless, his explanation was an adequate response to the precise question asked. In short, although the evidence was as to this point incomplete, it was, so far as it went, consistent with the police report.

I do not see how it can be suggested that the prosecutor's conduct in this instance was constitutionally vulnerable. First and foremost, the contents of the police reports on this episode were made available to the defense, and counsel elected to make nothing of them. Second, the omitted fact in Foster's testimony could not have had "an effect on the outcome of the trial." *Napue* v. *Illinois,* 360 U. S. 264, 272. Initially, it is very doubt-

ful that this evidence would have been admissible at trial. Under the law of Maryland, specific acts of misconduct are not admissible to impeach a witness' credibility. *Rau* v. *State,* 133 Md. 613, 105 A. 867. Further, since the evidence at trial was merely silent on these issues, and did not include inconsistent statements, this evidence presumably would not have been admissible on that basis to impeach the credibility of these witnesses. Finally, although Maryland permits the admission of evidence of a prosecutrix' general reputation for immorality, it does not permit evidence of specific acts of intercourse. *Shartzer* v. *State,* 63 Md. 149; *Humphreys* v. *State,* 227 Md. 115, 175 A. 2d 777. The Court of Appeals of Maryland has in this very case plainly said that "a prosecutrix cannot be asked whether she had previously had intercourse with a person other than the accused." *Giles* v. *State,* 229 Md. 370, 380, 183 A. 2d 359, 363. The evidence with which the plurality is concerned therefore cannot "reasonably be considered admissible," *Griffin* v. *United States,* 87 U. S. App. D. C. 172, 175, 183 F. 2d 990, 993, under the law of Maryland. Far more important from a federal standpoint, evidence of Foster's relations with the girl, even if admissible, could not have been substantially relevant to the principal factual issues at the trial. Its omission did not discolor the meaning of controlling facts, as did the episode involved in *Alcorta* v. *Texas,* 355 U. S. 28; nor did it measurably strengthen a witness' credibility, as did the one involved in *Napue* v. *Illinois,* 360 U. S. 264. It would at most have given the defense another inconclusive intimation of Joyce's promiscuity, and this could scarcely have sufficed to change the trial's outcome.

The plurality ultimately seeks to justify its disposition of this case in terms of the rules by which this Court has given recognition to the different roles played under the Constitution by federal and state courts. These efforts

are entirely unpersuasive. In essence, the plurality has first brought these police reports into the case through an informal discovery rule of its own creation which flies into the face of an unassailed state rule which excluded the reports, and now has invited the state courts to reconsider the case unrestricted by the local rule and not confined to the "Constitution's relevant commands." This scarcely fits the plurality's professed objective to "minimize federal-state tensions." And plainly this course finds no support in cases in which the Court has remanded for further consideration in light of a supervening event. Nothing here is remotely analogous to the change in state law that occurred in *Bell* v. *Maryland,* 378 U. S. 226, or to the intervening judgments of this Court that took place in *Patterson* v. *Alabama,* 294 U. S. 600, and in *Dorchy* v. *Kansas,* 264 U. S. 286. What is now done is explicable only on the premise that this Court possesses some sort of supervisory power over state courts, a premise which of course traverses the most fundamental axioms of our federal system.

II.

The rationale offered for remand by my Brother WHITE's opinion is equally unsatisfactory. At bottom, that rationale consists of the supposition that the presiding judge at the state post-conviction proceeding may possibly have misconstrued applicable Maryland law, and may therefore have improperly excluded testimony relevant to the mental condition of the prosecuting witness. My Brother WHITE does not suggest, as I think he cannot, that any of the rulings which he suspects to have been erroneous were deficient under any known federal standard. All of them at most involve, even under his premises, misapplications of Maryland law. Each of these rulings was plain on the face of the record presented to, and carefully considered by, the Maryland

Court of Appeals; all the materials pertinent to the evaluation of these rulings were before that court at the time of its review.

The court did not, of course, explicitly determine the various questions now posed, but it did, as my Brother WHITE acknowledges, examine the record to decide whether Joyce might have been suffering from mental illness, or whether she was otherwise incompetent as a witness. Such an examination must inevitably have obliged the court to assess the very rulings and restrictions which it must now reassess upon remand. Despite this, neither the majority nor the dissenting opinion below expressed any doubt that these rulings were entirely correct. At a minimum, a remand thus needlessly prolongs an already protracted case; unfortunately, it may also appear to endorse the substitution of the speculations of this Court on the content of state law for the conclusions of the State's highest court, as basis for the return of a case to the state courts for reconsideration.

In any event, the hesitations expressed by MR. JUSTICE WHITE's opinion about the scope of the evidence concerning Joyce's mental condition appear unwarranted on the record before us. The record makes plain that the court at the post-conviction proceeding permitted the admission of substantially more evidence on this issue than that opinion might be taken to suggest. First, the presiding judge permitted Dr. Connor, the attending physician, to state his diagnosis of Joyce's mental condition. In addition, Dr. Connor was allowed to indicate that he agreed with the diagnosis described to him by the consulting physician, Dr. Doudoumopoulis. Dr. Connor was not, as that opinion notes, permitted to describe that diagnosis, but the court supplemented its ruling with the statement to defense counsel that "I would admit it if you put it in the right manner." Both Dr. Connor and Dr. Doudoumopoulis were allowed in

a deposition hearing to state whether they had discussed Joyce's condition with various officials of Prince George's and Montgomery Counties. Further, the court permitted another psychiatrist, Dr. Solomon, to state, in reply to a hypothetical question asked by defense counsel, his opinion of the mental condition of a girl in Joyce's circumstances. In addition, Dr. Solomon was permitted to describe the basis for his views, to offer his opinion as to what her mental condition might have been some three months later (the interval before the trial in this case), and to state that a girl in these circumstances warranted a psychiatric examination. Dr. Solomon was prevented from speculating only whether this condition might have affected the girl's credibility as a witness, an issue, the court noted, which is for the jury, and not an expert witness, to determine. Finally, petitioners adduced very substantial evidence of Joyce's sexual history, all of which was pertinent to the court's determination whether she might have been suffering from mental illness.

Perhaps more evidence of Joyce's mental condition, and of the knowledge of Montgomery County authorities of that condition, could conceivably have been introduced; but it is true of all criminal prosecutions, federal and state, that some fragments of fact broadly pertinent to the issues of the trial do not reach the record. In any event, the petitioners themselves have apparently never challenged any of these rulings either before the Maryland Court of Appeals or in this Court. I can find no basis on the record before us for remanding this case simply in the hope that rulings of state law may now be held to have been improper, and thus that unknown additional evidence, which may or may not be pertinent and substantial, may then be admitted. This practice is warranted neither by the facts of this case nor by the role given to this Court by the Constitution in the review of state criminal convictions.

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III.

My Brother FORTAS' proposed resolution of the case is, with great respect, no more satisfactory, although he would, to be sure, base its disposition upon an asserted federal question. His reasoning, as I see it, rests at bottom upon quite fundamental objections to the character and balance of our adversary system of criminal justice. Neither those objections nor the conclusions which stem from them form any part of the disposition made of this case, in which he joins; it would accordingly be inappropriate for me to respond in more than relatively summary fashion. I content myself, therefore, with outlining the reasons why I cannot subscribe to my Brother FORTAS' approach.

As I understand him, my Brother FORTAS believes that state prosecuting officials are compelled by the Fourteenth Amendment to disclose to defense counsel any information "which is material, generously conceived, to the case, including all possible defenses." This would include all information which is "exonerative or helpful." This standard would demand markedly broader disclosures than this Court has ever held the Fourteenth Amendment to require. The Court has held since *Mooney* v. *Holohan,* 294 U. S. 103, that a State's knowing use of perjured testimony denies a fair trial to the accused. *Mooney* has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. *Alcorta* v. *Texas,* 355 U. S. 28; *Napue* v. *Illinois,* 360 U. S. 264. The standard applied in such cases has been whether the testimony "may have had an effect on the outcome of the trial." *Napue* v. *Illinois, supra,* at 272. These cases were very recently followed and applied in *Miller* v. *Pate, ante,* p. 1. Apart from dicta in *Brady* v. *Maryland,* 373

U. S. 83, the Court has never gone further.[9] Nor, in my view, does the Constitution demand more. This standard is well calculated to prevent the kinds of prosecutorial misconduct which vitiate the very basis of our adversary system, and yet to provide a firm line which halts short of broad, constitutionally required, discovery rules. It both guarantees the fundamental fairness of state criminal trials, thereby satisfying in full the requirements of the Fourteenth Amendment, and preserves intact the States' ultimate authority for the conduct of their systems of criminal justice. None of these advantages adheres to the standard suggested by my Brother FORTAS. His reasoning must inevitably result in the imposition upon the States through the Constitution of broad discovery rules. Those rules would entirely alter the character and balance of our present systems of criminal justice.

The extraordinary breadth of the standard apparently urged by MR. JUSTICE FORTAS becomes more plain when that standard is measured against Rule 16 of the Federal Rules of Criminal Procedure, applicable in federal criminal trials.[10] Discovery under Rule 16, even as now

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[9] I cannot agree that this Court in *Brady* extended *Mooney* in any fashion. The language in *Brady* upon which my Brother FORTAS relies was quite plainly "wholly advisory." *Brady* v. *Maryland, supra,* at 92 (separate opinion of WHITE, J.).

[10] In substance, Rule 16 provides that upon the motion of a defendant a court may permit the defendant to inspect and copy "statements or confessions made by the defendant," the results of physical or mental examinations and of "scientific tests or experiments," and the defendant's testimony before a grand jury. Further, the court may, upon a defendant's motion and upon a showing of materiality and reasonableness, permit the defendant to inspect and copy or photograph "books, papers, documents, tangible objects, buildings or places, or copies or portions thereof . . . ." The Rule expressly does not authorize the discovery or inspection of "internal

amended, is restricted by a number of carefully drawn limitations, each intended to "guard against possible abuses." Notes of the Advisory Committee on Rules, 39 F. R. D. 176. The defendant is permitted only to obtain certain categories of materials, and he must in each case first move the court for their production. These limitations fall far short of the standard urged by my Brother FORTAS. Under his view the information obtainable by the defendant could not be restricted by its character or source; failure to disclose could be justified, *post hoc,* only if the information cannot be deemed "material," generously judged. Nor could the defendant be obliged to demand disclosure; as my Brother FORTAS' opinion emphasizes, the burden must instead be placed upon the prosecutor, on threat of subsequent reversal of any conviction, spontaneously to proffer all that might prove "helpful" to the defense. The effect which the rule urged here would thus have on this federal and similar state discovery rules would be entirely unlike that of *Mooney* and the cases which stem from it. *Mooney* simply imposes sanctions upon specified forms of prosecutorial misconduct; MR. JUSTICE FORTAS' rule would in contrast create wide constitutional obligations to disclose which, whether operative before or during trial, would entirely swallow the more narrow discovery rules which now prevail even in federal criminal trials.

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government documents made by government agents" in connection with the case, or of statements "made by government witnesses or prospective government witnesses . . . to agents of the government . . . ." Other portions of Rule 16 permit a court to make such disclosures conditional upon disclosures by the defendant to the Government, to prescribe the time, place, and manner of discovery, and to make suitable protective orders. Finally, the Rule creates a continuing duty to disclose additional similar materials obtained after compliance with an order issued under the Rule, and permits the imposition of sanctions for failure to satisfy that duty.

Issues of the obligatory disclosure of information ultimately raise fundamental questions of the proper nature and characteristics of the criminal trial. These questions surely are entirely too important for this Court to implant in our laws by constitutional decree answers which, without full study, might appear warranted in a particular case. There are few areas which call more for prudent experimentation and continuing study. I can find nothing either in the Constitution or in this case which would compel, or justify, the imposition upon the States of the very broad disclosure rule now proposed.

IV.

The unarticulated basis of today's disposition, and of the disparate reasons which accompany it, is quite evidently nothing more than the Court's uneasiness with these convictions, engendered by post-trial indications of the promiscuity of this unfortunate girl. Unable to discover a constitutional infirmity and unwilling to affirm the convictions, the Court simply returns the case to the Maryland Court of Appeals, in hopes that, despite the plurality's repeated disclaimers, that court will share the Court's discomfort and discover a formula under which these convictions can be reversed. The Court is unable even to agree upon a state law basis with which to explain its remand. I cannot join such a disposition. We on this bench are not free to disturb a state conviction simply for reasons that might be permissible were we sitting on the state court of last resort. Nor are we free to interject our individual sympathies into the administration of state criminal justice. We are instead constrained to remain within the perimeter drawn for this Court by the Constitution.

I cannot find a tenable constitutional ground on which these convictions could be disturbed, and would therefore affirm the judgment of the Court of Appeals of Maryland.

KILGARLIN ET AL. *v.* HILL, SECRETARY OF STATE OF TEXAS, ET AL.

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

No. 235. Decided February 20, 1967.

Appellants challenge the 1965 legislative reapportionment of the Texas House of Representatives in a plan which combined single-member, multi-member, and floterial districts. The District Court sustained the plan except for the floterial districts, which were found to violate the principles of *Reynolds* v. *Sims,* 377 U. S. 533, and permitted the 1966 election to proceed under the plan. Despite population variances among the remaining districts resulting in a 1.31 to 1 ratio between the largest and smallest districts, the District Court approved the plan, holding that appellants had not sustained their burden of negating the existence of any state of facts which would sustain the legislation and that the deviations were justified by the state policy of respecting county lines wherever possible. *Held:* Population variances of the size evident here invoke the rule of *Swann* v. *Adams,* 385 U. S. 440, and, notwithstanding the District Court's view that the deviations here were generally justified by the state policy of respecting county lines, the judgment is reversed in part and the case is remanded for further proceedings to determine whether the state policy necessitates the range of deviations evident here.

252 F. Supp. 404, reversed in part and remanded.

William E. Wright for appellants.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, and *Mary K. Wall,* Assistant Attorney General, for appellees.

PER CURIAM.

Following judicial invalidation of the constitutional and statutory provisions governing the apportionment of the Texas State Legislature, the State Legislature reapportioned both the House and the Senate. Appel-

lants promptly challenged on various grounds the constitutionality of H. B. 195[1] which reapportioned the House of Representatives in a combination of single-member, multi-member and floterial districts. The District Court sustained all aspects of the plan except those provisions respecting the counties included in 11 floterial districts, 252 F. Supp. 404, which were found violative of the equality principles announced in *Reynolds* v. *Sims,* 377 U. S. 533. The court did, however, over appellants' objections, permit the 1966 election to proceed under H. B. 195 with a proviso to the effect that if the legislature did not adopt corrective legislation by August 1, 1967, the counties in the floterial districts would be reconstituted as multi-member districts and all the representatives assigned to those counties would be elected at large.

We affirm the District Court's action in permitting the 1966 election to proceed under H. B. 195 although constitutionally infirm in certain respects. In the particular circumstances of this case there is ample precedent for the court's action. See *Drum* v. *Seawell,* 383 U. S. 831; *Toombs* v. *Fortson,* 384 U. S. 210. We also affirm the court's judgment insofar as it held that appellants had not proved their allegations that H. B. 195 was a racial or political gerrymander violating the Fourteenth Amendment, that it unconstitutionally deprived Negroes of their franchise and that because of its utilization of single-member, multi-member and floterial districts it was an unconstitutional "crazy quilt."

In another respect, however, the District Court committed reversible error. Appellants alleged that in addition to the inequalities inherent in the floterial districts,

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[1] Tex. Rev. Civ. Stat. Ann., Art. 195a contains House Bill 195. The Senate reapportionment of 1965, Tex. Rev. Civ. Stat. Ann., Art. 193a, is not here in issue.

H. B. 195 also infringed Fourteenth Amendment rights because in the remaining legislative districts of the State there were unacceptable variations from the principle of *Reynolds* v. *Sims* that among legislative districts the population per representative should be substantially equal. Appellants' proof showed that in these other districts the population per representative varies from 54,385 to 71,301, or from 14.84% overrepresented to 11.64% underrepresented. The ratio between the largest and the smallest district is thus 1.31 to 1. The deviation from the average population per representative is greater than 10% in 12 single-member districts, and a total of 55 representatives would be elected from eight multi-member districts in which the population per representative varies from the ideal by more than 6%.

The District Court sustained the constitutionality of H. B. 195 on two grounds. First, it held that appellants had the burden not only of demonstrating the degree of variance from the equality principle but also of "negat[ing] the existence of any state of facts which would sustain the constitutionality of the legislation." 252 F. Supp. 404, 414. This, the court held, appellants had not done. At that time, of course, *Swann* v. *Adams*, 385 U. S. 440, had not been announced. Under that case it is quite clear that unless satisfactorily justified by the court or by the evidence of record, population variances of the size and significance evident here are sufficient to invalidate an apportionment plan. Without such justification, appellants' analysis of H. B. 195 made out a sufficient case under the Fourteenth Amendment.

Second, the District Court, not resting exclusively on its burden of proof ruling, found that the deviations from the equal population principle were amply justified here because they resulted from a bona fide attempt to conform to the state policy requiring legislative apportion-

ment plans to respect county boundaries wherever possible. We are doubtful, however, that the deviations evident here are the kind of "minor" variations which *Reynolds* v. *Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans. 377 U. S. 533, 578–579. But we need not reach that constitutional question, for we are not convinced that the announced policy of the State of Texas necessitated the range of deviations between legislative districts which is evident here. In the first place, Texas policy, as elaborated by the Attorney General and concurred in by the District Court,[2]

[2] The Attorney General expressed the state policy in a letter to the Speaker of the House, included as Appendix "D" in the opinion below, 252 F. Supp. 404, 455–456.

May 19, 1965

Honorable Ben Barnes
Speaker of the House
Austin, Texas

Dear Mr. Speaker:

As a result of the analyzing and briefing of Section 26, Article III of the Texas Constitution of 1876 and the recent decisions of the U. S. Supreme Court on the subject of state reapportionment, this office has reached the following legal conclusions.

1. Whenever a single county has sufficient population to be entitled to more than one representative, all the representatives to which it is entitled *shall be apportioned* to that county.

2. Multi-representative counties may be apportioned so that the representatives can run at-large within the county or from individual districts within the county *or*, a combination of any of these methods.

3. If a single county does not have sufficient population to entitle it to one representative, such county shall be joined with one or more contiguous counties until the proper population ratio is achieved. *The above cited provision of the Texas Constitution requires that counties be kept intact and their boundaries not be violated.*

4. Should the keeping of counties intact result in a violation of the Supreme Court "one man, one vote" rule, then the county lines must be violated *but only to the extent necessary to carry out the mandate*

permits the formation of multi-member and floterial districts and even, where necessary, the violation of county lines in order to surmount undue population variations. In the second place, the District Court did not relate its declared justification to any specific inequalities among the districts, nor demonstrate why or how respect for the integrity of county lines required the particular deviations called for by H. B. 195. Nor did the District Court articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations from the principles of *Reynolds* v. *Sims*. Similar fault can be found in accepting a general county-line justification for the population deviations that would occur should the present floterial districts be reconstituted as multi-member districts. The ratio between the largest reconstituted district and the smallest district created by H. B. 195 would be 1.21 to 1, and seven representatives would be elected from districts overrepresented by 13% or more. Another five representatives would be elected from districts overrepresented by 8% or more.

Appellants also raise specific challenges to the provisions of H. B. 195 with respect to Dallas, Bexar, and Harris Counties. Dallas and Bexar Counties are rel-

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of the Supreme Court. In all other instances, county lines must remain intact and multi-county districts or flotorial districts be formed by the joining of complete and contiguous counties.

The above legal conclusions have been set out as clearly and concisely as possible. These conclusions have been reached by a thorough analysis of the Texas constitutional provisions as well as recent federal court decisions. Our research has also thoroughly developed the legislative history and legislative interpretation of the legislative sessions immediately prior to and immediately subsequent to the adoption of the constitutional provisions involved.

Yours very truly,
s/Waggoner Carr

atively densely populated multi-member districts. Measured by population alone, each county could support one more representative than is allocated to it under H. B. 195, and thus more nearly approximate the arithmetic ideal. Giving each of them one more representative would not, of course, violate their county lines; and we cannot be sure, at least on this record and in view of the 150-member limit on the House of Representatives, that Dallas and Bexar Counties must be denied additional representation in order to adhere to county lines in other districts throughout the State. If other districts cannot be re-formed within county lines in such a way as to afford Dallas and Bexar Counties another representative and at the same time to afford the re-formed districts constitutional representation, we would have to meet the question whether the state policy advanced here justifies the seeming [3] underrepresentation in Dallas and Bexar Counties, which is 6.42% and 7.59% respectively. But on the record that is now before us we do not reach this issue and believe that the District Court should give further consideration to these counties.

Appellants complain that district 24 in Harris County is assigned only six representatives whereas district 22 in the same county with a slightly smaller population is assigned seven representatives. The court found the record to establish that the population in district 22 was growing rapidly as compared with district 24 and would soon justify the extra representative. This factual de-

[3] Our cases do not foreclose attempts to show that in the particular circumstances of a given case multi-member districts are invidiously discriminatory. See *Burns* v. *Richardson,* 384 U. S. 73, 88–89. It has recently been suggested that multi-member districts such as Dallas and Bexar are adequately represented, if not overrepresented. See Banzhaf, Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309 (1966).

termination not being challenged here, we accept the ruling of the District Court regarding these districts.

The judgment is reversed in part and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I reserve decision on one aspect of the problem concerning multi-member districts.

Under the present regime each voter in the district has one vote for each office to be filled. This allows the majority to defeat the minority on all fronts. It is suggested that in multi-member districts each person be able to vote for only one legislator, the theory being that in that way a minority, either political or otherwise, would have a chance to elect at least one representative.

I am not sure in my own mind how this problem should be resolved. But in view of the fact that appellants claim that multi-member districts of Texas are constructed in such a manner that Negroes are effectively disenfranchised, I would reserve that question for consideration when the case is once again before the District Court.

MR. JUSTICE CLARK would affirm the judgment of the District Court.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment of the District Court in its entirety, on the basis of the reasoning contained in MR. JUSTICE HARLAN'S dissenting opinion in *Swann* v. *Adams,* 385 U. S. 440, 447.

MacDONALD *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE.

No. 503, Misc. Decided February 20, 1967.

Appeal dismissed and certiorari denied.

Vasken Minasian for appellant.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

KIMBRO *v.* HEER, WARDEN.

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

No. 751, Misc. Decided February 20, 1967.

Certiorari granted; 364 F. 2d 116, vacated and remanded.

Petitioner *pro se.*

George F. McCanless, Attorney General of Tennessee, and *Henry C. Foutch* and *Paul E. Jennings,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Middle District of Tennessee, for a hearing. *Townsend* v. *Sain,* 372 U. S. 293.

MR. JUSTICE STEWART is of the opinion that certiorari should be denied.

CASCADE NATURAL GAS CORP. *v.* EL PASO NATURAL GAS CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

No. 4. Argued January 12, 1967.—Decided February 27, 1967.*

Almost three years ago this Court directed the District Court to order "without delay" that appellee El Paso Natural Gas Co. divest itself of the Pacific Northwest Pipeline Corp., whose acquisition by El Paso was found to have violated § 7 of the Clayton Act. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 662. Following remand, leave was unsuccessfully sought under Rule 24 (a) of the Federal Rules of Civil Procedure to intervene in the divestiture proceedings by various parties, including appellants, the State of California, where El Paso sells most of its gas; Southern California Edison, a large industrial natural gas user in California; and Cascade Natural Gas, a distributor in Oregon and Washington, whose sole supplier of natural gas was Pacific Northwest. Rule 24 (a)(3) then provided for intervention of right when the applicant is "so situated" as to be "adversely affected by . . . disposition of property" under court control. Amended Rule 24 (a)(2), which became effective after the intervention motions were denied, provides for intervention of right "when the applicant claims an interest relating to the property . . . and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest" unless it is adequately represented by existing parties. The District Court thereafter approved a divestiture plan whereby a New Company would be formed by El Paso to receive the properties and assets which El Paso received from Pacific Northwest. Appellants, claiming that the conditions under which the New Company would be established would fail to create a competitive pipeline in keeping with this Court's mandate, appealed from the District Court's denial of their motions to intervene. *Held:*

1. The District Court erred in denying appellants the right to intervene in the divestiture proceedings. Pp. 133–136.

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*Together with No. 5, *California* v. *El Paso Natural Gas Co. et al.*, and No. 24, *Southern California Edison Co.* v. *El Paso Natural Gas Co. et al.*, also on appeal from the same court.

(a) The category under old Rule 24 (a)(3) of "so situated" as to be "adversely affected" by disposition of property was not limited exclusively to those with an interest in property. Pp. 133–135.

(b) Protection of California interests in a competitive system was "at the heart of our mandate" directing divestiture (cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 506). Both the State of California and Southern California Edison qualified as intervenors of right under old Rule 24 (a)(3). P. 135.

(c) Since the entire merits of the case must be reopened to give those parties an opportunity to be heard as of right as intervenors, the new Rule 24 (a)(2), which is applicable to "further proceedings" in pending actions, is broad enough to include Cascade as an intervenor as of right since it has "an interest," not otherwise adequately represented, in the "transaction which is the subject of this action." Pp. 135–136.

2. Though the Attorney General has the right to settle litigation, such "settlement" cannot circumscribe the execution of this Court's mandate. P. 136.

3. The following guidelines are suggested for the new decree:

(a) The New Company's gas reserves must not be proportionately less to the existing reserves than those which Pacific Northwest had when it was independent; and reserves developed after the merger must, after thorough hearings, be equitably divided between El Paso and the New Company. Pp. 136–137.

(b) The terms of gas-acquisition contracts should be negotiated by the New Company, after full opportunity to evaluate their advisability, under such restrictions as the Natural Gas Act may impose. Pp. 137–138.

(c) The competitive position of the New Company and its financial viability must be comparable to that which Pacific Northwest enjoyed before the illegal merger obliterated it. P. 138.

(d) The severance of the illegal combination, whether by sale to outside interests or otherwise, must be swiftly made and effected in such a manner as to ensure that the New Company's stock does not end up under control of El Paso interests. Pp. 138–142.

4. A District Judge different from the one who heard the case before shall be assigned to hear the case on remand. Pp. 142–143.

Reversed and remanded.

Richard B. Hooper argued the cause for appellant in No. 4. With him on the brief were *H. B. Jones, Jr.*, and *Wilbert Carl Anderson*. *William M. Bennett* argued the cause and filed a brief for appellant in No. 5. *Rollin E. Woodbury* argued the cause for appellant in No. 24. With him on the brief were *Harry W. Sturges, Jr.*, and *William E. Marx*.

Gregory A. Harrison argued the cause and filed a brief for appellee El Paso Natural Gas Co. in all cases. *Daniel M. Friedman* argued the cause for the United States in all cases. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner* and *Milton J. Grossman*.

Richard W. Sabin, Assistant Attorney General of Oregon, by special leave of Court, argued the cause for the State of Oregon, as *amicus curiae*. With him on the brief was *Robert Y. Thornton,* Attorney General.

Mr. Justice Douglas delivered the opinion of the Court.

When this case was here the last time,[1] we held that the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company violated § 7 of the Clayton Act; and we directed the District Court "to order divestiture without delay." *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 662. That was on April 6, 1964. It is now nearly three years later and, as we shall see, no divestiture in any meaningful sense has been directed. The United States, now an appellee, maintains that the issues respecting divestiture are not

[1] *California* v. *Federal Power Commission*, 369 U. S. 482, involved another aspect of the same merger; and we held that the Commission should not have approved it until the District Court decided whether it violated § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18.

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before us. The threshold question does indeed involve another matter. Appellants were denied intervention by the District Court and came here by way of appeal, 32 Stat. 823, 15 U. S. C. § 29. We noted probable jurisdiction. 382 U. S. 970.

I.

The initial question concerning intervention turns on a construction of Rule 24 (a) of the Federal Rules of Civil Procedure entitled "Intervention of Right." At the time the District Court ruled on the motions that Rule provided in relevant part, "Upon timely application anyone shall be permitted to intervene in an action . . . (3) when the applicant is so situated as to be adversely affected by . . . disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." As amended effective July 1, 1966, subsequent to the time these motions to intervene were denied, Rule 24 (a)(2) provides that there may be intervention of right, "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

California, one of the appellants, is a State where El Paso sells most of its gas and its purpose in intervening was to assure that Pacific Northwest, illegally merged with El Paso, or its successor, would be restored as an effective competitor in California. As we noted in the prior opinion, Pacific Northwest had been "a substantial factor in the California market at the time it was acquired by El Paso." 376 U. S., at 658. It was to restore that "competitive factor" that divestiture was ordered. *Id.*, at 658–662. Southern California Edison, another

appellant, is a large industrial user of natural gas purchasing from El Paso sources and desirous of retaining competition in California. Cascade Natural Gas is a distributor in Oregon and Washington, and its sole supplier of natural gas was Pacific Northwest and will be the New Company created under the divestiture plan. Cascade maintains that there has been a grossly unfair division of gas reserves between El Paso and the New Company, particularly in the southwest field known as the San Juan Basin. Moreover, the District Court approved contracts between El Paso and the New Company for delivery of gas both from Canada and from the San Juan Basin, and allowed El Paso unilaterally and without application to the Federal Power Commission, to saddle new and allegedly onerous prices and other conditions on the New Company. Moreover, the stock of West Coast Transmission Co., Ltd., was ordered sold for the benefit of El Paso. Pacific Northwest had owned about a fourth of West Coast Transmission's stock and that ownership gave Pacific Northwest, it is said, special insight into and access to the Canadian gas supply. These factors, implicating the ability of Pacific Northwest to perform in the future, give Cascade, it is argued, standing to intervene.

Under old Rule 24 (a)(3) those "adversely affected" by a disposition of property would usually be those who have an interest in the property.[2] But we cannot read it to mean exclusively that group.

Rule 24 (a)(3) was not merely a restatement of existing federal practice at law and in equity. If it had been, there would be force in the argument that the rigidity of the older cases remains unaltered, restricting intervention as of right very narrowly, as for example where there is a fund in court to which a third party asserts

[2] See *Board of Comm'rs* v. *Bernardin*, 74 F. 2d 809, 816; *Dowdy* v. *Hawfield*, 88 U. S. App. D. C. 241, 242, 189 F. 2d 637, 638.

a right that would be lost absent intervention. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 316; *Central Trust Co.* v. *Chicago, R. I. & P. R. Co.,* 218 F. 336, 339. But the Advisory Committee stated that Rule 24 "amplifies and restates the present federal practice at law and in equity." We therefore know that some elasticity was injected; [3] and the question is, how much. As stated by the Court of Appeals for the Second Circuit in the *Central Trust Co.* case, "It is not always easy to draw the line." *Ibid.*

In *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502, a consent decree was entered in an antitrust suit, designed to protect Panhandle from Columbia which had acquired domination of the former to stifle

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[3] In 1966 the Advisory Committee when making a revision of Rule 24 (a) said:

"Rule 24 (a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: 'The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action.' *4 Moore's Federal Practice* ¶ 24.09[3], at 55 (2d ed. 1962), and see, *e. g., Formulabs, Inc.* v. *Hartley Pen Co.,* 275 F. 2d 52 (9th Cir. 1960). This development was quite natural, for Rule 24 (a)(3) was unduly restricted. *If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.* Intervention of right is here seen to be a kind of counterpart to Rule 19 (a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, *Pleading and Procedure: State and Federal* 749–50 (1962)." 4 Moore, Federal Practice (1966 Spec. Supp.), c. 24, pp. 1–2. (Emphasis supplied.)

its competition. The decree sought to assure opportunities for competition by Panhandle. A security holder of Panhandle sought to intervene on Panhandle's behalf when the consent decree was reopened and was denied that right. We reversed, noting at the outset that "the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." *Id.*, at 506.

We noted that Panhandle's economic independence was "at the heart of the controversy." *Ibid.* In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture. For it was the absorption of Pacific Northwest by El Paso that stifled that competition and disadvantaged the California interests. It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect. In that sense the present case is very close to *Pipe Line Co.* Apart from that but in the spirit of *Pipe Line Co.* we think that California and Southern California Edison qualify as intervenors under Rule 24 (a)(3). Certainly these two appellants are "so situated" geographically as to be "adversely affected" within the meaning of Rule 24 (a)(3) by a merger that reduces the competitive factor in natural gas available to Californians. We conclude that it was error to deny them intervention. We need not decide whether Cascade could have intervened as of right under that Rule. For there is now in effect a new version of Rule 24 (a) which in subsection (2) recognizes as a proper element in intervention "an interest" in the "transaction which is the subject of the action." This Rule applies to

"further proceedings" in pending actions. 383 U. S. 1031. Since the entire merits of the case must be reopened to give California and Southern California Edison an opportunity to be heard as of right as intervenors, we conclude that the new Rule 24 (a)(2) is broad enough to include Cascade also; and as we shall see the "existing parties" have fallen far short of representing its interests. We therefore reverse the District Court in each of these appeals and remand with directions to allow each appellant to intervene as of right, to vacate the order of divestiture and to have *de novo* hearings on the type of divestiture we envisioned and made plain in our opinion in 376 U. S. 651.

II.

The necessity for new hearings needs a word of explanation.

The United States on oral argument stated that the decree to which it agreed and which it urges us to approve was made in "settlement" of the litigation. We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate. *United States* v. *du Pont & Co.*, 366 U. S. 316, 325. Our direction was that the District Court provide for "divestiture without delay." That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market.

We do not undertake to write the decree. But we do suggest guidelines that should be followed:

(1) *Gas Reserves.* The gas reserves granted the New Company must be no less in relation to present existing

reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company. We are told by the intervenors that El Paso gets the new reserves in the San Juan Basin—which due to their geographical propinquity to California are critical to competition in that market. But the merged company, which discovered them, represented the interests both of El Paso and of Pacific Northwest. We do not know what an equitable division would require. Hearings are necessary, followed by meticulous findings made in light of the competitive requirements to which we have adverted.

As already indicated, the proposed decree provides the terms of contracts [4] imposed on the New Company respecting the purchase and gathering of gas from various sources. It is urged that these contracts are onerous, detrimental to the New Company, and partial to El Paso interests. We do not pass upon the wisdom or desirability of the proposed contracts. It is enough to note that they were proposed by El Paso, that the changes, reluctantly acceded to by the Government, will redound to the substantial benefit of El Paso, and that the New Company has had no opportunity to evaluate the advisability of the terms or to negotiate for better terms. Nor has the Federal Power Commission had the opportunity to pass

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[4] For example, one contract relates to reciprocal gas gathering between the New Company and El Paso in the San Juan Basin. Prior to the merger El Paso and Pacific Northwest entered into a contract providing that they would develop gathering lines in the basin cooperatively, and that whichever company made greater use of the other's gathering lines would pay a gathering charge of 1.375¢ per Mcf. of extra gas. El Paso did much more gathering for Pacific Northwest than Pacific Northwest did for El Paso. The proposed agreement increases the gathering charge to 4.5¢. The intervenors claim that the increased rate will substantially increase the New Company's costs and impair its ability to compete.

upon the contracts. The terms of these contracts should be negotiated by the New Company under such restrictions as the Natural Gas Act may impose.

(2) *Financial Aspects.* As noted, El Paso is allowed to sell the stock of West Coast Transmission Co., Ltd., brought into the merger by Pacific Northwest, and keep the proceeds, which if stock prices at the time of the proposed divestiture are considered might result, it is alleged, in a profit of $10,000,000 or more, while the New Company gets the stock of Northwest Production Co. which from 1960–1963 showed heavy losses. It is charged that by the proposed decree El Paso is saving the cream for itself and foisting the "cats and dogs" on the New Company. It is also earnestly argued that the New Company will sorely need the valuable and fairly liquid stock of West Coast Transmission if it is to have the working capital necessary to restore the competitive balance that the merger destroyed. These are highly relevant arguments. Certainly a plan of divestiture of the kind we envisaged must establish a New Company in the same or comparable competitive position that Pacific Northwest was in when the illegal merger obliterated it.

It is also pointed out that some $53,000,000 of taxable losses which Pacific Northwest had were utilized by El Paso during the years following the ill-starred merger. It is argued that since these tax loss carry-overs were in a real sense an asset of Pacific Northwest utilized by El Paso, the New Company should receive other assets or a reduction in debt of equivalent value. These allegations, if proven, require remuneration of some kind to the New Company. For it must be a viable, healthy unit, as able to compete as Pacific Northwest was when it was acquired by El Paso.

(3) *Control of El Paso.* The divestiture decree provides that El Paso is to cause the formation of the New Company, whose chief executive shall be approved by

El Paso, the Government, and the court. The new company is to file an application with the Federal Power Commission "at the earliest practicable date" requesting the issuance of a certificate of public convenience and necessity authorizing it to acquire, own, and operate the properties to be received from El Paso.[5] When the necessary certificates, authorizations, and orders are obtained from the FPC, El Paso is to transfer to the New Company the properties and assets set forth in the plan of divestiture, generally those which El Paso received from Pacific Northwest. In return, the New Company is to assume certain of El Paso's indebtedness and issue to El Paso all its common stock. El Paso is to transfer the New Company stock to the New Company's chief executive, as voting trustee. The New Company's chief executive shall release the stock only in accordance with the plan for divestment of El Paso's interest in the stock. Under the plan, El Paso is ordered completely to divest itself of all interest in the New Company stock within three years after the transfer of the assets to the New Company. Alternate methods of divestment are provided. (1) El Paso *may,* within 18 months of the transfer, distribute at least 80% of the shares to holders of El Paso common stock who are willing to exchange their El Paso shares for New Company shares, and who shall own no other El Paso shares immediately after the exchange. The remainder of New Company stock would be disposed of by a public offering. (2) If El Paso does not dispose of the New Company stock under the first alternative, it is to dispose of the New Company stock "by one or more sales to the public." At such public offering no El Paso officer or director and no owner of El Paso's capital stock,

[5] We are informed that the New Company's chief executive has been approved and that the New Company has applied to the Federal Power Commission for certification. The FPC proceedings have been continued until this Court has decided this appeal.

in excess of one-half of one percent of the total shares outstanding, shall be permitted to purchase New Company stock.[6]

Thus the El Paso-Pacific Northwest combination will not begin to be severed until the regulatory approvals have been obtained. Complete divestiture is not required until three years after the transfer of assets. An earlier divestiture is permissible, but divestiture is mandatory only after three years. During the interregnum between the entry of the decree and the regulatory approvals, and between the transfer of assets and El Paso's eventual disposition of the New Company stock, El Paso will continue to reap the benefits of the illegal combination. Moreover, prior to the eventual disposition of the New Company stock, all the stock is to be voted by the New Company's chief executive. The chief executive is to be approved by El Paso, and El Paso is the beneficial owner of the stock to be voted by him. Even though the chief executive is subject to the ultimate control and supervision of the District Court, there is danger that he may vote the New Company stock in a manner calculated to perpetuate the very conditions which led us to order severance of the illegal combination.

Even after the mandatory disposition of the new company stock there is considerable danger that El Paso interests may end up controlling the New Company. The decree, to be sure, provides that neither El Paso officers and directors nor owners of more than one-half of one percent of El Paso stock shall purchase New Company stock at a public offering. But the decree does not pro-

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[6] El Paso is also enjoined from having as an officer or director any person who is also an officer, director, or employee of the New Company or who owns any capital stock of the New Company or whose immediate family owns more than one-tenth of one percent of the stock of the New Company.

hibit members of the families of such prohibited purchasers from obtaining New Company stock. Further, under the terms of the decree, it would be possible for a group of El Paso stockholders, each with less than one-half of one percent of El Paso stock, to acquire at the initial public offering enough New Company stock substantially to influence or even to dominate the New Company. Or, such a group could combine with the families of prohibited purchasers in order to control the New Company. After the exchange or public offering, there is no restriction on the number of New Company shares El Paso shareholders may acquire. Thus, there is a danger that major El Paso stockholders may, subsequent to the exchange or public offering, purchase large blocks of New Company stock and obtain effective control. Thus, there has been no studied attempt to ensure the swift severance of the illegal combination or to make sure that the New Company's stock does not end up controlled by El Paso interests. Disposition of all of the stock with all convenient speed is necessary and conditions must be imposed to make sure that El Paso interests do not acquire a controlling interest. For if they do, the New Company might well be only El Paso under the masquerade of a beard.

The proposed decree bypasses completely the prospect of an outright purchase of the assets of the New Company or its stock by outside interests. Two purchasers apparently are anxious and eager; and before the United States knuckled under to El Paso and "settled" this litigation, it represented to the District Court that a "sale to a third party is both a desirable and possible alternative to the El Paso plan." No alternative of that kind was chosen. El Paso carried the day, obtained a decree that promises to perpetuate rather than terminate this unlawful merger, and that threatens to turn loose on the

public a New Company unable to maintain the competitive role that Pacific Northwest filled before this illegal transaction took place.

The convenience of El Paso would be the easier choice. The enforcement of our mandate and § 7 of the Clayton Act is the harder one; but that is the criterion we follow.

The evil with which the proposed decree is permeated reflects the attitude or philosophy of the District Court which was frankly stated after our remand as follows:

> "The Court: You see, what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That's what the root of this plan is.
>
> "Now, if you're going to get New Company down here in competition in Southern California from the San Juan Basin, you'd upset the whole scheme. To even that situation up, you're going to have to put El Paso up in the Northwest in competition there; and that's a kind of ridiculous thing—long pipelines from these various sources.
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> "It seems to me to make a lot of sense that New Company operating in the Northwest from very much closer Canadian reserves, and Northwest reserves, and El Paso down in the Southwest, with reserves in the San Juan Basin, serving the Southern California area, among some other areas. That seems to me to make a lot of sense."

The proposed decree in its various ramifications does precisely that. It therefore does the opposite of what our prior opinion and mandate commanded. Once more, and nearly three years after we first spoke, we reverse and remand, with directions that there be divestiture without delay and that the Chief Judge of the Circuit or the Judicial Council of the Circuit (28 U. S. C. § 332)

assign a different District Judge to hear the case. Cf. *United States* v. *Hatahley,* 257 F. 2d 920, 926, and its sequel, *United States* v. *Ritter,* 273 F. 2d 30, 32; *Occidental Petroleum Corp.* v. *Chandler,* 303 F. 2d 55, 57; *Texaco, Inc.* v. *Chandler,* 354 F. 2d 655, 657.

Reversed.

MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, dissenting.

The question presented by these appeals, and the only question, is whether the District Court erred in denying the appellants' motions to intervene as parties. Because I think the Court's answer to that question is wrong, and because I think the Court has gone further astray in undertaking to address itself to issues which are not here for adjudication, I respectfully dissent.

Intervention of right is governed by Federal Rule of Civil Procedure 24 (a). At the time the District Court passed on appellants' motions to intervene,[1] that Rule provided as follows:

> "Rule 24. Intervention
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> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or

[1] The Rule has since been amended. See p. 153, *infra.*

subject to the control or disposition of the court or an officer thereof."

I gather it is common ground that neither 24 (a)(1) nor 24 (a)(2) applies to these cases. No appellant claims any statutory right to intervene under 24 (a)(1). And it is clear that no appellant has any right to intervene under 24 (a)(2), for in order to intervene under that provision, the applicant for intervention must show that he "may be bound" by the judgment in the Government's action in a res judicata sense. *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683; *Sutphen Estates, Inc.* v. *United States,* 342 U. S. 19. See *Credits Commutation Co.* v. *United States,* 177 U. S. 311. And it is settled that the judgment in a government suit has no res judicata effect on private antitrust claims. *Sam Fox Publishing Co.* v. *United States, supra.*

The Court, however, finds that the State of California and Southern California Edison Co. have an absolute right to intervene under 24 (a)(3). I disagree for several reasons.

Analysis of the Rule's proper scope must begin with an historical examination of intervention practice, for, as the Court has stated, the Rule constitutes a "codification of general doctrines of intervention." *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502, 508.[2] Intervention to assert an interest in property within the court's control or custody derives from the English doctrine of appearance *pro interesse suo.* When a court acquired *in rem* jurisdiction over property, by admiralty libel, sequestration, receivership, or other process, a person claiming title or some other legal or equitable interest

[2] This statement is confirmed by the Rules Advisory Committee, which observed that the Rule "amplifies and restates the present federal practice at law and in equity." Advisory Committee on Rules for Civil Procedure, Notes, 25 (March 1938).

was allowed to come in to assert his claim to the property. Otherwise, he would have been subjected to the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard. Elements of this procedure were gradually assimilated in this country, *e. g., Pennock* v. *Coe,* 23 How. 117, and provided the foundation for intervention doctrine in the federal courts.[3]

Various generalizations about the nature of the property interest that will support intervention of right under this doctrine have been attempted. This Court has stated that the requisite interest must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Smith* v. *Gale,* 144 U. S. 509, 518.[4] Other courts have spoken of "a legal interest as distinguished from interests of a general and indefinite character," *Radford Iron Co.* v. *Appalachian Electric Power Co.,* 62 F. 2d 940, 942 (C. A. 4th Cir.), cert. denied, 289 U. S. 748, or "one that is known and protected by the law, sufficient and of the type to be denominated a lien, legal or equitable," *Gross* v. *Missouri & A. Ry. Co.,* 74 F. Supp. 242, 249 (D. C. W. D. Ark.). These formulations are of limited use in deciding particular cases. More illuminating are examples of particular interests which have been held to support intervention of right under the established practice. These have included the

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[3] For a discussion of the English and early American practice, see 4 Moore, Federal Practice ¶ 24.03; 2 Street, Federal Equity Practice §§ 1364–1370 (1909).

[4] Quoting with approval *Horn* v. *Volcano Water Co.,* 13 Cal. 62, 69. Subsequent federal decisions following this formulation include *Pure Oil Co.* v. *Ross,* 170 F. 2d 651, 653 (C. A. 7th Cir.); *Dowdy* v. *Hawfield,* 88 U. S. App. D. C. 241, 242, 189 F. 2d 637, 638, cert. denied, 342 U. S. 830.

claim of ownership in attached property,[5] the claim of a part owner to personal property being foreclosed under a mortgage,[6] a mortgage lien on a leasehold interest subjected to forfeiture,[7] and the claim of the purchaser of land involved in foreclosure proceedings against the seller.[8] Interests like these have continued to provide a familiar basis for intervention of right since the promulgation of Rule 24 (a)(3).[9]

The other traditional basis for intervention under 24 (a)(3) derives from interpleader practice; when a number of persons possess claims to a fund which are or may be mutually exclusive, intervention is allowed a claimant. Thus, in *Oliver* v. *United States,* 156 F. 2d 281 (C. A. 8th Cir.), the United States had acquired certain land and deposited the purchase price in court to be divided among the various owners. A title insurance company which asserted a claim to the proceeds, based on services rendered to the sellers, was allowed to intervene.[10]

Under Rule 24 (a)(3) the federal courts have sometimes allowed intervention even though the interest likely to be "adversely affected" was not one that would be recognized under traditional interpretations of the *pro interesse suo* or interpleader types of intervention. A representative case is *Formulabs, Inc.* v. *Hartley Pen Co.,* 275 F. 2d 52 (C. A. 9th Cir.), cert. denied, 363 U. S.

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[5] *Krippendorf* v. *Hyde,* 110 U. S. 276.

[6] *Osborne & Co.* v. *Barge,* 30 F. 805 (C. C. N. D. Iowa).

[7] See *United States* v. *Radice,* 40 F. 2d 445 (C. A. 2d Cir.).

[8] *Gaines* v. *Clark,* 51 App. D. C. 71, 275 F. 1017.

[9] *E. g., Plitt* v. *Stonebraker,* 90 U. S. App. D. C. 256, 195 F. 2d 39 (intervention granted to creditor asserting security interest in goods seized by marshal).

[10] For expansive interpretations of interpleader-type intervention, see *Barnes* v. *Alexander,* 232 U. S. 117; *Peckham* v. *Family Loan Co.,* 212 F. 2d 100 (C. A. 5th Cir.). But see *Vaughan* v. *Dickinson,* 19 F. R. D. 323 (D. C. W. D. Mich.), aff'd, 237 F. 2d 168 (C. A. 6th Cir.).

830. The applicant for intervention had licensed a secret manufacturing process to one of the parties, and the other party was seeking to apply discovery to the process. Finding that the trade secret was "property" subject to the court's control and that the secrecy which was the heart of the applicant's interest in that property might be totally destroyed, the court allowed intervention under 24 (a)(3).

But the claims of California and the Southern California Edison Co. in these cases lie far beyond the reach of even the most imaginable construction of 24 (a)(3). To be sure, the assets of El Paso are "property which is in the custody or subject to the control or disposition of the court" for purposes of the Rule. *Sutphen Estates, Inc.* v. *United States,* 342 U. S. 19. But the "interest" in these assets relied upon by the appellants to justify intervention is merely their preference that certain of the assets, particularly the San Juan Basin reserves, end up in the hands of New Company rather than El Paso, on the theory that such an allocation may be conducive to greater gas competition in California. These general and indefinite interests do not even remotely resemble the direct and concrete stake in litigation required for intervention of right. The Court's decision not only overturns established general principles of intervention, but, as will be shown below in detail, also repudiates a large and long-established body of decisions specifically, and correctly, denying intervention in government antitrust litigation.

This Court is all too familiar with the fact that antitrust litigation is inherently protracted. Indeed, it is just such delay which seems to so concern the Court in this case. But nothing could be better calculated to confuse and prolong antitrust litigation than the rule which the Court today announces. The entrance of additional parties into antitrust suits can only serve

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to multiply trial exhibits and testimony, and further confound the attempt to bring order out of complicated economic issues. For these reasons, federal courts have been most reluctant to grant intervention under 24 (a)(3) even in private antitrust litigation. For example, in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (C. A. 7th Cir.), cert. denied, 375 U. S. 834, the State of Illinois, representing consumers' interests in a possible rate rebate, was denied intervention in a suit brought by a utility charging equipment manufacturers with price fixing.[11]

The reasons for denying intervention are even stronger when intervention is sought in an antitrust suit brought by the Government. To the extent that the would-be intervenor seeks to press his own private antitrust claims against the defendant, intervention must be denied because Congress has carefully provided separate statutory procedures for private and public antitrust litigation.[12] As the Court observed in *United States* v. *Borden Co.*, 347 U. S. 514, 518–519, the thrust of the Clayton Act "is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." [13] The Court has accordingly approved the "unquestionably sound policy of not

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[11] Cf. *American Louisiana Pipe Line Co.* v. *Gulf Oil Corp.*, 158 F. Supp. 13 (D. C. E. D. Mich.) (county not allowed to intervene on behalf of consumers in private gas contract dispute). See also *Philadelphia Electric Co.* v. *Westinghouse Electric Corp.*, 308 F. 2d 856 (C. A. 3d Cir.), cert. denied, 372 U. S. 936.

[12] See 26 Stat. 209 (1890), as amended, 15 U. S. C. § 4; 38 Stat. 731 (1914), 15 U. S. C. § 15; 69 Stat. 282 (1955), 15 U. S. C. § 15a; 38 Stat. 736, as amended, 737, 15 U. S. C. §§ 25, 26; 32 Stat. 823 (1903), as amended, 15 U. S. C. §§ 28, 29.

[13] Quoting with approval *United States* v. *Bendix Home Appliances*, 10 F. R. D. 73, 77 (D. C. S. D. N. Y.).

permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government." *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683, at 693. *A fortiori,* intervention is improper when a private party appears in order to vindicate his theory of the *public* interest in an action brought by the Government. For as the Court has consistently recognized, it is the "United States, which must alone speak for the public interest" in antitrust litigation. *Buckeye Coal & Ry. Co.* v. *Hocking Valley Ry. Co.,* 269 U. S. 42, 49.[14] The appellants here seek intervention to press their own version of what the public interest in gas competition in California requires. But the determination of what the public interest requires is the statutory duty and responsibility of the Government. The law explicitly requires that suits brought by the Government for injunctive relief shall be "under the direction of the Attorney General." 15 U. S. C. §§ 4 and 25. That statutory command is violated when private parties are allowed to intervene and control public suits. The Government's discharge of its duties would be completely undermined if its antitrust litigation were cluttered with a myriad of private volunteers, all pressing their own particular interpretations of the "public interest" against the defendant, the Government, and each other.

It has been the consistent policy of this Court to deny intervention to a person seeking to assert some general

[14] In *United States* v. *Borden Co.,* 347 U. S. 514, 518, the Court stated: "The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served."

public interest in a suit in which a public authority charged with the vindication of that interest is already a party. Thus, in *In re Engelhard & Sons Co.*, 231 U. S. 646, intervention was denied to a subscriber seeking to enter a suit between a municipality and a telephone utility involving the validity of the city's rate ordinance and the disposition of rate overcharges. Similarly, in *City of New York* v. *Consolidated Gas Co. of New York*, 253 U. S. 219, and *City of New York* v. *New York Telephone Co.*, 261 U. S. 312, the City of New York was not allowed to intervene on behalf of consumer residents of the city in litigation between state authorities and public utilities over the validity of state rate regulation. The wise principle of those decisions is reflected in many other federal cases decided both before and after the adoption of Rule 24 (a)(3).[15]

The applicability of this principle to intervention in antitrust suits brought by the Government was early

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[15] *O'Connell* v. *Pacific Gas & Electric Co.*, 19 F. 2d 460 (C. A. 9th Cir.) (intervention denied to ratepayer protesting proposed settlement of litigation between utility and municipality); *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4th Cir.), cert. denied, 289 U. S. 748 (business injured by utility's proposed dam denied intervention in suit between utility and FPC); *MacDonald* v. *United States*, 119 F. 2d 821 (C. A. 9th Cir.), aff'd as modified, 315 U. S. 262 (intervention under Rule 24 denied in suit over mineral rights between United States and railroad to one claiming such rights under patent from United States); *Reich* v. *Webb*, 336 F. 2d 153 (C. A. 9th Cir.), cert. denied, 380 U. S. 915 (depositors denied 24 (a)(3) intervention in proceeding by Federal Home Loan Bank Board against savings and loan association officers); *Gross* v. *Missouri & A. Ry. Co.*, 74 F. Supp. 242 (D. C. W. D. Ark.) (24 (a)(3) intervention denied municipalities served by railroad involved in reorganization proceedings to which State was a party); *Butterworth* v. *Dempsey*, 229 F. Supp. 754, 798–799 (D. C. Conn.), aff'd, 378 U. S. 562 (intervention under 24 (a)(3) denied overrepresented towns in reapportionment suit brought against state authorities).

recognized by this Court. *Ex parte Leaf Tobacco Board,* 222 U. S. 578, denied intervention to enterprises that sold tobacco to defendants in an antitrust suit brought by the Government. From that time since, we have consistently refused to recognize the right to intervene in government antitrust suits.[16] *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U. S. 137; *Partmar Corp.* v. *United States,* 338 U. S. 804; *Wometco Television & Theatre Co.* v. *United States,* 355 U. S. 40; *Westinghouse Broadcasting Co.* v. *United States,* 364 U. S. 518, dismissing appeal from 186 F. Supp. 776; *Sam Fox Publishing Co.* v. *United States, supra*; *Bardy* v. *United States,* 371 U. S. 576.[17] And we have upheld

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[16] Intervention in this Court was allowed in *United States* v. *St. Louis Terminal,* 236 U. S. 194, but there the "intervenors" were in the practical status of defendants.

Missouri-Kansas Pipe Line Co. v. *United States,* 312 U. S. 502, relied upon by the Court, is completely inapposite. Panhandle Eastern Pipe Line Co. was a competitor of defendants charged by the Government with improperly exercising control over Panhandle to weaken its threat as a competitor. A consent decree was negotiated to protect Panhandle's independence. The decree provided for retention of jurisdiction by the court to enter such "further orders and decrees" as were necessary to carry out its purpose, and stated that "Panhandle Eastern, upon proper application, may become a party hereto" to protect its rights under the decree. When the Government later sought modifications of the decree, we held that the decree gave Panhandle the right to intervene. The Court carefully noted that this right to intervene was bottomed solely on the specific provisions of the decree and not general principles of intervention: "Its foundation is the consent decree. We are not here dealing with a conventional form of intervention . . . ." 312 U. S., at 506. The Court concluded, "Therefore, the codification of general doctrines of intervention contained in Rule 24 (a) does not touch our problem." 312 U. S., at 508.

[17] The policy behind these decisions was stated in *United States* v. *American Society of Composers, Authors and Publishers,* 341 F. 2d 1003 (C. A. 2d Cir.), cert. denied, 382 U. S. 877, in which ASCAP licensees were denied intervention to assert that ASCAP had violated

denial of intervention to a private party who claimed that a decree negotiated between the Government and an antitrust defendant failed to carry out the mandate of this Court. *Ball* v. *United States,* 338 U. S. 802.

The results which follow from the Court's rejection of the practical wisdom embodied in these decisions are apparent. There were over 20 applications to intervene in the decree proceedings below. The Court's construction of 24 (a)(3) would require the District Court to grant most if not all of them. El Paso gas goes to millions of consumers, and under the Court's decision any or all of them are entitled to intervene as of right. And there is nothing in the Court's opinion which suggests that this right to intervene is limited to litigation over remedy. If consumers and others have an interest in making sure that a government antitrust decree meets their standards of effectiveness, they have an even greater interest in insuring that a violation is found. Thus the Court's reasoning gives any consumer a right to intervene in government antitrust litigation at the very outset. The Court invites a scope of intervention that will make the delays in this case seem mercifully short.

The Court's decision would not be of such concern, nor merit so much discussion, if it were simply limited to 24 (a)(3), a provision which has been superseded. But the same approach which creates a right to intervene for California and the Southern California Edison Co. under the old Rule 24 (a)(3) appears in the Court's construction of the new Rule 24, under which it says Cascade has a right to intervene. The new Rule 24 (a)(2)

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a decree in an antitrust suit brought by the Government: "The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit . . . ." 341 F. 2d, at 1008.

replaces the previous Rule 24 (a)(2) and (3), and provides for intervention of right:

> "[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

This and other amendments to the Federal Rules of Civil Procedure were promulgated by this Court to "take effect on July 1, 1966, and . . . govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending . . . ." 383 U. S. 1031. Since the District Court denied Cascade's motion to intervene in 1965, before the effective date of the amended Rule, the new Rule was inapplicable to Cascade's motion.[18] But even if the new Rule were applicable, neither Cascade nor the other appellants could claim intervention of right under it.

The purpose of the revision was to remedy certain logical shortcomings in the construction of the former 24 (a)(2), see *Sam Fox Publishing Co.* v. *United States, supra,* and to give recognition to decisions such as

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[18] In *Klapprott* v. *United States,* 335 U. S. 601, the petitioner sought to reopen a default judgment denaturalizing him, relying on amendments to Rule 60 (b). Several Justices thought that the petitioner should be able to obtain relief under the amended Rule even though the District Court had denied the petitioner's application before the effective date of the amendments. Cascade's interest here bears no resemblance to the extraordinary hardship and injustice claimed by the petitioner in *Klapprott,* where it could be persuasively argued that it was "more consonant with equitable considerations to judge the case on the basis of the Rule now in force, even though the lower court did not have the opportunity to apply it." 335 U. S., at 629 (dissenting opinion).

Formulabs, Inc. v. *Hartley Pen Co., supra,* which had expanded intervention under the former 24(a)(3) beyond the strict *pro interesse suo* model it embodied.[19] But an applicant is still required to have an "interest" in the litigation sufficiently direct and immediate to justify his entry as a matter of right. The remote and general concerns that appellants State of California and Southern California Edison Co. have with this government suit have already been discussed. And Cascade's interest is even more insubstantial. While it purchases gas from El Paso in Oregon, it seeks intervention to vindicate gas competition in California.[20] Even if it should be thought that the amended Rule might encompass such remote interests in some conceivable circumstances, it is clear that such interests may never justify intervention of right in public antitrust litigation, where Congress has carefully entrusted the conduct of government suits to the "direction of the Attorney General." But even if Cascade should pass this hurdle, it would also have to show that there was a failure of "adequate representation" by the Justice Department in this case.

The Court states that the Government "knuckled under to El Paso" and has "fallen far short of representing" Cascade's interest. Since the interest that Cascade claims to be representing is that of the public, the Court is charging the Justice Department with dereliction of duty or serious incompetence. I regard this charge as wholly unjustified. The Government did settle for less than all the relief that it sought at the outset. But this is a wholly familiar phenomenon of negotiation. Bar-

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[19] See Notes of Advisory Committee on Rules, Fed. Rule Civ. Proc. 24, 28 U. S. C. App. Rule 24 (1964 ed., Supp. II).

[20] The FPC will protect Cascade's existing supply of gas when New Company applies for certification. See, *e. g., Michigan Consolidated Gas Co.* v. *FPC,* 108 U. S. App. D. C. 409, 283 F. 2d 204, cert. denied, 364 U. S. 913.

gaining for consent decrees and stipulated remedies is a normal and necessary element in the Government's enforcement of the antitrust laws. Moreover, it is perfectly conceivable that in the course of negotiations the Government may become aware of errors in its opening position. If, as the Court's opinion seems to suggest, the Government is required to press its original negotiating position unceasingly and to the bitter end, the number of cases which the Government can afford to undertake will be sharply reduced, and the enforcement of the antitrust laws will ultimately become less effective. And of course the delay in antitrust litigation, which so concerns the Court, will markedly increase.

The Court's standard of "adequate representation" comes down to this: If, after the existing parties have settled a case or pursued litigation to the end, some volunteer comes along who disagrees with the parties' assessment of the issues or the way they have pursued their respective interests, intervention must be granted to that volunteer as of right. This strange standard is not only unprecedented and unwise, it is also unworkable.

The requirement of inadequate representation by existing parties as a precondition of the right to intervene under the new Rule 24 is obviously an adaptation of the similar standard contained in the former 24 (a)(2). Decisions under that standard allowed intervention of right when the intervenor could show a conflict of interest between himself and the party supposed to represent his interest,[21] a complete failure of representation by existing parties,[22] or collusion or the likelihood of collusion be-

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[21] *Pyle-National Co.* v. *Amos*, 172 F. 2d 425 (C. A. 7th Cir.); *Mack* v. *Passaic Nat. Bank & Trust Co.*, 150 F. 2d 474, 154 F. 2d 907 (C. A. 3d Cir.); *In re Standard Power & Light Corp.*, 48 F. Supp. 716 (D. C. Del.).

[22] *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (C. A. 9th Cir.).

tween them.[23] Mere tactical disagreement over how litigation should be conducted is obviously insufficient to support intervention of right.[24] In ignoring these precedents, the Court also overlooks the sound policies which underlie them. The Court's approach draws judges into the adversary arena and forces them into the impossible position of trying to second-guess the parties in the pursuit of their own interests. It is also wasteful and productive of delay, because under this strange standard a person's right to intervene in litigation cannot be ascertained until that litigation is concluded and the existing parties' conduct evaluated.

Wrong as the Court's approach is with respect to litigation generally, it is even more wrong when a would-be intervenor seeks to challenge the adequacy of the Government's representation of the public interest. The separation of powers in our federal system generates principles that make it peculiarly inappropriate for courts to assume the role of supervision over policy decisions of the Executive. Yet the Court presumes to tell the Justice Department that it made tactical errors in conducting litigation, failed in its assessment of the public interest, and cannot settle a lawsuit which it has brought. This Court does not have the constitutional power to second-

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[23] *Cuthill* v. *Ortman-Miller Machine Co.*, 216 F. 2d 336 (C. A. 7th Cir.); *Park & Tilford, Inc.* v. *Schulte*, 160 F. 2d 984 (C. A. 2d Cir.), cert. denied, 332 U. S. 761; *Klein* v. *Nu-Way Shoe Co.*, 136 F. 2d 986 (C. A. 2d Cir.); *Molybdenum Corp. of America* v. *International Mining Corp.*, 32 F. R. D. 415 (D. C. S. D. N. Y.); *Twentieth Century-Fox Film Corp.* v. *Jenkins*, 7 F. R. D. 197 (D. C. S. D. N. Y.).

[24] *Alleghany Corp.* v. *Kirby*, 344 F. 2d 571 (C. A. 2d Cir.), cert. dismissed, 384 U. S. 28; *Stadin* v. *Union Electric Co.*, 309 F. 2d 912 (C. A. 8th Cir.), cert. denied, 373 U. S. 915; *United States* v. *American Society of Composers, Authors and Publishers*, 202 F. Supp. 340 (D. C. S. D. N. Y.). But cf. *Ford Motor Co.* v. *Bisanz Bros.*, 249 F. 2d 22 (C. A. 8th Cir.).

guess decisions of the Attorney General made within the bounds of his official discretion. That is the responsibility of the President and, ultimately, the electorate. In words appropriate here, we long ago stated in the context of an attack on the Government's settlement of an antitrust case: ". . . we do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Swift & Co.* v. *United States,* 276 U. S. 311, 331–332. The Court today gives only lip service to these principles. It states that "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here." *Ante,* at 136. But it then proceeds to take the direction of a government lawsuit out of the hands of the Attorney General and into its own.

The Court relies on the fact that we have previously rendered a judgment in this case and cites dictum from the opinion in *United States* v. *E. I. du Pont & Co.,* 366 U. S. 316, to justify the extraordinary course it takes. But in the absence of outright fraud, it has never been thought that the fact that parties have initially resorted to the courts gives judges power to set aside later settlement agreements and impose others on the parties. And certainly when it is the Executive Branch of the Government that has made the settlement as representative of the public interest, only the grossest bad faith or malfeasance on its part could possibly support such a step. Either the Court is saying the Government was guilty of such misconduct—a charge totally without support in the record—or the Court has grossly overreached the permissible limit of judicial power.

Not only concern for the constitutional position of this Court, but more directly pragmatic considerations

underlie my disagreement with today's decision. To permit volunteers to intervene and second-guess the Justice Department is especially inappropriate when the issues involved, like those in the antitrust field, require technical experience and an assessment and balancing of interests essentially administrative and political. Formulation of effective and consistent government antitrust policy is unlikely to result from "piecemeal intervention of a multitude of individual complainants" [25] in litigation brought by the Government. Less than six years ago we fully recognized this principle:

> ". . . sound policy would strongly lead us to decline [the] invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publishing Co.* v. *United States, supra,* at 689.[26]

Today the Court ignores all this and grants intervention of right to any volunteer claiming to speak for the public interest whenever he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit. I think this decision, which undermines the Justice Department in the discharge of its responsibilities, and invites obstruction and

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[25] *United States* v. *General Electric Co.,* 95 F. Supp. 165, 169 (D. C. N. J.).

[26] This policy has been given continuing recognition by the lower federal courts. *Reich* v. *Webb,* 336 F. 2d 153 (C. A. 9th Cir.), cert. denied, 380 U. S. 915; *MacDonald* v. *United States,* 119 F. 2d 821 (C. A. 9th Cir.), aff'd as modified, 315 U. S. 262; *United States* v. *General Electric Co.,* 95 F. Supp. 165 (D. C. N. J.). See *Wometco Television & Theatre Co.* v. *United States,* 355 U. S. 40. But cf. *Atlantic Refining Co.* v. *Standard Oil Co.,* 113 U. S. App. D. C. 20, 304 F. 2d 387.

delay in the course of public litigation, is unsupported by the provision of old Rule 24, new Rule 24, or any other conceivably tolerable standard governing intervention as of right. The District Court did not err in denying intervention to the appellants,[27] and these appeals should therefore be dismissed.[28]

But even if I am completely wrong, and the Court is right in concluding that the District Court erred in denying appellants the right to intervene, the proper course would be simply to remand the case to the District Court so that the appellants' contentions may be met by the Government or El Paso and passed on by a trial court that is intimately familiar with the massive record in this case. Instead, the Court brushes aside the "threshold" question of appellants' right to intervene in a few pages and devotes most of its opinion to pronouncements on gas reserves, delivery contracts, and other intricacies of gas competition in the western United States. These issues were never the subject of adversary proceedings in the District Court. They were never resolved through findings by the District Court. Appellees did not directly brief or argue them before this Court. On the basis of what are in effect *ex parte* criticisms of the decree entered below, the Court lays down "guidelines" with respect to complex issues which will shape the future of an important segment of this Na-

[27] The appellants also seek to challenge the District Court's denial of their motions for permissive intervention under Rule 24 (b). We have no jurisdiction to consider this challenge. *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137. See *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683, at 688 and n. 3. And in any event the District Court did not, in the circumstances of this protracted and complex litigation, abuse its discretion in choosing to allow appellants to present their views by *amicus* briefs rather than affording them permissive intervention as full parties.

[28] See *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19.

tion's commerce. In so doing the Court roams at large, unconfined by anything so mundane as a factual record developed in adversary proceedings.

> "The obvious must be restated. We do not sit to draft antitrust decrees *de novo*. This is a court of appeal, not a trial court. We do not see the witnesses, sift the evidence in detail, or appraise the course of extended argument . . . . In short, this Court does not partake of the procedure and is not charged with the responsibility demanded of the court entrusted with the task of devising the details of a decree appropriate for the governance of a vastly complicated situation arising out of unique circumstances." *United States* v. *E. I. du Pont & Co.*, 366 U. S. 316, 371 (dissenting opinion).

The Court has decided this case on little more than repugnance for "the attitude or philosophy of the District Court" and the unjustified and extraordinarily opprobrious conclusion that the Government "knuckled under." This is not a happy foundation for radical extensions of intervention doctrine. And it is not a proper basis for deciding how stock in the New Company should be marketed, or how gas reserves in New Mexico should be divided. In its zeal to censure the District Judge and reprimand the Justice Department, the Court has rushed headlong into a jurisprudential quagmire far more dangerous than the "evil" it purports to discern in the decree entered by the trial court.

Finally, I must note my emphatic disagreement with the Court's extraordinary action in directing that further proceedings in this case must be conducted by a different district judge. Federal reviewing courts have taken this serious step only in the rarest circumstances, when the trial judge's personal or emotional involvement in a case has been demonstrated. See *Offutt* v. *United States*, 348

U. S. 11; *Cooke* v. *United States,* 267 U. S. 517; *Occidental Petroleum Corp.* v. *Chandler,* 303 F. 2d 55 (C. A. 10th Cir.), cert. denied, 372 U. S. 915. No such involvement by the District Judge in this case is remotely suggested by the record. Nobody has requested his replacement at any stage of the proceedings. For this Court, on its own motion, to disqualify a trial judge in the middle of a case because it disagrees with his "philosophy" is not only unprecedented, but incredible.

LEVIN *v.* MISSISSIPPI RIVER FUEL CORP. ET AL.

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

No. 352. Argued January 19, 1967.—Decided February 27, 1967.*

The capital stock of the Missouri Pacific Railroad Company (MoPac), a Missouri corporation, consists of two classes, A and B. Class A, with 1,849,576 shares outstanding, is preferentially entitled to noncumulative dividends not to exceed $5 a share annually, and its equity is limited to $100 a share. Class B, with 39,731 shares outstanding, is entitled to the earnings and equity in excess of the Class A preferences, and its equity is currently valued at about $6,500 a share. MoPac's corporate charter provides that each share of each class is entitled to one vote, with the proviso that a separate vote of each class is required on any proposal affecting the preferences or relative rights of either class. Section 5 (11) of the Interstate Commerce Act requires for ICC approval of a voluntary railroad merger the assent of the majority of the shares entitled to vote "unless a different vote is required under applicable State law." Missouri law applicable to mergers provides for approval by at least a two-thirds vote of all outstanding shares (Mo. Rev. Stat. § 351.425). Another section of state law provides for class voting where a corporation's charter so requires (§ 351.270). A plan to consolidate MoPac and a subsidiary railroad was approved by their boards of directors and submitted for ICC approval, including provision for an exchange of each MoPac share, without regard to class, for four shares of the new corporation. The proposed plan was to be passed on by the stockholders voting collectively rather than by class. Charging that the proposed exchange was unfair in view of the far greater value of the Class B stock than that of the Class A stock, appellants, Class B stockholders, brought this suit for declaratory relief. The District Court upheld appellants' contention that the collective voting plan would violate MoPac's corporate charter and both state and federal law. The Court of Appeals reversed on the ground that, despite Missouri law, the "plenary character of § 5 (11) . . . with its consequent preemptive nature" compelled a contrary result. *Held:* In a consolidation such as that proposed here, Missouri law

*Together with No. 359, *Alleghany Corp. et al.* v. *Mississippi River Fuel Corp. et al.*, also on certiorari to the same court.

applies, and § 351.270 of that law requires application of the corporate charter provision, which in turn requires a majority assent of the stockholders on a separate class-vote basis. Pp. 167–170.

359 F. 2d 106, reversed and remanded.

John Lowenthal argued the cause for petitioner in No. 352. With him on the briefs was *Maxwell Brandwen.*

Breck P. McAllister argued the cause for petitioners in No. 359. With him on the briefs was *William E. Haudek.*

Robert H. McRoberts argued the cause for respondents Mississippi River Fuel Corp. et al. in both cases. With him on the brief was *John H. Hendren. Dennis G. Lyons* argued the cause for respondent Missouri Pacific Railroad Co. in both cases. With him on the brief was *Daniel A. Rezneck.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The ultimate issue in these cases is whether the holders of the Class B stock of the Missouri Pacific Railroad Company (MoPac) are entitled to vote separately, as a class, on the proposed plan of consolidation of MoPac and Texas and Pacific Railway Company (T & P) into the newly formed Texas and Missouri Pacific Railroad Company (T & M). An application has been filed with the Interstate Commerce Commission requesting permission to effect a plan of consolidation under §§ 5 (2) and 5 (11) of the Interstate Commerce Act, as amended, 54 Stat. 905, 908 (1940), 49 U. S. C. §§ 5 (2) and 5 (11). MoPac's Board of Directors has announced that its Class B shareholders are not entitled to vote on the plan separately and apart from its Class A shareholders, and that it intends to submit the plan only to the collective vote of the Class A and Class B shareholders.

Three separate declaratory judgment actions were filed by different Class B shareholders seeking a declaration

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that the plan requires the separate approval of the holders of the Class B shares by majority vote. Upon a limited consolidation of the cases, the District Court held that MoPac's Articles of Association prohibited the consolidation unless class voting was observed and that § 5 (11)[1] of the Interstate Commerce Act, by adopting state law, required the separate approval of each class of shareholders. 233 F. Supp. 747. The Court of Appeals reversed on the ground that, despite Missouri law, the "plenary character of § 5 (11) . . . with its consequent preemptive nature" compelled a contrary result. 359 F. 2d 106, at 119. We granted certiorari. 385 U. S. 814. We have concluded that Missouri law, as provided by § 5 (11), is controlling on the point and that the judgment must, therefore, be reversed.

I.

Background of the Parties and the Litigation.

MoPac, a Missouri corporation, is an interstate common carrier railroad. It had been in reorganization proceedings under § 77 of the Bankruptcy Act, as amended,

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[1] Section 5 (11):

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority . . . ."

11 U. S. C. § 205, until January 1, 1955.[2] After those proceedings terminated, the corporation's preferred and common stock was replaced by two classes of $100 stated capital no par voting shares: Class A, which is preferentially entitled to noncumulative dividends not to exceed $5 per share annually, and Class B, which is entitled to all the earnings and the equity in excess of the Class A preferences. MoPac's Articles of Association, Art. VII, § D (3), provide that class voting shall not be required save as to four types of corporate change, none of which shall be effected without the separate consent of the record holders of a majority of the Class A and the Class B shares. The four specified changes are: (1) the issuance of additional shares; (2) the creation or issuance of any MoPac obligation or security convertible into or exchangeable for MoPac shares; (3) an alteration or change in "the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock"; and, finally, (4) the amendment or elimination of any of the foregoing requirements.

MoPac has 1,849,576 shares of Class A stock and 39,731 shares of Class B stock outstanding. T & P was incorporated by an Act of Congress in 1871 and is also an interstate railroad of which MoPac owns 82.86% of the outstanding shares of stock. Mississippi River Fuel Corporation (Mississippi) is a Delaware corporation and owns a majority (57.95%) of the Class A shares of the stock of MoPac. Alleghany Corporation (Alleghany) is a Maryland corporation and owns a majority (51%) of the Class B stock of MoPac, subject to a voting trust. T & M is a Delaware corporation organized for the

[2] See *Missouri Pac. R. Co. Reorganization,* 290 I. C. C. 477 (1954); *In re Missouri Pac. R. Co.,* 129 F. Supp. 392 (D. C. E. D. Mo. 1955), aff'd *sub nom. Missouri Pac. R. Co. 5¼% S. S. B. C.* v. *Thompson,* 225 F. 2d 761 (C. A. 8th Cir. 1955).

purpose of being the consolidated company upon the merger of MoPac and T & P.

The agreement and plan of consolidation were approved by the Board of Directors of MoPac and T & P in December of 1963. The plan provided for an exchange of each MoPac share (without regard to class) for four shares of the new corporation and for an exchange of the T & P stock (other than that owned by MoPac) on a basis of one share of T & P for 4.8 shares of the new company. In January of 1964, the three companies filed a joint application with the Interstate Commerce Commission for an order under § 5 (2) of the Act authorizing the consolidation and the issuance of securities by T & M under § 20a. In this application MoPac advised that it would submit the proposed plan to its stockholders, for approval, by May of 1964 on the basis of a collective, rather than class, vote.

There are a total of six individual petitioners, each of whom owns only a nominal number of Class B shares, and Alleghany which owns, as aforesaid, a majority of those shares. The respondents are MoPac, T & P, Mississippi, and some of their directors or officers, only one of whom owns any Class B stock of MoPac. The first of the three suits which this cause involves was filed prior to the submission of the plan to the Commission; the second and third subsequent thereto. Each of the suits attacks the plans of consolidation, alleging, among other things, that the Class B stock has a much greater value than that of the Class A and that the exchange is unfair; that the collective voting plan would violate the Articles of Association, the law of Missouri (and, therefore, § 5 (11) of the Act) and would result in irreparable injury to the Class B shareholders. Each complaint prays for a declaration that the plan of consolidation requires the separate vote of each class of stock. At trial the parties agreed that the court should

first pass upon the voting rights question. The District Court held that class voting was required and certified the issue to the Court of Appeals which permitted an interlocutory appeal under 28 U. S. C. § 1292 (b). Further proceedings in the District Court were stayed.

As we have indicated, the Court of Appeals held that, even though MoPac's Articles of Association required a class vote on consolidation and Missouri law, therefore, demanded such a vote, it nevertheless was "impressed with the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5 (11), and with its consequent preemptive nature." 359 F. 2d, at 119. The Court felt that, by virtue of the federal statute, it was compelled to conclude that it should apply the general standard as to voting rights, *i. e.,* the majority of all voting shares, rather than honor the exception, *i. e.,* class voting, as provided under Missouri law.

II.

Conclusion.

We believe the Court of Appeals erred in so construing § 5 (11) of the Act. That section specifically provides that voluntary consolidations of railroads must have the assent "of a majority [vote of all shares], unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote . . . ." As the Court of Appeals held, this section "bows in the direction of state law." 359 F. 2d, at 114. Both the District Court and the Court of Appeals decided that Mo. Rev. Stat. c. 351 was "the applicable state law." As both courts found, § 351.055 (3) authorizes the issuance of classes of shares of stock and § 351.270 provides that where "the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any

class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section." But the Court of Appeals concluded that since § 351.425 [3] permitted the plan to be approved by the vote of at least two-thirds of all the outstanding shares, § 5 (11) required that it control, rather than § 351.270. We think not. In using the language "required under applicable State law," § 5 (11) embraced all state law, as the Court of Appeals held. This included the exception of § 351.270 as to those corporations whose articles of incorporation required class voting. The national transportation policy and the provisions of § 5 (11), rather than permitting the result the Court of Appeals reached, require that "the articles of incorporation shall control . . . ." It follows that if a consolidation comes within the requirements of § D (3) of the articles of association, the approval by the separate vote of each class of stock is required. The District Court found that the plan of consolidation did come within § D (3). It is clear that the Court of Appeals did not disturb this finding, although it is not precisely clear what the court found on the question. At one point, it appears to say that "the articles seem to require" separate class voting, while it later assumes that they do so. Subsequently the opinion notes that the court is "not persuaded . . . that MoPac's Articles call for a class vote on a consolidation . . . ." 359 F. 2d, at 119. In any event, we agree with the trial court that the articles do require a separate class vote on the plan. We believe that the provision that the company "shall not . . . (c) alter or change the preferences, qualifications, limitations,

[3] Mo. Rev. Stat. § 351.425 provides, in pertinent part: ". . . The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations."

restrictions and special or relative rights of the Class A Stock or of the Class B Stock" would clearly include the plan of consolidation here. MoPac, by consolidating the two railroads that it already controls, will change its Class A stock from voting shares preferentially entitled to non-cumulative dividends of not to exceed $5 per share annually to shares that participate equally in all of the earnings of the company. The Class B stock which now enjoys all of the earnings and the equity in excess of the present Class A preferences would lose those special features. As the Court of Appeals found, the effectuation of the plan would "result in the present Class B holdings being engulfed by the larger number of Class A holdings." 359 F. 2d, at 110. It is apropos to note here that while the equity of each Class A share remains limited to $100, the value of the equity of the Class B shares is approximately $6,500 per share. The plan proposes to exchange four shares of stock of T & M for one share of MoPac Class B, which, under such values, is like exchanging four rabbits for one horse. Moreover, the final proviso of § D (3) requires a separate class vote where any amendment or elimination of any of the provisions of the section itself is proposed. Under the plan this section would be entirely eliminated on the basis of a collective vote rather than a separate class one. But MoPac argues that this would not be "company action." We cannot agree. The boards of directors of MoPac and T & P, which it controls, drew up the plan and now request its approval by the Interstate Commerce Commission. This certainly is "company action" within the terms of the Articles.[4] Indeed,

[4] It is interesting to note that the Interstate Commerce Commission itself required that Art. VII, § D (3) be inserted in MoPac's Articles of Association. The Commission's order provided:

"The certificate of incorporation [of the reorganized corporation] shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that

this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here.

We do not, of course, reach the merits of the proposed plan which is the concern of the Commission in the first instance. Any reference to the effect of the plan is not to be construed as in any way passing upon its merits. With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and that § 351.270 of that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis.

The judgment is, therefore, reversed and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding." 290 I. C. C. 477, at 665.

VACA ET AL. *v.* SIPES, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 114. Argued November 17, 1966.—Decided February 27, 1967.

Petitioners, union officials, were sued in a state court by a union member who alleged wrongful discharge by his employer in violation of the collective bargaining agreement and the union's arbitrary refusal to take his grievance to arbitration under the fifth and final step of the bargaining agreement's grievance procedures. The employee, whose duties required strenuous activity, was discharged on the ground of poor health. During the fourth grievance step the union sent the employee to a physician for a complete examination. The report was unfavorable to the employee and the union decided not to take the grievance to arbitration. After a jury verdict for the employee, the trial judge set aside the verdict on the ground that the NLRB had exclusive jurisdiction over the controversy. The Kansas City Court of Appeals affirmed, but the Missouri Supreme Court reversed and ordered the jury's verdict reinstated. *Held:*

1. Since the union's duty, as exclusive agent, fairly to represent all members of a designated unit is based on federal statutes, federal law governs the employee's cause of action for breach of that duty. Pp. 176–177.

2. Although the NLRB has recently held that a union's breach of its statutory duty of fair representation is an unfair labor practice under § 8 (b) of the National Labor Relations Act, it does not follow that the broad pre-emption doctrine defined in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, holding that the NLRB has exclusive jurisdiction over activity arguably subject to § 8 of the Act, is applicable thereto. Pp. 177–188.

(a) The pre-emption doctrine has not been rigidly applied where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Pp. 179–180.

(b) The pre-emption rule has not been applied where the activity regulated was merely a peripheral concern of the Labor Management Relations Act. P. 180.

(c) The doctrine of fair representation, which protects individuals against arbitrary union conduct, might be jeopardized by the NLRB's failure to act in certain cases, if the pre-emption

doctrine were applied to oust the courts of their traditional jurisdiction to curb arbitrary union conduct. Pp. 181–183.

(d) As a practical matter, in an employee's suit against his employer for breach of contract under § 301 of the Labor Management Relations Act, the employee may well find it necessary to prove a breach of duty by his union, a facet of the case which does not destroy the court's jurisdiction, even if the employee joins the union as a defendant. That being so, the result should be no different if the employee sues the employer and the union in separate actions. Pp. 183–187.

(e) Where a breach of duty by the union and a breach of contract by the employer are proven in a § 301 breach-of-duty action, the court must fashion an appropriate remedy against both defendants. Pp. 187–188.

3. A union breaches its duty of fair representation when its conduct toward a member of the designated unit is arbitrary, discriminatory or in bad faith, but it does not breach that duty merely because it settles a grievance short of arbitration, and the Missouri Supreme Court erred in upholding the jury's verdict solely on the ground that the evidence supported the employee's claim of wrongful discharge. Pp. 190–193.

4. As a matter of federal law the evidence does not support a verdict that the union breached its duty, as the employee, who had no absolute right to have his grievance arbitrated, failed to prove arbitrary or bad-faith conduct by the union in processing his grievance. Pp. 193–195.

5. The claimed damages, which were primarily those suffered as a result of the employer's alleged breach of contract, should not have been all charged to the union, and, if liability were found, it should have been apportioned between the employer and the union according to the damages caused by the fault of each. Pp. 195–198.

397 S. W. 2d 658, reversed.

David E. Feller argued the cause for petitioners. With him on the brief were *Henry A. Panethiere, Russell D. Jacobson, Jerry D. Anker* and *George G. West.*

Allan R. Browne argued the cause and filed a brief for respondent.

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Marshall, Robert S. Rifkind, Arnold*

Ordman, Dominick L. Manoli and *Norton J. Come* for the United States; by *J. Albert Woll, Robert C. Mayer, Laurence Gold* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; and by *Robert L. Hecker* and *Earl G. Spiker* for Swift & Co.

MR. JUSTICE WHITE delivered the opinion of the Court.

On February 13, 1962, Benjamin Owens filed this class action against petitioners, as officers and representatives of the National Brotherhood of Packinghouse Workers [1] and of its Kansas City Local No. 12 (the Union), in the Circuit Court of Jackson County, Missouri. Owens, a Union member, alleged that he had been discharged from his employment at Swift & Company's (Swift) Kansas City Meat Packing Plant in violation of the collective bargaining agreement then in force between Swift and the Union, and that the Union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance with Swift to arbitration under the fifth step of the bargaining agreement's grievance procedures.

Petitioners' answer included the defense that the Missouri courts lacked jurisdiction because the gravamen of Owens' suit was "arguably and basically" an unfair labor practice under § 8 (b) of the National Labor Relations Act (N. L. R. A.), as amended, 61 Stat. 141, 29 U. S. C. § 158 (b), within the exclusive jurisdiction of the National Labor Relations Board (NLRB). After a jury trial, a verdict was returned awarding Owens $7,000 compensatory and $3,300 punitive damages. The trial judge set aside the verdict and entered judgment for petitioners on the ground that the NLRB had exclusive jurisdiction

[1] Now known as the National Brotherhood of Packinghouse & Dairy Workers.

over this controversy, and the Kansas City Court of Appeals affirmed. The Supreme Court of Missouri reversed and directed reinstatement of the jury's verdict,[2] relying on this Court's decisions in *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, and in *Automobile Workers* v. *Russell,* 356 U. S. 634. 397 S. W. 2d 658. During the appeal, Owens died and respondent, the administrator of Owens' estate, was substituted. We granted certiorari to consider whether exclusive jurisdiction lies with the NLRB and, if not, whether the finding of Union liability and the relief afforded Owens are consistent with governing principles of federal labor law. 384 U. S. 969. The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), Swift, and the United States have filed *amicus* briefs supporting petitioners. Although we conclude that state courts have jurisdiction in this type of case, we hold that federal law governs, that the governing federal standards were not applied here, and that the judgment of the Supreme Court of Missouri must accordingly be reversed.

I.

In mid-1959, Owens, a long-time high blood pressure patient, became sick and entered a hospital on sick leave from his employment with Swift. After a long rest during which his weight and blood pressure were reduced, Owens was certified by his family physician as fit to resume his heavy work in the packing plant. However, Swift's company doctor examined Owens upon his return and concluded that his blood pressure was too high to permit reinstatement. After securing a second authorization from another outside doctor, Owens returned to the plant, and a nurse permitted him to resume work

[2] Punitive damages were reduced to $3,000, the amount claimed by Owens in his complaint.

on January 6, 1960. However, on January 8, when the doctor discovered Owens' return, he was permanently discharged on the ground of poor health.

Armed with his medical evidence of fitness, Owens then sought the Union's help in securing reinstatement, and a grievance was filed with Swift on his behalf. By mid-November 1960, the grievance had been processed through the third and into the fourth step of the grievance procedure established by the collective bargaining agreement.[3] Swift adhered to its position that Owens' poor health justified his discharge, rejecting numerous medical reports of reduced blood pressure proffered by Owens and by the Union. Swift claimed that these reports were not based upon sufficiently thorough medical tests.

On February 6, 1961, the Union sent Owens to a new doctor at Union expense "to see if we could get some better medical evidence so that we could go to arbitration with his case." R., at 107. This examination did not support Owens' position. When the Union received the report, its executive board voted not to take the Owens grievance to arbitration because of insufficient medical evidence. Union officers suggested to Owens that he accept Swift's offer of referral to a rehabilitation center, and the grievance was suspended for that purpose. Owens rejected this alternative and demanded that the Union take his grievance to arbitration, but the Union

[3] The agreement created a five-step procedure for the handling of grievances. In steps one and two, either the aggrieved employee or the Union's representative presents the grievance first to Swift's department foreman, and then in writing to the division superintendent. In step three, grievance committees of the Union and management meet, and the company must state its position in writing to the Union. Step four is a meeting between Swift's general superintendent and representatives of the National Union. If the grievance is not settled in the fourth step, the National Union is given power to refer the grievance to a specified arbitrator.

refused. With his contractual remedies thus stalled at the fourth step, Owens brought this suit. The grievance was finally dismissed by the Union and Swift shortly before trial began in June 1964.[4]

In his charge to the jury, the trial judge instructed that petitioners would be liable if Swift had wrongfully discharged Owens and if the Union had "arbitrarily . . . and without just cause or excuse . . . refused" to press Owens' grievance to arbitration. Punitive damages could also be awarded, the trial judge charged, if the Union's conduct was "willful, wanton and malicious." However, the jury must return a verdict for the defendants, the judge instructed, "if you find and believe from the evidence that the union and its representatives acted reasonably and in good faith in the handling and processing of the grievance of the plaintiff." R., at 161–162. The jury then returned the general verdict for Owens which eventually was reinstated by the Missouri Supreme Court.

II.

Petitioners challenge the jurisdiction of the Missouri courts on the ground that the alleged conduct of the Union was arguably an unfair labor practice and within the exclusive jurisdiction of the NLRB. Petitioners rely on *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enforcement denied, 326 F. 2d 172 (C. A. 2d Cir. 1963), where a sharply divided Board held for the first time that a union's breach of its statutory duty of fair representation violates N. L. R. A. § 8 (b), as amended. With the NLRB's adoption of *Miranda Fuel*, petitioners argue, the broad pre-emption doctrine defined in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, be-

[4] No notice of the dismissal was given to Owens, who by that time had filed a second suit against Swift for breach of contract. The suit against Swift is still pending in a pretrial stage.

comes applicable. For the reasons which follow, we reject this argument.

It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see *Ford Motor Co.* v. *Huffman,* 345 U. S. 330; *Syres* v. *Oil Workers International Union,* 350 U. S. 892, and in its enforcement of the resulting collective bargaining agreement, see *Humphrey* v. *Moore,* 375 U. S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210, and was soon extended to unions certified under the N. L. R. A., see *Ford Motor Co.* v. *Huffman, supra.* Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey* v. *Moore,* 375 U. S., at 342. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. *E. g., Ford Motor Co.* v. *Huffman, supra.*

Although N. L. R. A. § 8 (b) was enacted in 1947, the NLRB did not until *Miranda Fuel* interpret a breach of a union's duty of fair representation as an unfair labor practice. In *Miranda Fuel,* the Board's majority held that N. L. R. A. § 7 gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their

employment," and "that Section 8 (b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." 140 N. L. R. B., at 185. The Board also held that an employer who "participates" in such arbitrary union conduct violates § 8 (a)(1), and that the employer and the union may violate §§ 8 (a)(3) and 8 (b)(2), respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." [5] *Id.*, at 186.

The Board's *Miranda Fuel* decision was denied enforcement by a divided Second Circuit, 326 F. 2d 172 (1963). However, in *Local 12, United Rubber Workers* v. *N. L. R. B.*, 368 F. 2d 12, the Fifth Circuit upheld the Board's *Miranda Fuel* doctrine in an opinion suggesting that the Board's approach will pre-empt judicial cognizance of some fair representation duty suits. In light of these developments, petitioners argue that Owens' state court action was based upon Union conduct that is arguably proscribed by N. L. R. A. § 8 (b), was potentially enforceable by the NLRB, and was therefore pre-empted under the *Garmon* line of decisions.

A. In *Garmon*, this Court recognized that the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act (L. M. R. A.) necessarily imply that potentially conflicting "rules of law, of remedy, and of administration" cannot be permitted to

[5] See also *Cargo Handlers, Inc.*, 159 N. L. R. B. No. 17; *Local 12, United Rubber Workers*, 150 N. L. R. B. 312, enforced, 368 F. 2d 12 (C. A. 5th Cir. 1966); *Maremont Corp.*, 149 N. L. R. B. 482; *Galveston Maritime Assn., Inc.*, 148 N. L. R. B. 897; *Hughes Tool Co.*, 147 N. L. R. B. 1573.

operate. 359 U. S., at 242. In enacting the National Labor Relations Act and later the Labor Management Relations Act,

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491.

Consequently, as a general rule, neither state nor federal courts have jurisdiction over suits directly involving "activity [which] is arguably subject to § 7 or § 8 of the Act." *San Diego Building Trades Council* v. *Garmon,* 359 U. S., at 245.

This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction: Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 U. S. C. § 187, expressly permits anyone injured by a violation of N. L. R. A. § 8 (b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; § 301 of that Act, 61 Stat. 156, 29 U. S. C. § 185, permits suits for breach of a collec-

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tive bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board (see *Smith* v. *Evening News Assn.*, 371 U. S. 195); and N. L. R. A. § 14, as amended by Title VII, § 701 (a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U. S. C. § 164 (c), permits state agencies and courts to assume jurisdiction "over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction" (compare *Guss* v. *Utah Labor Board*, 353 U. S. 1).

In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act." *San Diego Building Trades Council* v. *Garmon*, 359 U. S., at 243–244. See, *e. g.*, *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (libel); *Automobile Workers* v. *Russell*, 356 U. S. 634 (violence); *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617 (wrongful expulsion from union membership); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (mass picketing). See also *Hanna Mining Co.* v. *Marine Engineers Beneficial Assn.*, 382 U. S. 181. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.

A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law

in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in *Steele* and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L. M. R. A.[6] Moreover, when the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. See 140 N. L. R. B., at 184–186. Finally, as the dissenting Board members in *Miranda Fuel* have pointed out, fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.[7]

In addition to the above considerations, the unique interests served by the duty of fair representation doc-

[6] See *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 332, n. 4. In *Huffman*, the NLRB submitted an *amicus* brief stating that it had not assumed pre-emptive jurisdiction over fair representation duty issues. Mem. for the NLRB, Nos. 193 and 194, Oct. Term, 1952. In *Syres* v. *Oil Workers International Union*, 350 U. S. 892, the Court reversed the dismissal of a suit which claimed breach of the duty of fair representation despite express reliance by one respondent on exclusive NLRB jurisdiction. Brief for Resp. Gulf Oil Corp., No. 390, Oct. Term, 1955.

[7] See *Hughes Tool Co.*, 147 N. L. R. B. 1573, 1589–1590 (Chairman McCulloch and Member Fanning, dissenting in part).

trine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases. The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. See N. L. R. A. § 1, as amended, 61 Stat. 136, 29 U. S. C. § 151. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. See, *e. g., J. I. Case Co.* v. *Labor Board,* 321 U. S. 332. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U. S., at 198–199. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. See *United Electrical Contractors Assn.* v. *Ordman,* 366 F. 2d 776, cert. denied, 385 U. S. 1026.[8] The existence of even a small group

[8] The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. See N. L. R. A. § 10 (c), as amended, 61 Stat. 147, 29 U. S. C.

of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N. L. R. A. § 8 (b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

B. There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L. M. R. A. § 301 charging an employer with a breach of contract. To illustrate, let us assume a collective bargaining agreement that limits discharges to those for good cause and that contains no grievance, arbitration or other provisions purporting to restrict access to the courts. If an employee is discharged without cause, either the union or the employee may sue the employer under L. M. R. A. § 301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of

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§ 160 (c); *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial." See Administrative Decision of the General Counsel, Case No. K–610, Aug. 13, 1956, in CCH N. L. R. B. Decisions, 1956–1957, Transfer Binder, ¶ 54,059.

the NLRB. *Garmon* and like cases have no application to § 301 suits. *Smith* v. *Evening News Assn.*, 371 U. S. 195.

The rule is the same with regard to pre-emption where the bargaining agreement contains grievance and arbitration provisions which are intended to provide the exclusive remedy for breach of contract claims.[9] If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union[10] against the employer to compel arbitration of the employee's grievance, the adjudication of the claim by the arbitrator, or a suit to enforce the resulting arbitration award. See, *e. g.*, *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564.

However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U. S.

[9] If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted. See *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 657–658; 6A Corbin, Contracts § 1436 (1962).

[10] Occasionally, the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration. See *Retail Clerks* v. *Lion Dry Goods, Inc.*, 341 F. 2d 715, cert. denied, 382 U. S. 839.

650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. *Drake Bakeries* v. *Bakery Workers,* 370 U. S. 254, 260–263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our

opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. *Richardson* v. *Texas & N. O. R. Co.*, 242 F. 2d 230, 235–236 (C. A. 5th Cir.).

For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.[11] We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine

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[11] Accord, *Hiller* v. *Liquor Salesmen's Union*, 338 F. 2d 778 (C. A. 2d Cir.); *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182 (C. A. 9th Cir.), cert. denied, 371 U. S. 920; *Fiore* v. *Associated Transport, Inc.*, 255 F. Supp. 596; *Bieski* v. *Eastern Automobile Forwarding Co.*, 231 F. Supp. 710, aff'd, 354 F. 2d 414 (C. A. 3d Cir.); *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782, aff'd per curiam, 273 F. 2d 614 (C. A. 4th Cir.), cert. denied, 363 U. S. 849; *Jenkins* v. *Wm. Schluderberg-T. J. Kurdle Co.*, 217 Md. 556, 144 A. 2d 88.

whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a § 301 suit, and the jurisdiction of the courts is not pre-empted under the *Garmon* principle. This, at the very least, is the holding of *Humphrey* v. *Moore, supra,* with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against the Union itself.

For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee with-

out remedy for the union's wrong.[12] Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many § 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

It follows from the above that the Missouri courts had jurisdiction in this case. Of course, it is quite another problem to determine what remedies may be available against the Union if a breach of duty is proven. See Part IV, *infra*. But the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the *Garmon* pre-emption doctrine inapplicable.

III.

Petitioners contend, as they did in their motion for judgment notwithstanding the jury's verdict, that Owens failed to prove that the Union breached its duty of fair representation in its handling of Owens' grievance. Peti-

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[12] Assuming for the moment that Swift breached the collective bargaining agreement in discharging Owens and that the Union breached its duty in handling Owens' grievance, this case illustrates the difficulties that would result from a rule pre-empting the courts from remedying the Union's breach of duty. If Swift did not "participate" in the Union's unfair labor practice, the Board would have no jurisdiction to remedy Swift's breach of contract. Yet a court might be equally unable to give Owens full relief in a § 301 suit against Swift. Should the court award damages against Swift for Owens' full loss, even if it concludes that part of that loss was caused by the Union's breach of duty? Or should it award Owens only partial recovery hoping that the Board will make him whole? These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate.

tioners also argue that the Supreme Court of Missouri, in rejecting this contention, applied a standard that is inconsistent with governing principles of federal law with respect to the Union's duty to an individual employee in its processing of grievances under the collective bargaining agreement with Swift. We agree with both contentions.

A. In holding that the evidence at trial supported the jury's verdict in favor of Owens, the Missouri Supreme Court stated:

> "The essential issue submitted to the jury was whether the union . . . arbitrarily . . . refused to carry said grievance . . . through the fifth step . . . .
>
> "We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants." 397 S. W. 2d, at 665.

Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary

conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See *Humphrey* v. *Moore, supra*; *Ford Motor Co.* v. *Huffman, supra.* There has been considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. See generally Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1482–1501 (1963); Comment, Federal Protection of Individual Rights under Labor Contracts, 73 Yale L. J. 1215 (1964). Some have suggested that every individual employee should have the right to have his grievance taken to arbitration.[13] Others have urged that the union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.[14]

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[13] See *Donnelly* v. *United Fruit Co.*, 40 N. J. 61, 190 A. 2d 825; Report of Committee on Improvement of Administration of Union-Management Agreements, 1954, Individual Grievances, 50 Nw. U. L. Rev. 143 (1955); Murphy, The Duty of Fair Representation under Taft-Hartley, 30 Mo. L. Rev. 373, 389 (1965); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N. Y. U. L. Rev. 362 (1962).

[14] See *Sheremet* v. *Chrysler Corp.*, 372 Mich. 626, 127 N. W. 2d 313; Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 B. C. Ind. & Com. L. Rev. 783 (1966).

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In L. M. R. A. § 203 (d), 61 Stat. 154, 29 U. S. C. § 173 (d), Congress declared that "Final adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to

arbitration.[15] This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. See *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, 438; Ross, Distressed Grievance Procedures and Their Rehabilitation, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators 104 (1963). It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L. M. R. A. § 203 (d), *supra,* if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

For these same reasons, the standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks

[15] Under current grievance practices, an attempt is usually made to keep the number of arbitrated grievances to a minimum. An officer of the National Union testified in this case that only one of 967 grievances filed at all of Swift's plants between September 1961 and October 1963 was taken to arbitration. And the AFL–CIO's *amicus* brief reveals similar performances at General Motors Corporation and United States Steel Corporation, two of the Nation's largest unionized employers: less than .05% of all written grievances filed during a recent period at General Motors required arbitration, while only 5.6% of the grievances processed beyond the first step at United States Steel were decided by an arbitrator.

sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. Since the union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device by providing him with recourse against both employer (in a § 301 suit) and union, this severe limitation on the power to settle grievances is neither necessary nor desirable. Therefore, we conclude that the Supreme Court of Missouri erred in upholding the verdict in this case solely on the ground that the evidence supported Owens' claim that he had been wrongfully discharged.

B. Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation. As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance. The evidence revealed that the Union diligently supervised the grievance into the fourth step of the bargaining agreement's procedure, with the Union's business representative serving as Owens' advocate throughout these steps. When Swift refused to reinstate Owens on the basis of his medical reports indicating reduced blood pressure, the Union sent him to another doctor of his own choice, at Union expense, in an attempt to amass persuasive medical evidence of Owens' fitness for work. When this examination proved unfavorable, the Union

concluded that it could not establish a wrongful discharge. It then encouraged Swift to find light work for Owens at the plant. When this effort failed, the Union determined that arbitration would be fruitless and suggested to Owens that he accept Swift's offer to send him to a heart association for rehabilitation. At this point, Owens' grievance was suspended in the fourth step in the hope that he might be rehabilitated.

In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. See *Humphrey* v. *Moore,* 375 U. S. 335, 349–350; *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 337–339. In a case such as this, when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner. See Cox, Rights under a Labor Agreement, 69 Harv. L. Rev., at 632–634. But here the Union processed the grievance into the fourth step, attempted to gather sufficient evidence to prove Owens' case, attempted to secure for Owens less vigorous work at the plant, and joined in the employer's efforts to have Owens rehabilitated. Only when these efforts all proved unsuccessful did the Union conclude both that arbitration would be fruitless and that the grievance should be dismissed. There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith.[16] Having concluded that

[16] Owens did allege and testify that petitioner Vaca, President of the Kansas City local, demanded $300 in expenses before the Union would take the grievance to arbitration, a charge which all the petitioners vigorously denied at trial. Under the collective bargaining agreement, the local union had no power to invoke arbitration. See n. 3, *supra.* Moreover, the Union's decision to send

the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here.

IV.

In our opinion, there is another important reason why the judgment of the Missouri Supreme Court cannot stand. Owens' suit against the Union was grounded on his claim that Swift had discharged him in violation of the applicable collective bargaining agreement. In his complaint, Owens alleged "that, as a direct result of said wrongful breach of said contract, by employer . . . Plaintiff was damaged in the sum of Six Thousand, Five Hundred ($6,500.00) Dollars per year, continuing until the date of trial." For the Union's role in "preventing Plaintiff from completely exhausting administrative remedies," Owens requested, and the jury awarded, compensatory damages for the above-described breach of contract plus punitive damages of $3,000. R., at 4. We hold that such damages are not recoverable from the Union in the circumstances of this case.

The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. In this case, the employee's complaint was that the Union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement. But the damages sought by Owens were primarily those suffered

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Owens to another doctor at Union expense occurred after Vaca's alleged demand, and the ultimate decision not to invoke arbitration came later still. Thus, even if the jury believed Owens' controverted testimony, we do not think that this incident would establish a breach of duty by the Union.

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because of the employer's alleged breach of contract. Assuming for the moment that Owens had been wrongfully discharged, Swift's only defense to a direct action for breach of contract would have been the Union's failure to resort to arbitration, compare *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, with *Smith* v. *Evening News Assn.,* 371 U. S. 195, and if that failure was itself a violation of the Union's statutory duty to the employee, there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay. See pp. 185–186, *supra.* The difficulty lies in fashioning an appropriate scheme of remedies.

Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and the union to arbitrate the underlying grievance.[17] It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved. But we see no reason inflexibly to require arbitration in all cases. In some cases, for example, at least part of the employee's damages may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.

A more difficult question is, what portion of the employee's damages may be charged to the union: in partic-

[17] Obviously, arbitration is an appropriate remedy only when the parties have created such a procedure in the collective bargaining agreement.

ular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in *Humphrey* v. *Moore, supra.* It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages.[18]

The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any

[18] We are not dealing here with situations where a union has affirmatively caused the employer to commit the alleged breach of contract. In cases of that sort where the union's conduct is found to be an unfair labor practice, the NLRB has found an unfair labor practice by the employer, too, and has held the union and the employer jointly and severally liable for any back pay found owing to the particular employee who was the subject of their joint discrimination. *E. g., Imparato Stevedoring Corp.*, 113 N. L. R. B. 883 (1955); *Squirt Distrib. Co.*, 92 N. L. R. B. 1667 (1951); *H. M. Newman*, 85 N. L. R. B. 725 (1949). Even if this approach would be appropriate for analogous § 301 and breach-of-duty suits, it is not applicable here. Since the Union played no part in Swift's alleged breach of contract and since Swift took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted.

in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.

Reversed.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN join, concurring in the result.

1. In my view, a complaint by an employee that the union has breached its duty of fair representation is subject to the exclusive jurisdiction of the NLRB. It is a charge of unfair labor practice. See *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962);[1] *Local 12, United Rubber Workers,* 150 N. L. R. B. 312, enforced, 368 F. 2d 12 (C. A. 5th Cir. 1966).[2] As is the case with most other

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[1] This decision of the NLRB was denied enforcement by the Court of Appeals for the Second Circuit but on a basis which did not decide the point relevant here. *NLRB* v. *Miranda Fuel Co.*, 326 F. 2d 172 (C. A. 2d Cir. 1963). Only one judge, Judge Medina, took the position that the NLRB had incorrectly held violation of the duty of fair representation to be an unfair labor practice. As an alternative ground for decision, he held that the NLRB had not had sufficient evidence to support its finding of breach of the duty. Judge Lumbard agreed with this latter holding, and explicitly did not reach the question whether breach of the duty is an unfair labor practice. Judge Friendly dissented. He would have affirmed the NLRB both on the sufficiency of the evidence and on the holding that breach of the duty of fair representation is an unfair labor practice as to which the NLRB can give relief.

[2] The opinion by Judge Thornberry for the Fifth Circuit supports the views expressed herein. See also Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 172–173 (1957); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327 (1958).

unfair labor practices, the Board's jurisdiction is preemptive. *Garner* v. *Teamsters Union,* 346 U. S. 485 (1953); *Guss* v. *Utah Labor Board,* 353 U. S. 1 (1957); *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959); *Local 438, Constr. Laborers* v. *Curry,* 371 U. S. 542 (1963); *Plumbers' Union* v. *Borden,* 373 U. S. 690 (1963); *Iron Workers* v. *Perko,* 373 U. S. 701 (1963); *Liner* v. *Jafco, Inc.,* 375 U. S. 301 (1964). Cf. *Woody* v. *Sterling Alum. Prods., Inc.,* 365 F. 2d 448 (C. A. 8th Cir. 1966), pet. for cert. pending, No. 946, O. T. 1966. There is no basis for failure to apply the preemption principle in the present case, and, as I shall discuss, strong reason for its application. The relationship between the union and the individual employee with respect to the processing of claims to employment rights under the collective bargaining agreement is fundamental to the design and operation of federal labor law. It is not "merely peripheral," as the Court's opinion states. It "presents difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.'" *Iron Workers* v. *Perko, supra,* 373 U. S., at 706. Accordingly, the judgment of the Supreme Court of Missouri should be reversed and the complaint dismissed for this reason and on this basis. I agree, however, that if it were assumed that jurisdiction of the subject matter exists, the judgment would still have to be reversed because of the use by the Missouri court of an improper standard for measuring the union's duty, and the absence of evidence to establish that the union refused further to process Owens' grievance because of bad faith or arbitrarily.

2. I regret the elaborate discussion in the Court's opinion of problems which are irrelevant. This is not an action by the employee against the employer, and the

discussion of the requisites of such an action is, in my judgment, unnecessary. The Court argues that the employee could sue the employer under L. M. R. A. § 301; and that to maintain such an action the employee would have to show that he has exhausted his remedies under the collective bargaining agreement, or alternatively that he was prevented from doing so because the union breached its duty to him by failure completely to process his claim. That may be; or maybe all he would have to show to maintain an action against the employer for wrongful discharge is that he demanded that the union process his claim to exhaustion of available remedies, and that it refused to do so.[3] I see no need for the Court to pass upon that question, which is not presented here, and which, with all respect, lends no support to the Court's argument. The Court seems to use its discussion of the employee-employer litigation as somehow analogous to or supportive of its conclusion that the employee may maintain a court action against the union. But I do not believe that this follows. I agree that the NLRB's unfair labor practice jurisdiction does not preclude an action under § 301 against the employer for wrongful discharge

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[3] Cf. my Brother BLACK's dissenting opinion in this case. Cf. also *Brown* v. *Sterling Alum. Prods. Corp.*, 365 F. 2d 651, 656–657 (C. A. 8th Cir. 1966), cert. denied, *post*, p. 957. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), does not pass upon the issue. The Court states that "To leave the employee remediless" when the union wrongfully refuses to process his grievance, "would . . . be a great injustice." I do not believe the Court relieves this injustice to any great extent by requiring the employee to prove an unfair labor practice as a prerequisite to judicial relief for the employer's breach of contract. Nor do I understand how giving the employee a cause of action against the *union* is an appropriate way to remedy the injustice which would exist if the union were allowed to foreclose relief against the *employer*.

from employment. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). Therefore, Owens might have maintained an action against his employer in the present case. This would be an action to enforce the collective bargaining agreement, and Congress has authorized the courts to entertain actions of this type. But his claim against the union is quite different in character, as the Court itself recognizes. The Court holds—and I think correctly if the issue is to be reached—that the union could not be required to pay damages measured by the breach of the employment contract, because it was not the union but the employer that breached the contract. I agree; but I suggest that this reveals the point for which I contend: that the employee's claim against the union is not a claim under the collective bargaining agreement, but a claim that the union has breached its statutory duty of fair representation. This claim, I submit, is a claim of unfair labor practice and it is within the exclusive jurisdiction of the NLRB. The Court agrees that "one of the available remedies [obtainable, the Court says, by court action] when a breach of the union's duty is proved" is "an order compelling arbitration." This is precisely and uniquely the kind of order which is within the province of the Board. Beyond this, the Court is exceedingly vague as to remedy: "appropriate damages or equitable relief" are suggested as possible remedies, apparently when arbitration is not available. Damages against the union, the Court admonishes, should be gauged "according to the damage caused by [its] fault"—*i. e.*, the failure to exhaust remedies for the grievance. The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly

to represent all employees in the unit. This is an unfair labor practice, and should be treated as such.[4]

3. If we look beyond logic and precedent to the policy of the labor relations design which Congress has provided, court jurisdiction of this type of action seems anomalous and ill-advised. We are not dealing here with the interpretation of a contract or with an alleged breach of an employment agreement. As the Court in effect acknowledges, we are concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit, including those who may not be members of the union. The Court—regrettably, in my opinion—ventures to state judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee. In my opinion, this is precisely and especially the kind of judgment that Congress intended to entrust to the Board and which is well within the pre-emption doctrine that this Court has prudently stated.[5] See cases cited, *supra*, es-

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[4] The Court argues that since the employee suing the employer for breach of the employment contract would have to show exhaustion of remedies under the contract, and since he would for this purpose have to show his demand on the union and, according to the Court, its wrongful failure to prosecute his grievance, the union could be joined as a party defendant; and since the union could be joined in such a suit, it may be sued independently of the employer. But this is a *non sequitur*. As the Court itself insists, the suit against the union is not for breach of the employment contract, but for violation of the duty fairly to represent the employee. This is an entirely different matter. It is a breach of statutory duty—an unfair labor practice—and not a breach of the employment contract.

[5] In a variety of contexts the NLRB concerns itself with the substantive bargaining behavior of the parties. For example: (a) the duty to bargain in good faith, see, *e. g., Fibreboard Corp.* v. *Labor Board,* 379 U. S. 203 (1964); (b) jurisdictional disputes, see, *e. g., Labor Board* v. *Radio Engineers,* 364 U. S. 573 (1961);

pecially the *Perko* and *Borden* cases, the facts of which strongly parallel the situation in this case. See also *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 72 (1966) (dissenting opinion). The nuances of union-employee and union-employer relationships are infinite and consequential, particularly when the issue is as amorphous as whether the union was proved guilty of "arbitrary or bad-faith conduct" which the Court states as the standard applicable here. In all reason and in all good judgment, this jurisdiction should be left with the Board and not be placed in the courts, especially with the complex and necessarily confusing guidebook that the Court now publishes.

Accordingly, I join the judgment of reversal, but on the basis stated.

MR. JUSTICE BLACK, dissenting.

The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer. This result follows from the Court's announcement in this case, involving an employee's suit against his union, of a new rule to govern an employee's suit against his employer. The rule is that before an employee can sue his employer under § 301 of the L. M. R. A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by "arbitrary, discriminatory, or . . . bad faith" conduct on

(c) secondary boycotts and hot cargo clauses, see, *e. g., Orange Belt District Council of Painters No. 48* v. *NLRB,* 117 U. S. App. D. C. 233, 328 F. 2d 534 (1964).

the part of his union. With this new rule and its result I cannot agree.

The Court recognizes, as it must, that the jury in this case found at least that Benjamin Owens was fit for work, that his grievance against Swift was meritorious, and that Swift breached the collective bargaining agreement when it wrongfully discharged him. The Court also notes in passing that Owens* has a separate action for breach of contract pending against Swift in the state courts. And in Part IV of its opinion, the Court vigorously insists that "there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay," that the "employee should have no difficulty recovering these damages from the employer" for his "unrelated breach of contract," and that "the employee [is] assured of direct recovery from the employer." But this reassurance in Part IV gives no comfort to Owens, for Part IV is based on the assumption that the union breached its duty to Owens, an assumption which, in Part III of its opinion, the Court finds unsupported by the facts of this case. What this all means, though the Court does not expressly say it, is that Owens will be no more successful in his pending breach-of-contract action against Swift than he is here in his suit against the union. For the Court makes it clear "that the question of whether a union has breached its duty of fair representation will . . . be a critical issue in a suit under L. M. R. A. § 301," that "the wrongfully discharged employee may bring an action against his employer" only if he "can prove that the union . . . breached its duty of fair representation in its handling of the employee's grievance," and "that the employee, as part and parcel of his § 301 action, finds

*Owens died while the appeal of his case from the trial court was pending. The administrator of his estate was substituted and is the respondent herein though for simplicity is referred to herein as Owens.

it necessary to prove an unfair labor practice by the union." Thus, when Owens attempts to proceed with his pending breach-of-contract action against Swift, Swift will undoubtedly secure its prompt dismissal by pointing to the Court's conclusion here that the union has not breached its duty of fair representation. Thus, Owens, who now has obtained a judicial determination that he was wrongfully discharged, is left remediless, and Swift, having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct. I simply fail to see how it should make one iota of difference, as far as the "unrelated breach of contract" by Swift is concerned, whether the union's conduct is wrongful or rightful. Neither precedent nor logic supports the Court's new announcement that it does.

Certainly, nothing in *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, supports this new rule. That was a case where the aggrieved employee attempted to "completely sidestep available grievance procedures in favor of a lawsuit." *Id.,* at 653. Noting that "it cannot be said . . . that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so," *ibid.,* the Court there held that the employee "must *attempt* use of the contract grievance procedure," *id.,* at 652, and "must afford the union the opportunity to act on his behalf," *id.,* at 653. I dissented on the firm belief that an employee should be free to litigate his own lawsuit with his own lawyer in a court before a jury, rather than being forced to entrust his claim to a union which, even if it did agree to press it, would be required to submit it to arbitration. And even if, as the Court implied, "the worker would be allowed to sue after he had presented his claim to the union and after he had suffered the inevitable discouragement and delay which necessarily accompanies the union's refusal

to press his claim," *id.*, at 669, I could find no threat to peaceful labor relations or to the union's prestige in allowing an employee to by-pass completely contractual remedies in favor of a traditional breach-of-contract lawsuit for back pay or wage substitutes. Here, of course, Benjamin Owens did not "completely sidestep available grievance procedures in favor of a lawsuit." With complete respect for the union's authority and deference to the contract grievance procedures, he not only gave the union a chance to act on his behalf, but in every way possible tried to convince it that his claim was meritorious and should be carried through the fifth step to arbitration. In short, he did everything the Court's opinion in *Maddox* said he should do, and yet now the Court says so much is not enough.

In *Maddox,* I noted that the "cases really in point are those which involved agreements governed by the Railway Labor Act and which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge. *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U. S. 653; *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630." 379 U. S., at 666. I also observed that the Court's decision in *Maddox* "raised the overruling axe so high [over those cases] that its falling is just about as certain as the changing of the seasons." *Id.,* at 667. In the latter observation I was mistaken. The Court has this Term, in *Walker* v. *Southern R. Co.,* 385 U. S. 196, refused to overrule in light of *Maddox* such cases as *Moore* and *Koppal.* Noting the long delays attendant upon exhausting administrative remedies under the Railway Labor Act, the Court based this refusal on "[t]he contrast between the administrative remedy" available to Maddox and that available to Walker. If, as the Court suggested, the availability of an administrative remedy determines whether an employee can sue without first

exhausting it, can there be any doubt that Owens who had no administrative remedy should be as free to sue as Walker who had a slow one? Unlike Maddox, Owens attempted to implement the contract grievance procedures and found them inadequate. Today's decision, following in the wake of *Walker* v. *Southern R. Co.*, merely perpetuates an unfortunate anomaly created by *Maddox* in the law of labor relations.

The rule announced in *Maddox*, I thought, was a "brainchild" of the Court's recent preference for arbitration. But I am unable to ascribe any such genesis to today's rule, for arbitration is precisely what Owens sought and preferred. Today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated. Fearing that arbitrators would be overworked, the Court allows unions unilaterally to determine not to take a grievance to arbitration—the first step in the contract grievance procedure at which the claim would be presented to an impartial third party—as long as the union decisions are neither "arbitrary" nor "in bad faith." The Court derives this standard of conduct from a long line of cases holding that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." What the Court overlooks is that those cases laid down this standard in the context of situations where the employee's sole or fundamental complaint was against the union. There was not the slightest hint in those cases that the same standard would apply where the employee's primary complaint was against his employer for breach of contract and where he only incidentally contended that the union's conduct prevented the adjudication, by either court or arbitrator, of the underlying grievance. If the Court here were satisfied with merely holding that in this situation the employee

could not recover damages from the union unless the union breached its duty of fair representation, then it would be one thing to say that the union did not do so in making a good-faith decision not to take the employee's grievance to arbitration. But if, as the Court goes on to hold, the employee cannot sue his employer for breach of contract unless his failure to exhaust contractual remedies is due to the union's breach of its duty of fair representation, then I am quite unwilling to say that the union's refusal to exhaust such remedies—however non-arbitrary—does not amount to a breach of its duty. Either the employee should be able to sue his employer for breach of contract after having attempted to exhaust his contractual remedies, or the union should have an absolute duty to exhaust contractual remedies on his behalf. The merits of an employee's grievance would thus be determined by either a jury or an arbitrator. Under today's decision it will never be determined by either.

And it should be clear that the Court's opinion goes much further than simply holding that an employee has no absolute right to have the union take his grievance to arbitration. Here, of course, the union supervised the grievance into the fourth step of the contract machinery and dropped it just prior to arbitration on its belief that the outcome of arbitration would be unfavorable. But limited only by the standard of arbitrariness, there was clearly no need for the union to go that far. Suppose, for instance, the union had a rule that it would not prosecute a grievance even to the first step unless the grievance were filed by the employee within 24 hours after it arose. Pursuant to this rule, the union might completely refuse to prosecute a grievance filed several days late. Thus, the employee, no matter how meritorious his grievance, would get absolutely nowhere. And unless he could prove that

the union's rule was arbitrary (a standard which no one can define), the employee would get absolutely no consideration of the merits of his grievance—either by a jury, an arbitrator, the employer, or by the union. The Court suggests three reasons for giving the union this almost unlimited discretion to deprive injured employees of all remedies for breach of contract. The first is that "frivolous grievances" will be ended prior to time-consuming and costly arbitration. But here no one, not even the union, suggests that Benjamin Owens' grievance was frivolous. The union decided not to take it to arbitration simply because the union doubted the chance of success. Even if this was a good-faith doubt, I think the union had the duty to present this contested, but serious, claim to the arbitrator whose very function is to decide such claims on the basis of what he believes to be right. Second, the Court says that allowing the union to settle grievances prior to arbitration will assure consistent treatment of "major problem areas in the interpretation of the collective bargaining contract." But can it be argued that whether Owens was "fit to work" presents a major problem in the interpretation of the collective bargaining agreement? The problem here was one of interpreting medical reports, not a collective bargaining agreement, and of evaluating other evidence of Owens' physical condition. I doubt whether consistency is either possible or desirable in determining whether a particular employee is able to perform a particular job. Finally, the Court suggests that its decision "furthers the interest of the union as statutory agent." I think this is the real reason for today's decision which entirely overlooks the interests of the injured employee, the only one who has anything to lose. Of course, anything which gives the union life and death power over those whom it is supposed to represent furthers its "interest." I simply fail to see how

the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf.

Henceforth, in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith. The Court never explains what is meant by this vague phrase or how trial judges are intelligently to translate it to a jury. Must the employee prove that the union in fact acted arbitrarily, or will it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration? Must the employee join the union in his § 301 suit against the employer, or must he join the employer in his unfair representation suit against the union? However these questions are answered, today's decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy. Today's decision, while giving the worker an ephemeral right to sue his union for breach of its duty of fair representation, creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement.

SHELL OIL CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 863. Decided February 27, 1967.

64 Cal. 2d 713, 414 P. 2d 820, appeal dismissed.

Robert D. Mackenzie for appellant.

Thomas C. Lynch, Attorney General of California, *James E. Sabine* and *Ernest P. Goodman,* Assistant Attorneys General, and *John J. Klee, Jr.,* Deputy Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BOGART *v.* REAGAN, GOVERNOR OF CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1044, Misc. Decided February 27, 1967.

Appeal dismissed.

Peter D. Bogart, appellant, *pro se.*

Warren M. Christopher for appellee State Bar of California.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. The request for other relief is denied.

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PHILLIPS ET VIR *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 684, Misc. Decided February 27, 1967.

Certiorari granted; 240 Cal. App. 2d 197, 49 Cal. Rptr. 480, reversed.

Appellants *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *S. Clark Moore,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE BLACK and MR. JUSTICE CLARK are of the opinion that the judgment should be vacated and the case remanded for further consideration in light of *Chapman* v. *California, supra.*

MR. JUSTICE HARLAN would affirm the judgment below for the reasons set forth in his dissenting opinion in *Chapman* v. *California, supra,* at 45.

KLOPFER *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 100. Argued December 8, 1966.—Decided March 13, 1967.

Petitioner's trial on a North Carolina criminal trespass indictment ended with a declaration of a mistrial when the jury failed to reach a verdict. After the case had been postponed for two terms, petitioner filed a motion with the trial court in which he petitioned the court to ascertain when the State intended to bring him to trial. While this motion was being considered, the State's prosecutor moved for permission to take a "*nolle prosequi* with leave," a procedural device whereby the accused is discharged from custody but remains subject to prosecution at any time in the future at the discretion of the prosecutor. Although petitioner objected that the trespass charge was abated by the Civil Rights Act of 1964 and that entry of the *nolle prosequi* order would violate his federal right to a speedy trial, the trial court, without stated justification, granted the prosecutor's motion. On appeal, the State Supreme Court affirmed the trial court's action, holding that while a defendant has a right to a speedy trial if there is to be a trial, that right does not require the State to prosecute if the prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. *Held:* By indefinitely postponing prosecution on the indictment over petitioner's objection and without stated justification, the State denied petitioner the right to a speedy trial guaranteed to him by the Sixth and Fourteenth Amendments of the Federal Constitution. Pp. 219–226.

266 N. C. 349, 145 S. E. 2d 909, reversed and remanded.

Wade H. Penny, Jr., argued the cause and filed a brief for petitioner.

Andrew A. Vanore, Jr., argued the cause for respondent. With him on the brief were *T. W. Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Deputy Attorney General.

William W. Van Alstyne and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al., as *amici curiae*.

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

The question involved in this case is whether a State may indefinitely postpone prosecution on an indictment without stated justification over the objection of an accused who has been discharged from custody. It is presented in the context of an application of an unusual North Carolina criminal procedural device known as the "*nolle prosequi* with leave."

Under North Carolina criminal procedure, when the prosecuting attorney of a county, denominated the solicitor, determines that he does not desire to proceed further with a prosecution, he may take a *nolle prosequi,* thereby declaring "that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 266–267, 74 S. E. 740, 741 (1912). But the taking of the *nolle prosequi* does not permanently terminate proceedings on the indictment. On the contrary, "When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application." *State* v. *Klopfer,* 266 N. C. 349, 350, 145 S. E. 2d 909, 910 (1966). And if the solicitor petitions the court to *nolle prosequi* the case "with leave," the consent required to reinstate the prosecution at a future date is implied in the order "and the solicitor (without further order) may have the case restored for trial." *Ibid.* Since the indictment is not discharged by either a *nolle prosequi* or a *nolle prosequi* with leave, the statute of limitations remains tolled. *State* v. *Williams,* 151 N. C. 660, 65 S. E. 908 (1909).

Although entry of a *nolle prosequi* is said to be "usually and properly left to the discretion of the Solicitor," *State* v. *Moody,* 69 N. C. 529, 531 (1873), early decisions indicate that the State was once aware that the trial judge would have to exercise control over the procedure to prevent oppression of defendants. See *State* v. *Smith,* 129 N. C. 546, 40 S. E. 1 (1901); *State* v. *Thornton,* 35 N. C. 256 (1852). But, in the present case, neither the court below nor the solicitor offers any reason why the case of petitioner should have been *nolle prossed* except for the suggestion of the Supreme Court that the solicitor, having tried the defendant once and having obtained only a mistrial, "may have concluded that another go at it would not be worth the time and expense of another effort." 266 N. C., at 350, 145 S. E. 2d, at 910. In his brief in this Court, the Attorney General quotes this language from the opinion below in support of the judgment.

Whether this procedure is presently sustained by the North Carolina courts under a statute or under their conception of the common-law procedure is not indicated by the opinion of the court, the transcript or the briefs of the parties in the present case. The only statutory reference to a *nolle prosequi* is in § 15–175, General Statutes of North Carolina,[1] which on its face does not apply to the facts of this case. Perhaps the procedure's

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[1] N. C. Gen. Stat. § 15–175 (1965):

"A nolle prosequi 'with leave' shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the

genesis lies in early nineteenth century decisions of the State's Supreme Court approving the use of a *nolle prosequi* with leave to reinstate the indictment, although those early applications of the procedure were quite different from those of the period following enactment of § 15–175. Compare *State* v. *Thompson,* 10 N. C. 613 (1825), and *State* v. *Thornton,* 35 N. C. 256 (1852) (capias issued immediately after entry of the *nolle prosequi* with leave), with *State* v. *Smith,* 170 N. C. 742, 87 S. E. 98 (1915) (capias issued eight years after a *nolle prosequi* with leave was taken, even though the defendant had been available for trial in 1907).

The consequence of this extraordinary criminal procedure is made apparent by the case before the Court. A defendant indicted for a misdemeanor may be denied an opportunity to exonerate himself in the discretion of the solicitor and held subject to trial, over his objection, throughout the unlimited period in which the solicitor may restore the case to the calendar. During that period, there is no means by which he can obtain a dismissal or have the case restored to the calendar for trial.[2] In spite of this result, both the Supreme Court and the Attorney General state as a fact, and rely upon it for affirmance in this case, that this procedure as applied to the petitioner placed no limitations upon him, and was in no way violative of his rights. With this we cannot agree.

This procedure was applied to the petitioner in the following circumstances:

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district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witnesses for the State indorsed on the indictment."

The provision was originally enacted in 1905.

[2] On oral argument, counsel for the State informed the Court that a North Carolina indictment could be quashed only if it contained a vitiating defect. See also N. C. Gen. Stat. §§ 15–153, 15–155 (1965).

On February 24, 1964, petitioner was indicted by the grand jury of Orange County for the crime of criminal trespass, a misdemeanor punishable by fine and imprisonment in an amount and duration determined by the court in the exercise of its discretion.[3] The bill charged that he entered a restaurant on January 3, 1964, and, "after being ordered . . . to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he . . . had no license therefor . . . ." Prosecution on the indictment began with admirable promptness during the March 1964 Special Criminal Session of the Superior Court of Orange County; but, when the jury failed to reach a verdict, the trial judge declared a mistrial and ordered the case continued for the term.

Several weeks prior to the April 1965 Criminal Session of the Superior Court, the State's solicitor informed petitioner of his intention to have a *nolle prosequi* with leave entered in the case. During the session, petitioner, through his attorney, opposed the entry of such an order in open court. The trespass charge, he contended, was abated by the Civil Rights Act of 1964 as construed in *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964). In spite of petitioner's opposition, the court indicated that it would approve entry of a *nolle prosequi* with leave if requested to do so by the solicitor. But the solicitor

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[3] N. C. Gen. Stat. § 14–134 (Supp. 1965). Although not expressly limited by statute, the extent of punishment is limited by N. C. Const. 1868, Art. I, § 14 ("Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted"). See *State* v. *Driver,* 78 N. C. 423 (1878). Decisions of the state courts indicate that imprisonment for up to two years would not be an "unusual punishment." See, *e. g., State* v. *Farrington,* 141 N. C. 844, 53 S. E. 954 (1906). The constitutional limitation upon the amount of the fine has not been judicially determined.

declined to make a motion for a *nolle prosequi* with leave. Instead, he filed a motion with the court to continue the case for yet another term, which motion was granted.

The calendar for the August 1965 Criminal Session of the court did not list Klopfer's case for trial. To ascertain the status of his case, petitioner filed a motion expressing his desire to have the charge pending against him "permanently concluded in accordance with the applicable laws of the State of North Carolina and of the United States as soon as is reasonably possible." Noting that some 18 months had elapsed since the indictment, petitioner, a professor of zoology at Duke University, contended that the pendency of the indictment greatly interfered with his professional activities and with his travel here and abroad. "Wherefore," the motion concluded, "the defendant . . . petitions the Court that the Court in the exercise of its general supervisory jurisdiction inquire into the trial status of the charge pending against the defendant and . . . ascertain the intention of the State in regard to the trial of said charge and as to when the defendant will be brought to trial."

In response to the motion, the trial judge considered the status of petitioner's case in open court on Monday, August 9, 1965, at which time the solicitor moved the court that the State be permitted to take a *nolle prosequi* with leave. Even though no justification for the proposed entry was offered by the State, and, in spite of petitioner's objection to the order, the court granted the State's motion.

On appeal to the Supreme Court of North Carolina, petitioner contended that the entry of the *nolle prosequi* with leave order deprived him of his right to a speedy trial as required by the Fourteenth Amendment to the United States Constitution. Although the Supreme

Court acknowledged that entry of the *nolle prosequi* with leave did not permanently discharge the indictment, it nevertheless affirmed. Its opinion concludes:

> "Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the state's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi.* In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.
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> "In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is affirmed." 266 N. C., at 350–351, 145 S. E. 2d, at 910.

The North Carolina Supreme Court's conclusion—that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody—has been explicitly rejected by every other state court which has considered the question.[4] That conclusion has also been

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[4] See *Rost* v. *Municipal Court of Southern Judicial District,* 184 Cal. App. 2d 507, 7 Cal. Rptr. 869 (1st Dist. 1960); *Kistler* v. *State,* 64 Ind. 371 (1879); *Jones* v. *Commonwealth,* 114 Ky. 599, 71 S. W. 643 (1903); *Barrett* v. *State,* 155 Md. 636, 142 A. 96 (1928); *Hicks* v. *Recorder's Court of Detroit,* 236 Mich. 689, 211 N. W. 35 (1926); *State* v. *Artz,* 154 Minn. 290, 191 N. W. 605 (1923).

See also *Jacobson* v. *Winter,* 91 Idaho 11, 415 P. 2d 297 (1966); *People* v. *Bryarly,* 23 Ill. 2d 313, 178 N. E. 2d 326 (1961); *People* v. *Prosser,* 309 N. Y. 353, 130 N. E. 2d 891 (1955); *State* v. *Couture,* 156 Me. 231, 163 A. 2d 646 (1960); *State* v. *Keefe,* 17 Wyo. 227, 98 P. 122 (1908) (the right to a speedy trial may be violated by

implicitly rejected by the numerous courts which have held that a *nolle prossed* indictment may not be reinstated at a subsequent term.[5]

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undue delay in bringing a prisoner confined within the State to trial, even though he is not held in custody under the indictment).

Dicta in decisions of the Colorado, Iowa, and Utah courts clearly indicate that these States would also hold that the speedy trial right would protect a defendant in petitioner's position: see *In re Miller,* 66 Colo. 261, 263–264, 180 P. 749, 750–751 (1919); *Pines* v. *District Court of Woodbury County,* 233 Iowa 1284, 1294, 10 N. W. 2d 574, 580 (1943); *State* v. *Mathis,* 7 Utah 2d 100, 103, 319 P. 2d 134, 136 (1957).

Although Pennsylvania has not decided the question presented by this case, decisions of its Supreme Court indicate that the "right to a speedy trial" is only applicable to a man held in prison. See *Commonwealth ex rel. Smith* v. *Patterson,* 409 Pa. 500, 187 A. 2d 278 (1963). But in that case, the Commonwealth's Supreme Court held that the delay in trying the defendant and the failure to give him notice of the pendency of a complaint for eight years constituted a denial of due process. Moreover, Rule 316 of the Commonwealth's rules of criminal procedure authorizes the court to dismiss a case which has not been brought to trial within a "reasonable time."

By rule or legislation in 17 States, any defendant, whether at large or in custody, whose trial has been unduly delayed is entitled to a dismissal. See Ariz. Rule Crim. Proc. 236; Cal. Pen. Code § 1382; Ga. Code Ann. § 27–1901 (1953); Idaho Code Ann. § 19–3501 (1948); Iowa Code § 795.2 (Supp. 1966); La. Rev. Stat. §§ 15:7.8–15:7.11 (Supp. 1962); Me. Rev. Stat. Ann., Tit. 15, § 1201 (1964); Mont. Rev. Codes Ann. § 94–9501 (1947); Nev. Rev. Stat. § 178.495; N. J. Rev. Rule Crim. Proc. 3:11–3 (Supp. 1966); N. D. Cent. Code § 29–18–01 (1960); Okla. Stat., Tit. 22, § 812 (1951); Ore. Rev. Stat. § 134.120; S. D. Code § 34.2203 (Supp. 1960); Utah Code Ann. § 77–51–1 (1953); Wash. Rev. Code § 10.46.010; W. Va. Code Ann. § 6210 (1961).

[5] Thirty States continue to permit a prosecuting official to enter a *nolle prosequi.* Legislation or court decisions in 13 of these proscribe reinstatement of the indictment at a subsequent term. See *Lawson* v. *People,* 63 Colo. 270, 165 P. 771 (1917); *Price* v. *Cobb,* 60 Ga. App. 59, 61, 3 S. E. 2d 131, 133 (1939) (by implication); *Jones* v. *Newell,* 117 So. 2d 752 (D. C. App. Fla., 2d Dist., 1960); *State* v. *Wong,* 47 Haw. 361, 389 P. 2d 439 (1964); *People* v.

We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him

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Watson, 394 Ill. 177, 68 N. E. 2d 265 (1946), cert. denied, 329 U. S. 769; La. Rev. Stat. § 15:328 (1950); *Barrett* v. *State,* 155 Md. 636, 142 A. 96 (1928); *State* v. *Montgomery,* 276 S. W. 2d 166 (Mo. 1955); *In re Golib,* 99 Ohio App. 88, 130 N. E. 2d 855 (1955); *State ex rel. Hobbs* v. *Murrell,* 170 Tenn. 152, 93 S. W. 2d 628 (1936); *Ex parte Isbell,* 48 Tex. Cr. R. 252, 87 S. W. 145 (1905); *Dudley* v. *State,* 55 W. Va. 472, 47 S. E. 285 (1904); *Woodworth* v. *Mills,* 61 Wis. 44, 20 N. W. 728 (1884).

Alabama permits reinstatement of an indictment *nolle prossed* with leave, but only if the defendant cannot be brought before the court. See Ala. Code, Tit. 15, § 251 (Supp. 1965). Thus this procedure is similar to that of filing away the indictment, discussed below.

Of the remaining States, only North Carolina and Pennsylvania have held that a *nolle prossed* indictment could be reinstated at a subsequent term. See *Commonwealth* v. *McLaughlin,* 293 Pa. 218, 142 A. 213 (1928).

Several States permit the removal of the indictment from the trial docket with leave to reinstate at some indefinite future date. But in each, use of the procedure has been limited to situations in which the defendant cannot be brought before the court or where he has consented to the removal. See, *e. g., People* v. *Fewkes,* 214 Cal. 142, 4 P. 2d 538 (1931); *State* v. *Dix,* 18 Ind. App. 472, 48 N. E. 261 (1897); *Lifshutz* v. *State,* 236 Md. 428, 204 A. 2d 541 (1964), cert. denied, 380 U. S. 953; *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133 (1874) (indictment may be filed away only after verdict and then only with the consent of the accused); *Gordon* v. *State,* 127 Miss. 396, 90 So. 95 (1921) (consent of defendant necessary); *Rush* v. *State,* 254 Miss. 641, 182 So. 2d 214 (1966) (but not if defendant was in a mental institution at the time the indictment was retired to the files). At one time, Illinois decisions indicated that when an accused was imprisoned within the State on another charge an indictment might be filed away without his consent. See, *e. g., People* v. *Kidd,* 357 Ill. 133, 191 N. E. 244 (1934). But these decisions have since been overruled. See *People* v. *Bryarly,* 23 Ill. 2d 313, 178 N. E. 2d 326 (1961).

to go "whithersoever he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," [6] the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

While there has been a difference of opinion as to what provisions of this Amendment to the Constitution apply to the States through the Fourteenth Amendment, that question has been settled as to some of them in the recent cases of *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), and *Pointer* v. *Texas,* 380 U. S. 400 (1965). In the latter case, which dealt with the confrontation-of-witnesses provision, we said:

> "In the light of *Gideon, Malloy,* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal

[6] *United States* v. *Ewell,* 383 U. S. 116, 120 (1966).

> rights against federal encroachment.' *Malloy* v. *Hogan, supra,* 378 U. S., at 10." [7]

We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, "We will sell to no man, we will not deny or defer to any man either justice or right"; [8] but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).[9] By the late thirteenth century, justices, armed with commissions of gaol delivery and/or oyer and terminer [10] were visiting the

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[7] 380 U. S., at 406.

[8] Magna Carta, c. 29 [c. 40 of King John's Charter of 1215] (1225), translated and quoted in Coke, The Second Part of the Institutes of the Laws of England 45 (Brooke, 5th ed., 1797).

[9] "4. And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices." 2 English Historical Documents 408 (1953).

[10] An example of the Commission of gaol delivery is set forth in Goebel, Cases and Materials on the Development of Legal Institutions 53 (7th rev. 1946):

"The lord king to his beloved and faithful Stephen de Segrave and William Fitz Warin, greeting. Know that we have appointed you justices to deliver our gaol at Gloucester, in accordance with the custom of our realm, of the prisoners arrested and held there. And hence we order you that in company with the coroners of the county of Gloucester you convene at Gloucester on the morrow of the festival of the Holy Trinity in the twelfth year of our reign [Monday, May 22, 1228], to deliver the aforementioned gaol, as

countryside three times a year.[11] These justices, Sir Edward Coke wrote in Part II of his Institutes, "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, . . . without detaining him long in prison." [12] To Coke, prolonged detention without trial would have been contrary to the law and custom of England; [13] but he also believed that the delay in trial, by itself, would be an improper denial of justice. In his explication of Chapter 29 of the Magna Carta, he wrote that the words "We will sell to no man, we will not deny or defer to any man either justice or right" had the following effect:

> "And therefore, every subject of this realme, for injury done to him *in bonis, terris, vel persona,* by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay." [14]

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aforesaid, for we have ordered our sheriff of Gloucestershire that at the aforesaid time and place he cause to come before you all the prisoners in the aforesaid gaol and all persons attached to appear against them and on account of them. In witness whereof, etc. Dated April 20, in the twelfth year of our reign."

"The judges commissioned in a general oyer and terminer commission," Professor Goebel writes, "are ordered to inquire by grand jury of named crimes, from treasons to the pettiest offence, as to all particulars and to hear and determine these according to the law and custom of the realm." *Id.,* at 54.

[11] *Id.,* at 54.

[12] Coke, *op. cit. supra,* n. 8, at 43.

[13] See *Ibid.*

[14] *Id.,* at 55. "Hereby it appeareth," Coke stated in the next paragraph, "that justice must have three qualities, it must be *libera, quia nihil iniquius venali justitia; plena, quia justitia non debet*

Coke's Institutes were read in the American Colonies by virtually every student of the law.[15] Indeed, Thomas Jefferson wrote that at the time he studied law (1762–1767), "*Coke Lyttleton* was the universal elementary book of law students." [16] And to John Rutledge of South Carolina, the Institutes seemed "to be almost the foundation of our law." [17] To Coke, in turn, Magna Carta was one of the fundamental bases of English liberty.[18] Thus, it is not surprising that when George Mason drafted the first of the colonial bills of rights,[19] he set forth a principle of Magna Carta, using phraseology similar to that of Coke's explication: "[I]n all capital or criminal prosecutions," the Virginia Declaration of Rights of 1776 provided, "a man hath a right . . . to a speedy trial . . . ." [20] That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation,[21]

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claudicare; et celeris, quia dilatio est quaedam negatio; and then it is both justice and right." Later in the explication of Chapter 29, Coke wrote that in conformity with the promise not to delay justice, all of the King's "commissions of oier, and terminer, of goale delivery, of the peace, &c. have this clause, *facturi quod ad justitiam pertinet, secundum legem,* and *consuetudinem Angliae,* that is, to doe justice and right, according to the rule of the law and custome of England . . . ."

[15] See Warren, History of the American Bar 157–187 (1911); Meador, Habeas Corpus and Magna Carta 23–24 (1966).

[16] Quoted in Warren, *op. cit. supra,* n. 15, at 174.

[17] Quoted in Bowen, The Lion and the Throne 514 (1956).

[18] See Coke, *op. cit. supra,* n. 8, at A4 (Proeme).

[19] See 1 Rowland, The Life of George Mason 234–266 (1892).

[20] See Va. Declaration of Rights, 1776, § 8.

[21] See Del. Const., 1792, Art. I, § 7; Md. Declaration of Rights, 1776, Art. XIX; Pa. Declaration of Rights, 1776, Art. IX; Va. Declaration of Rights, 1776, § 8. Mass. Const., 1780, Part I, Art. XI, provided:

"Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged

as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens.

The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution.

For the reasons stated above, the judgment must be reversed and remanded for proceedings not inconsistent with the opinion of the Court.

It is so ordered.

MR. JUSTICE STEWART concurs in the result.

MR. JUSTICE HARLAN, concurring in the result.

While I entirely agree with the result reached by the Court, I am unable to subscribe to the constitutional premises upon which that result is based—quite evidently the viewpoint that the Fourteenth Amendment "incorporates" or "absorbs" *as such* all or some of the specific provisions of the Bill of Rights. I do not believe that this is sound constitutional doctrine. See my opinion concurring in the result in *Pointer* v. *Texas,* 380 U. S. 400, 408.

I would rest decision of this case not on the "speedy trial" provision of the Sixth Amendment, but on the ground that this unusual North Carolina procedure,

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to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

This has been construed as guaranteeing to all citizens the right to a speedy trial. See *Commonwealth* v. *Hanley,* 337 Mass. 384, 149 N. E. 2d 608 (1958). A similar provision was included in the New Hampshire Constitution of 1784, Part I, Art. XIV.

Kentucky, Tennessee, and Vermont, the three States which were admitted to the Union during the eighteenth century, specifically guaranteed the right to a speedy trial in their constitutions. See Vt. Const. 1786, c. I, Art. XIV; Ky. Const. 1792, Art. XII, § 10; Tenn. Const. 1796, Art. XI, § 9.

which in effect allows state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment. To support that conclusion I need only refer to the traditional concepts of due process set forth in the opinion of THE CHIEF JUSTICE.

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FEDERAL TRADE COMMISSION *v.* JANTZEN, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 310. Argued February 14, 1967.—Decided March 13, 1967.

Respondent, a manufacturer, in 1958 consented to the entry of a Federal Trade Commission (FTC) cease-and-desist order prohibiting it from engaging in further discriminatory activities violating § 2 (d) of the Clayton Act, and the FTC adopted the order in 1959. In 1964, following charges of additional discriminatory activities, respondent stipulated that it had committed violations of the 1959 order. The FTC petitioned the Court of Appeals to enforce the original order under the third paragraph of § 11 of the original Clayton Act, which authorized the FTC to apply to a court of appeals for enforcement of its orders. The Court of Appeals dismissed the petition for want of jurisdiction, upholding respondent's contention that a 1959 amendment (the Finality Act) substituting new enforcement remedies for those in § 11 had repealed the authority of the FTC to seek, and of the courts to grant, enforcement of FTC cease-and-desist orders entered before the Finality Act took effect. *Held:* FTC orders under the Clayton Act entered before the Finality Act was enacted remain enforceable under § 11 of the Clayton Act. Pp. 233–236.

(a) The provision in § 2 of the Finality Act making the Act's provisions inapplicable to a Clayton Act "proceeding initiated" before enactment of the Finality Act refers to the filing of the "proceeding" before the FTC and is not limited to the application for enforcement or petition for review in a court of appeals. P. 233.

(b) The express purpose of the Finality Act "to provide for the more expeditious enforcement of cease and desist orders" and the Act's legislative history are inconsistent with giving absolution to the almost 400 proven violators of the Clayton Act who are subject to pre-Finality Act orders of the FTC. P. 234.

356 F. 2d 253, reversed and remanded.

Ralph S. Spritzer argued the cause for petitioner. On the brief were *Solicitor General Marshall, Assistant*

Attorney General Turner, Nathan Lewin, Howard E. Shapiro, James McI. Henderson and *Thomas F. Howder.*

Edwin S. Rockefeller argued the cause for respondent. With him on the brief were *Donald H. Green* and *Joel E. Hoffman.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This case involves the effect of the Act of July 23, 1959, 73 Stat. 243 (Finality Act), upon orders issued by the Federal Trade Commission under § 11 of the Clayton Act, 38 Stat. 734, prior to the date of the former Act. The respondent claims that the Finality Act repealed the enforcement provisions of § 11 of the Clayton Act, 15 U. S. C. § 21 (1958 ed.), and that orders of the Commission entered prior to the enactment of the Finality Act are not now enforceable. The Court of Appeals agreed, held that it had no jurisdiction to enforce such orders and directed that the proceeding be dismissed. 356 F. 2d 253. In view of the pendency of almost 400 such orders and the conflict among the circuits[1] on the point, we granted certiorari. 385 U. S. 810.

I.

The facts are not disputed, save on points not relevant here, and will not be stated in detail. Jantzen manufactures men's, women's, and children's apparel. On September 4, 1958, it was charged by the Commission with having violated § 2 (d) of the Clayton Act by allowing discriminatory advertising and promotional allowances to certain of its customers. Jantzen did not answer the complaint. However, it consented to the entry of a cease-and-desist order against it prohibiting further discrimination in advertising and promotional activities.

[1] See *Federal Trade Comm'n* v. *Pacific-Gamble-Robinson Co.*, No. 18260 (C. A. 9th Cir. 1962); *Federal Trade Comm'n* v. *Benrus Watch Co.*, No. 27752 (C. A. 2d Cir. 1962), and the instant case.

This agreement and a form of order were approved by a hearing examiner and on January 16, 1959, the order was adopted by the Commission. On July 22, 1964, some five years after the adoption of the Finality Act, the Commission ordered an investigation into charges that Jantzen had violated the 1959 consent order. Jantzen stipulated before a hearing examiner that it had violated the consent order by granting discriminatory allowances to customers in Chattanooga, Tenn., and Brooklyn, N. Y. The Commission thereafter concluded that Jantzen had violated the order. It then applied to the Court of Appeals for an order affirming and enforcing the original order. The application was based on the provisions of the third paragraph of § 11 of the original Clayton Act, which authorized the Commission, in the event such an order was not obeyed, to apply to a court of appeals for its "enforcement." Jantzen claimed that the amendment of § 11 by the Finality Act resulted in a repeal of the Commission's authority to seek, and the courts' to grant, affirmance and enforcement of such orders. The Court of Appeals agreed and dismissed the application for lack of jurisdiction. We reverse and remand the proceedings for further consideration in light of this opinion.

II.

We start with the proposition that the Congress intended by its enactment of the Finality Act of 1959 to strengthen the hand of the Commission in the enforcement of the Clayton Act. As the report of the Committee on the Judiciary of the Senate stated: "The effectiveness of the Clayton Act . . . has long been handicapped by the absence of adequate enforcement provisions. . . . S. 726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years." S. Rep. No. 83, 86th Cong., 1st Sess., 2 (1959). The procedures existing prior to the adoption of the Finality

Act required the Commission to investigate, and after complaint, prove a violation of the Clayton Act before it could issue a cease-and-desist order. After its issuance a violation of the order had to be investigated and proved before the Commission might obtain an order compelling its obedience. Only then could a court of appeals order enforcement. And under *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470 (1952), a contempt proceeding would not lie except on allegations of violation of the Act a third time and proof of a failure or refusal to obey the Commission's order, previously affirmed.

The Finality Act eliminated these "laborious, time consuming, and very expensive" procedures. S. Rep. No. 83, *supra*, at 2. As Congressman Huddleston, one of the principal supporters of the bill which later became the Act, stated to the House:

> "The bill . . . is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act." 105 Cong. Rec. 12732.

The remarks of Congressman Celler, Chairman of the House Judiciary Committee, of Congressman Roosevelt and of other supporters of the bill were substantially the same. 105 Cong. Rec. 12730–12733.

The Wheeler-Lea Amendment clarified the procedures of the Federal Trade Commission Act but did not amend those of the Clayton Act. Under the Wheeler-Lea Amendment orders issued by the Commission were to become final 60 days after their issuance or upon affirmance by a court of appeals in which a petition for review had been filed. However, § 5 (a) of the Amendment expressly provided that orders outstanding at the time

of the adoption of the Amendment would become final 60 days after the latter date or upon affirmance in review proceedings instituted during that 60-day period. 52 Stat. 117. The Finality Act instead of using the language of § 5 (a) of the Wheeler-Lea Amendment contains a special provision, § 2, which reads as follows:

> "The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton] Act . . . . Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act."

The Court of Appeals thought the use of this language was significant in that, unlike § 5 (a), it "does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals . . . . Thus the third paragraph [of § 11] is expressly continued in effect for this very limited purpose, namely, the completion of proceedings for enforcement initiated by the Commission in a Court of Appeals. . . . [T]his is a strong indication that the Congress knew, and intended, that it was repealed for other purposes." The Court of Appeals buttressed this reading of the Finality Act by noting that the Commission originally took the position "that existing Clayton Act orders would become final within 60 days, under the new law, just as under the Wheeler-Lea Act . . . ." 356 F. 2d, at 257. See *Sperry Rand Corp.* v. *F. T. C.*, 110 U. S. App. D. C. 1, 288 F. 2d 403 (1961); *F. T. C.* v. *Nash-Finch Co.*, 110 U. S. App. D. C. 5, 288 F. 2d 407 (1961). From this, the court indicated that this change of position by the Commission pointed up its conclusion that "the repeal in this case was express." 356 F. 2d, at 257.

III.

We cannot agree. One error of the Court of Appeals seems to be the limited scope it gives the phrase "*proceeding* initiated before the date of enactment of this Act." (Emphasis supplied.) The Court of Appeals thought this included only the *application* for enforcement under paragraph three or the *petition for review* under paragraph four of the original § 11 of the Act. We think not. We believe the word "proceeding" was used in the sense that it was employed throughout § 11 prior to the Amendment, namely the action brought by the Commission against the alleged violator of the Clayton Act. It follows that the "proceeding initiated" meant the filing of the "proceeding" before the Commission and was not limited to the application for enforcement or petition for review. This is made clear to us by the last sentence of § 2: "Each such proceeding shall be governed by the provisions of such *section* [§ 11 of the Clayton Act] as they existed on the day preceding the date of enactment of this Act." We emphasize that here the Congress said "section" not paragraphs 3–7, inclusive, of the section. It follows that the provisions of the entire section were preserved intact and governed all orders predating the Finality Act. The apparent reason for this variance from the procedure of the Wheeler-Lea Act was because of the heavy penalties which the Congress attached to the violation of final orders of the Commission under the Finality Act.[2] It, therefore, wished to make clear that not only applications for enforcement of pre-Finality Act orders and petitions for review of such orders but any action of the Commission with reference to pre-Finality Act orders would be governed by the provisions of § 11 of the Clayton Act "as they existed on the day

[2] The penalties were raised to $5,000 for each day in which a violation continued.

preceding the date of enactment of this [Finality] Act." We believe that this interpretation is implicit in our opinion on the second review by this Court of *Federal Trade Comm'n* v. *Henry Broch & Co.*, 368 U. S. 360 (1962), where MR. JUSTICE BRENNAN held that the 1959 amendments to § 11 of the Clayton Act "do not apply to enforcement of the instant order." At 365. In note 5, on p. 365, the opinion pointed out that the order "was entered by the Commission on December 10, 1957. The procedures enacted by the 1959 amendments therefore do not apply to it. See *Sperry Rand Corp.* v. *Federal Trade Comm'n,* 110 U. S. App. D. C. 1, 288 F. 2d 403." It is significant that *Sperry Rand* specifically held that "[e]nforcement due to any violation of the [pre-Finality Act] consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered." At 4, 288 F. 2d, at 406. Such a holding here is supported by the fact that the Finality Act nowhere denies the Commission the power to enforce preexisting orders. At most its provisions are silent with regard to such authority. Furthermore, the caption of the Finality Act itself as well as the legislative history gives added weight to our interpretation. The caption recites the purpose of the Act to be "to provide for the more expeditious enforcement of cease and desist orders . . . ." 73 Stat. 243. Such a purpose would certainly not include making approximately 400 orders dead letters. As we have noted previously the legislative history shows beyond contradiction that not only its sponsors but the responsible committees reporting the bill for passage believed "that this legislation will strengthen the enforcement provisions of section 11 of the Clayton Act . . . ." S. Rep. No. 83, *supra,* at 3. Giving some 400 proven violators absolution from prior orders of the Commission would hardly comport with such a congressional intent. The Court of Appeals bottomed its opinion on the language used in the opening sentence of

subsection (c) of the Finality Act reading that the "third, fourth, fifth, sixth, and seventh paragraphs of" § 11 of the Clayton Act "are amended to read as follows." But we must read the Act as a whole as we have § 2 heretofore. And in so doing we cannot, as MR. JUSTICE DOUGLAS said, ignore the "common sense, precedent, and legislative history" of the setting that gave it birth. *United States* v. *Standard Oil Co.*, 384 U. S. 224, 225 (1966). And as Mr. Justice Holmes said many years ago:

> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (1908).

But whether or not we are correct in our application and interpretation we have concluded that a sensible construction of the Finality Act compels the opposite result to that reached by the Court of Appeals. That court would grant review and enforcement of proceedings under the old procedures where the petition for review or the application for enforcement was filed prior to the date of the enactment of the Finality Act but orders from which no petition or application was ever filed would not be capable of enforcement. This would subject violators who sought review to the sanctions of the section but those who had not sought review would be free to violate orders against them with impunity. Consequently, almost 400 separate violators would be forgiven. It is no answer to say that the Commission could file new complaints which would come under the new procedures.

The fact is that some 400 particularized orders written to correct specific mischief violative of the Clayton Act would be unenforceable. There is quite a difference between proving a violation of the Clayton Act and a failure to obey a specific order of the Commission. Long, tedious, and costly investigation, proof of injury to competition as well as other affirmative requirements necessary to the issuance of an order and many defenses such as cost justification, meeting competition, exclusive dealing, etc., are all avoided. Particularly in merger cases would the enforcement of prior orders be simplified and expedited.

In view of all of these considerations we cannot say that the author of the Finality Act and its sponsors—all stalwart champions of effective antitrust enforcement—would have intended to strip the Commission of all of its enforcement weapons with reference to some 400 concerns already adjudged to be Clayton Act violators. Nor could we ascribe to a Congress that has so clearly expressed its will any such result. We can only say that as between choices Congress rejected only one, namely, that of the Wheeler-Lea Act's 60-day review provision. Certainly it intended that the old procedures would apply to proceedings on petition for review or application for enforcement. There is no evidence that it intended to put the pre-1959 orders into the discard. We remain more faithful to the Act, we think, when we find that they too are enforceable under the old procedures.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

While I confess to great difficulty in driving through the statute to the Court's conclusion, I am content to acquiesce in my Brother CLARK's opinion with the added help of the Second Circuit's opinion in *F. T. C.* v. *Standard Motor Products, Inc.*, 371 F. 2d 613.

FEDERAL POWER COMMISSION *v.* UNITED GAS PIPE LINE CO. ET AL.

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

No. 127. Argued January 11, 1967.—Decided March 13, 1967.*

Respondent United Gas Pipe Line Co. (United) was a member of an affiliated group of companies which filed consolidated federal income tax returns. Two of the companies had net losses. Thus the total tax on a consolidated basis was less than what the total tax would have been had separate returns been filed. The Federal Power Commission (FPC) decided that, in determining the proper tax allowance to be included in United's cost of service for purposes of establishing a rate base, there should be an allocation of the actual consolidated taxes paid. The FPC formula (1) applies the losses of unregulated companies first to the gains of other unregulated companies, (2) applies any remaining losses to reduce the taxes of the regulated companies, and (3) allocates the consolidated tax among the regulated companies in proportion to their taxable income. The Court of Appeals set aside the FPC order holding that the FPC exceeded its jurisdiction and that United was entitled to include as a cost of service the full amount of taxes it would owe if it filed a separate return. *Held:*

1. The jurisdiction of the FPC includes the determination of cost of service for ratemaking, and it has the power and the duty to limit cost of service to real expenses. Pp. 243–245.

2. The FPC formula, which allocates tax liability among the group members which are regulated, regardless of whether they are regulated by it or by state or local authorities, is neither unjust nor unreasonable. Pp. 245–246.

3. There is no frustration of the tax laws inherent in the FPC action. Pp. 246–247.

357 F. 2d 230, reversed and remanded.

Howard E. Wahrenbrock argued the cause for petitioner in No. 127. With him on the brief were *Solicitor*

*Together with No. 128, *Memphis Light, Gas & Water Division* v. *United Gas Pipe Line Co. et al.*, also on certiorari to the same court.

General Marshall, Ralph S. Spritzer, Richard A. Posner and *Richard A. Solomon.*

Reuben Goldberg argued the cause for petitioner in No. 128. With him on the brief was *George E. Morrow.*

Thomas Fletcher argued the cause and filed a brief for respondent United Gas Pipe Line Co. in both cases. *William W. Brackett* argued the cause for respondents Texas Eastern Transmission Corp. et al. in both cases. With him on the brief were *Charles C. McDugald* and *Joseph F. Weiler.*

Conrad C. Mount, Jack Werner and *Melvin Richter* filed a brief for the Independent Natural Gas Association of America, as *amicus curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether the Federal Power Commission, in the course of determining just and reasonable rates for United Gas Pipe Line Company (United) under § 4 (e) of the Natural Gas Act, 52 Stat. 822, 15 U. S. C. § 717c (e), made a proper allowance for federal income taxes in calculating the company's cost of service. United claimed that in determining the cost of service its allowance for federal income taxes should be at the full 52% rate, or $12,751,454, for the test year. The Commission disagreed because United was a member of an affiliated group which during the five-year period of 1957–1961 had elected to file consolidated returns for federal income tax purposes,[1] a fact which in the Commission's

[1] The election was pursuant to the privilege granted in § 1501 of the Internal Revenue Code of 1954, 26 U. S. C. § 1501. The other members of the affiliated group are United Gas Corporation, which wholly owns United and which is a gas distribution company subject to state and local regulation, and two other wholly owned subsidiaries of United Gas Corporation—Union Producing Company

view required a reduced tax allowance in the company's cost of service. Had consolidated returns not been filed during the five-year period and had each company in the affiliated group instead filed separate returns, the total tax for the group would have been several million dollars more than was paid on a consolidated basis. This was so because on a consolidated basis consolidated losses serve to reduce consolidated income and because two members of the group, Union and Overseas, had net losses over the five-year period, thereby reducing taxes by $2,092,038 over those years.

To determine what the Commission considered the proper tax allowance for United's rate base, it allocated the actual consolidated taxes paid during the five-year period among the members of the group in accordance with a formula it had developed in *Cities Service Gas Co.*, 30 F. P. C. 158, the order in which was set aside after issuance of the order in the instant case, 337 F. 2d 97. As so allocated, United's annual share of the consolidated tax was 50.04% of its taxable income. Using this rate, the Commission allowed United $9,940,892 for federal income taxes instead of the $12,751,454 claimed by United. 31 F. P. C. 1180, 1191.

The Court of Appeals, relying on the decision of the Court of Appeals for the Tenth Circuit in *Cities Service Gas Co.* v. *FPC*, 337 F. 2d 97, held "the tax allocation as made by the Commission's order was contrary to the requirements which Congress had imposed," 357 F. 2d 230, 231, and hence vacated and set aside the order. We reverse and remand to the Court of Appeals for further proceedings.

(Union), a domestic oil and gas producer whose interstate sales of gas are subject to the jurisdiction of the Federal Power Commission, and United Overseas Production Company (Overseas) which engaged in oil exploration in foreign countries.

I.

In the *Cities Service* case the affiliated group filing the consolidated return was composed of both regulated and unregulated companies. Some of the unregulated companies had taxable income, others had even larger losses, and, therefore, as a group the unregulated companies showed a net loss over the representative years used by the Commission to forecast the future federal income tax element of cost of service. The regulated companies as a group, on the other hand, had taxable income in the same period. On an unconsolidated basis the individual members of the affiliated group would have paid a considerably larger total tax than was actually paid on the consolidated basis. The gas company whose tax allowance for rate purposes was being determined claimed that it was entitled to the full 52% of its own taxable income. Its position was that the Commission had no power at all to apply any of the losses of unregulated companies to reduce its tax allowance and hence its rates. The tax allowance was thus to be figured at 52% without regard to the taxes actually paid by the affiliated group on a consolidated basis, seemingly even if the group paid no tax at all.

For the Commission, however, the only real cost to the regulated company was related to the consolidated tax actually paid and incurred in connection with the other companies in the group. In the Commission's view, it was unacceptable to determine the cost of service on a hypothetical figure—to fix jurisdictional rates "on the basis of converting a hypothetical tax payment into a prudent operating expense." 30 F. P. C., at 162. It refused to accept the argument that "Gas Company ratepayers should make Cities Service stockholders whole for

the tax losses of nonregulated enterprises even though this means an allowance for taxes over and beyond that which the consolidated system as a whole actually paid." *Ibid.* The Commission's function, it said, was to fix just and reasonable rates, not to insure that other affiliates would be made whole for their tax losses out of income from regulated enterprises. Thus the task was "to determine the proportion of the consolidated tax which is reasonably attributable to the Gas Company *vis-a-vis* the other Cities Service affiliates." *Ibid.*

To make this determination, the Commission devised a formula which in effect applied the losses of unregulated companies first to the gains of other unregulated companies.[2] If a net taxable income remained in the un-

[2] "[T]he proper method to be applied in computing the Federal income taxes to be included in the cost of service of a regulated company where that company has joined in a consolidated tax return with affiliates is (1) separate the companies into regulated and unregulated groups, (2) determine the net aggregate taxable income of each group, and (3) apportion the net total consolidated tax liability over a representative period of time between the two groups, and among the companies in the regulated group, on the basis of their respective taxable incomes; provided that the allowance so computed for the regulated company shall not exceed what its tax liability would be for rate making purposes, if computed on a separate return basis." 30 F. P. C. 158, 164.

As the Commission noted, *id.*, at 162, it could draw little from the experience of state and local regulatory bodies dealing with the question whether the losses of affiliates should be taken into account in determining the tax allowance for regulated enterprises since the state and local solutions had not been consistent. It does not appear that the Commission drew on its own experience, although with a single exception the Commission seems to have accounted for consolidated tax savings in past ratemaking proceedings. See *Penn-York Natural Gas Corp.*, 5 F. P. C. 33, 39 (1946); *Hope Natural Gas Co.*, 10 F. P. C. 583, 612, aff'd, 10 F. P. C. 625 (1951); *Atlantic Seaboard Corp.*, 11 F. P. C. 486, 515, aff'd,

regulated group, the regulated companies would not share in the savings from the consolidated return and would be deemed to have paid a tax at the full 52% rate. But if losses of the unregulated companies exceeded their net income and hence reduced the taxes of the regulated group below what they would have paid had they filed separate returns, the consolidated tax paid would be allocated among the regulated companies in proportion to their taxable incomes. As applied to the facts in the *Cities Service* case, the formula resulted in a tax allowance of $5,866,847 rather than the $7,055,981 claimed by the Cities Service Gas Company.

The Court of Appeals set aside the Commission's order. In its view, the addition of the gas company's income to the consolidated return cost the affiliated group exactly 52% of the taxable income of the gas company, either in taxes paid or in a reduction of loss carry-forwards or carrybacks. The Commission's formula as applied was therefore held to appropriate losses of unregulated companies and to exceed the Commission's "jurisdictional limits which require an effective separation of regulated and nonregulated activities for the determination of the ingredients of the rate base . . . mean[ing] a separation of profits and losses between regulated and nonregulated businesses in determining the tax allowance includible in the cost of service of the regulated company." 337 F. 2d 97, 101. Hence the court, relying on *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, and *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U. S. 635, set aside the Commission's order.

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11 F. P. C. 43, remanded on other grounds, 200 F. 2d 108 (1952); *United Fuel Gas Co.*, 12 F. P. C. 251 (1953); *Hope Natural Gas Co.*, 12 F. P. C. 342, 347 (1953); *Home Gas Co.*, 13 F. P. C. 241, 246 (1954); *United Fuel Gas Co.*, 23 F. P. C. 127, 134 (1960). But see *Olin Gas Transmission Corp.*, 17 F. P. C. 685 (1956).

II.

In our view what the Commission did here did not exceed the powers granted to it by Congress. One of its statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission. Ratemaking is, of course, subject to the rule that the income and expense of unregulated and regulated activities should be segregated. But there is no suggestion in these cases that in arriving at the net taxable income of United the Commission violated this rule. Nor did it in our view in determining the tax allowance. United had not filed its own separate tax return. Instead it had joined with others in the filing of a consolidated return which resulted in the affiliated group's paying a lower total tax than would have been due had the affiliates filed on a separate-return basis. The question for the Commission was what portion of the single consolidated tax liability belonged to United. Other members of the group should not be required to pay any part of United's tax, but neither should United pay the tax of others. A proper allocation had to be made by the Commission. Respondents insist that in making the allocation the Commission would violate the statute unless in every conceivable circumstance, including this one, United is allowed an amount for taxes equal to what it would have paid had it filed a separate return. In their view United should never share in the tax savings inherent in a consolidated return, even if on a consolidated basis system

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losses exceed system gains and neither the affiliated group nor any member in it has any tax liability. This is an untenable position and we reject it. Rates fixed on this basis would give the pipeline company and its stockholders not only the fair return to which they are entitled but also the full amount of an expense never in fact incurred. In such circumstances, the Commission could properly disallow the hypothetical tax expense and hold that rates based on such an unreal cost of service would not be just and reasonable.

It is true that the avoidance of tax and the reduction of the tax allowance are accomplished only by applying losses of unregulated companies to the income of the regulated entity. But the Commission is not responsible for the use of consolidated returns. It is the tax law which permits an election by an appropriate group to file on a consolidated basis. The members of a group, as in these cases, themselves chose not to file separate returns and hence, for tax purposes, to mingle profits and losses of both regulated and unregulated concerns, apparently deeming it more desirable to attempt to turn the losses of some companies into immediate cash through tax savings rather than to count on the loss companies themselves having future profits against which prior losses could be applied. Such a private decision made by the affiliates, including the regulated member, has the practical and intended consequence of reducing the group's federal income taxes, perhaps to zero, as was true of one of the years involved in the *Cities Service* case. But when the out-of-pocket tax cost of the regulated affiliate is reduced, there is an immediate confrontation with the ratemaking principle that limits cost of service to expenses actually incurred. Nothing in *Colorado Interstate* or *Panhandle* forbids the Commission to recognize the actual tax saving impact of a private election to file con-

solidated returns. On the contrary, both cases support the power and the duty of the Commission to limit cost of service to real expenses.[3]

We think that in the proper circumstances the Commission has the power to reduce cost of service, and hence rates, based on the application of nonjurisdictional losses to jurisdictional income. Hence, the question becomes one of when and to what extent the tax savings flowing from the filing of a consolidated return are to be shared by the regulated company. Or, to put it in the Commission's words the issue is one of determining "the proportion of the consolidated tax which is reasonably attributable to the gas company *vis-a-vis* [its] other . . . affiliates." 30 F. P. C., at 162.

Viewing these cases in this light, we cannot say that the method the Commission chose to allocate the tax liability among the group members was erroneous or contrary to its statutory authority. Under its formula, the net losses and net income of unregulated companies are first set off one against the other, and the tax savings made possible by losses of unregulated enterprises are thus first allocated to the unregulated companies. Only if "unregulated" losses exceed "unregulated" income is the regulated company deemed to have enjoyed a reduction in its taxes as a result of the consolidated return. If there is more than one regulated company in the group, they will share the tax liability or tax saving in proportion to their taxable income.

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[3] See *Colorado Interstate Gas Co.* v. *FPC,* 324 U. S. 581, 604–605; *Panhandle Eastern Pipe Line Co.* v. *FPC,* 324 U. S. 635, 648–649; *El Paso Natural Gas Co.* v. *FPC,* 281 F. 2d 567, 573, cert. denied *sub nom. California* v. *FPC,* 366 U. S. 912; *Alabama-Tennessee Natural Gas Co.* v. *FPC,* 359 F. 2d 318, 331, cert. denied, 385 U. S. 847.

It is true that the Commission includes in the regulated group companies which are regulated not by it but by state or local authorities and that under the Commission's formula enterprises not subject to its jurisdiction may be required to share the tax saving with the federally regulated concern. But we know of nothing in the decisions or the statutes governing the ratemaking activities of the Commission which dictates priority for the state-regulated company or which provides that the jurisdictional company may share in the tax saving only if the saving exceeds the separate-return tax liability of the state-regulated company. One could as well argue that for ratemaking purposes the company subject to federal regulation should have the first benefit of the tax saving. The Commission's formula, of course, prefers neither concern but allocates the tax liability equitably between each regulated member, without regard to the source of the regulation.[4] "When Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation." *Colorado Interstate Gas Co.* v. *FPC,* 324 U. S. 581, 589. "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602.

There is no frustration of the tax laws inherent in the Commission's action. The affiliated group may continue

[4] That some sharing of the tax savings with nonfederally regulated companies was in order seems to have been recognized by the members of the affiliated group. Under the internal allocation formula employed by the group, the tax liability assigned to United represented an effective tax rate of 48.8%.

to file consolidated returns and through this mechanism set off system losses against system income, including United's fair return income. The tax law permits this, but it does not seek to control the amount of income which any affiliate will have. Nor does it attempt to set United's rates. This is the function of the Commission, a function performed here by rejecting that part of the claimed tax expense which was no expense at all, by reducing cost of service and therefore rates, and by allowing United only a fair return on its investment.

Nor did the Commission "appropriate" or extinguish the losses of any member of the affiliated group, regulated or unregulated. Those losses may still be applied to system gains and thereby be turned into instant cash. United may, of course, have less income than it did. If so, this will correspondingly reduce the opportunity of the affiliated group to use the losses of unregulated companies to appropriate United's income for the benefit of nonjurisdictional activities because United's income will no longer offset the same amount of losses which it once did. But the losses of unregulated companies are in no way destroyed. They remain with the system, readily available to reduce the taxes of the profitable affiliates to the maximum extent allowed by the tax law.

Another matter deserves some comment. It is said here that the Commission, in applying its tax allowance formula, erroneously failed to recognize and to take account of the fact that United has both jurisdictional and nonjurisdictional activities and income. Although this is a matter which might affect the results achieved in application of the Commission's formula, it is one to which the Court of Appeals has not addressed itself, and we think it appropriate for the issue to be raised there if the parties are so inclined.

For the reasons stated herein, the judgment of the Court of Appeals is reversed and the cases remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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

My analysis of the elusive issue involved in these cases leads me to different conclusions from those reached by the Court and to agreement with the result reached by the Court of Appeals on the facts of these cases.

We are presented here with the problems of resolving an apparent conflict between the consolidated tax return provisions of the Internal Revenue Code,[1] which permit an affiliated group of corporations, in this instance having some activities within and some without the Federal Power Commission's jurisdiction, to be treated as a "business entity" for tax purposes,[2] and the Natural Gas Act which imposes on the Commission the duty of observing "the fundamental rate making principle [that] . . . requires a separation between regulated and unregulated costs and revenues." *Cities Service Gas Co.*, 30 F. P. C. 158, 162. The Court holds that the FPC may resolve the apparent dilemma by working only with "the single consolidated tax liability" and determining by allocation what portion should be attributed to United for rate-making purposes. By filing a consolidated return the members of the affiliated group are said "to mingle profits

[1] 26 U. S. C. §§ 1501–1505.

[2] "The permission to file consolidated returns by affiliated corporations merely recognizes the business entity as distinguished from the legal corporate entity of the business enterprise." S. Rep. No. 960, 70th Cong., 1st Sess., p. 14.

and losses of both regulated and unregulated concerns" and thus create the necessity for allocation. The only serious problem the Court sees is the resolution of the question "when and to what extent the tax savings flowing from the filing of a consolidated return are to be shared by the regulated company." And the Court attempts to sidestep sharp analysis of that problem by resorting to the principle that, in ratemaking, the end in effect justifies the means.[3]

As will be developed more fully below, I think that the Court's resolution of the jurisdictional issue, while possessing a certain surface plausibility, mistakes the operation of the tax laws and permits the Commission to place regulatory pressure on entities and business decisions wholly outside its jurisdiction under the Natural Gas Act. I think also that the Commission's formula

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[3] The Court's opinion seizes on the language of *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, for the proposition that judicial inquiry must be at an end when it is determined that a rate order "cannot be said to be unjust and unreasonable." But the problem before the Court in that case was an entirely different one. There it was argued that the Court was obligated to delve into the details of an initial ratemaking in order to determine whether certain rates were reasonable. The Court held that in an initial ratemaking the essential question was only whether the return actually allowed permitted the company to sustain itself in the market. The Court noted that it could not become involved in questions of "fair value" because "the value of the going enterprise depends on earnings under whatever rates may be anticipated." *Id.*, at 601. Nothing in *Hope Natural Gas* suggests that courts are powerless to review a particular formula to determine whether it is based on rational criteria. A return which is "just and reasonable" must reflect underlying congressional policies. Thus courts have not hesitated to review the underlying rationales of Commission decisions while giving due deference to the Commission's discretion. See, *e. g.*, *Tennessee Gas Transmission Co.* v. *FPC*, 293 F. 2d 761; *United Gas Imp. Co.* v. *FPC*, 290 F. 2d 133; *Detroit* v. *FPC*, 97 U. S. App. D. C. 260, 230 F. 2d 810.

cannot be upheld even under the Court's jurisdictional analysis. The formula indefensibly undercuts the policy of the tax laws, and thus cannot be considered a means of reaching "just and reasonable" rates. Cf. *El Paso Natural Gas Co.* v. *FPC*, 281 F. 2d 567.

I.

The Court's "single consolidated tax liability" approach ignores the fact that what is consolidated is corporate taxable incomes rather than the underlying revenues and deductions. Thus what has happened in this case is not the imposition of a single tax liability on the activities, as a whole, of the affiliated corporate group, but the reduction of the sum of separate 52% corporate tax liabilities by the setoff of tax losses against taxable income. Certainly there can be no contention that United would be entitled to anything other than a 52% of taxable income tax expense for ratemaking purposes absent tax losses in the consolidated group.[4] The only question that properly arises on this record is whether the Commission could consider any setoff to have been made against United's tax liability for ratemaking purposes when nonjurisdictional activities could have taken full advantage of the setoffs belonging to the group and the group desired to allocate them to those activities.[5]

[4] Thus despite the Court's "single consolidated tax liability" phraseology, I am certain that the Court does not mean to imply that the Commission may allocate by any criterion other than taxable incomes. The Court cannot mean to suggest that, for example, the Commission is empowered to allocate by gross revenues and thus consider special deductions belonging to nonjurisdictional activities as allocable for ratemaking purposes when the nonjurisdictional activity is fully capable of using them.

[5] In determining what it considered to be the properly allocated percentage of "tax saving" for ratemaking purposes the Commission utilized a five-year average (1957–1961) to eliminate the effects of short-term fluctuation. During that period, the total tax losses of

The "tax losses" belonging to the group arose almost exclusively from the excess of depletion allowances over revenues in the accounts of the nonjurisdictional activities of Union and Overseas. Such allowances belonged to Union and Overseas and those corporations were entitled to their exclusive use. By agreeing to the consolidated return [6] Union and Overseas agreed to deliver to the group, in any taxable year, whatever deductions they themselves could not then utilize in their own returns. The question how to allocate the benefit of those

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Union and Overseas were $3,893,980. The total taxable income of Gas Corporation, all of which was nonjurisdictional, was $9,024,170. Moreover, 56% of United's taxable income of $105,290,983 was nonjurisdictional. Thus even in the two years, 1960 and 1961, when the tax losses of Union and Overseas exceeded the taxable income of Gas Corporation, the group's nonjurisdictional taxable income was more than sufficient to offset all tax losses.

The Court notes the observation, made by the FPC in its brief, p. 26, that United reflected a "tax saving" on its books. This statement is somewhat misleading since it is directed to the allocation made for earnings and profits tax purposes under 26 U. S. C. § 1552 (a)(1) and that allocation bears no necessary relation to the actual allocation of liability for corporate purposes. Exhibit 14–1 reveals that, on the basis of allocated liability for corporate purposes, United had an average effective tax rate of 51.749% for the test years.

Moreover, the allocation of setoffs in the 1957–1961 period has no direct relevance to the issue in this case for the Commission was not engaged in analyzing rates for that period. The rates under scrutiny were those United proposed to charge in the future. If the Commission had found that United actually intended to allocate setoffs to its jurisdictional operation for corporate purposes while attempting to take a full 52% tax expense deduction for ratemaking purposes, the Commission might well have been justified in recognizing the setoffs for ratemaking purposes to the extent that United actually utilized them. On this record, it is clear that the Commission did not make any such finding.

[6] 26 U. S. C. § 1501 requires that all of the affiliated corporations consent to the filing of the consolidated return.

deductions among the members of the group would seem to be one for the group rather than the Commission when, as here, they do not arise from jurisdictional activities and can be used by group members to offset other nonjurisdictional gains. The courts have allowed good-faith business decisions to control such allocations for the vital purpose of determining which corporations shall pay the tax. See *Case* v. *New York Central R. Co.*, 15 N. Y. 2d 150, 204 N. E. 2d 643. And the tax Commissioner would permit the group to allocate for earnings and profits purposes in precisely the manner the group has chosen here.[7] Although these decisions cannot control for ratemaking purposes, they do make it clear that the Commission's assertion of jurisdiction to make an allocation amounts to an order that certain nonjurisdictional assets be delivered up to jurisdictional use since there is no other compulsion for such an allocation. The Court asserts that "[o]ne could as well argue that for ratemaking purposes the company subject to federal regulation should have the first benefit of the tax saving." But no authority or reason is given in support of this assertion, and, in my opinion, none can be found. The Commission has no authority to control the disposition of nonjurisdictional assets or the revenues or losses arising therefrom.

A parallel example will make even clearer the jurisdictional violation arising from the Commission's action here. If Union or Overseas had found itself with an excess quantity of steel pipe useful to all members of the group and had to negotiate its sale at a discount, one could hardly "as well argue that for ratemaking purposes" United should be credited with the discount purchase when the pipe had been sold to Gas Corporation and United had been forced to purchase pipe on the

[7] Proposed Treas. Reg. § 1.1502–33 recently promulgated by the Commissioner of Internal Revenue makes this a permissible means of allocation. 31 Fed. Reg. 16788–16789.

market.[8] And it could not be asserted that the Commission would have authority to order the transfer of the discount pipe to United.[9]

The far-reaching nonjurisdictional impact of the Commission's ruling gives further evidence that its action was one which Congress could not have contemplated and would not have condoned. As the dissenting Commissioners pointed out in the *Cities Service Gas Co.* proceeding, 30 F. P. C., at 175, the Commission has made jurisdictional rates turn on the corporate form assumed by nonjurisdictional activities. If, for example, the group had separately incorporated its nonjurisdictional operations, they would have shown taxable income in filing the consolidated return and no ratemaking allocation would be forthcoming. Similarly, since the Commission regulations themselves require separation of jurisdictional and nonjurisdictional operations within a single corporation, all the affiliates could merge into United and since nonjurisdictional activities would show a net taxable income, United would receive a 52% tax expense

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[8] And this nonjurisdictional decision would seem outside the Commission's control even if it were influenced by the fact that United could benefit less from the lower price because the ratepayers would absorb the benefit. Union and Overseas have no duty to act for the benefit of United's ratepayers. And if United were to join in a group compact agreeing to this allocation of excess pipe with the proviso that the excess would be sold to United in the absence of other needs, the decision would seem perfectly justifiable. United's contingent benefit would be more than it would have outside the compact, and since United has no right to compel the nonjurisdictional corporations to deal with it, United would not have surrendered anything. See *Case* v. *New York Central R. Co.*, 15 N. Y. 2d 150, 204 N. E. 2d 643.

[9] It should be noted as well that this example makes clear that it is entirely normal for United to be expected to pay for the acquisition of the asset, and thus some consideration should pass to Union and Overseas. This point is further developed in Part II of this opinion.

for ratemaking purposes.[10] The congressional purpose in allowing consolidated returns was to eliminate exactly this kind of dependence on corporate form and leave corporations free to continue business in whatever corporate form best suited them. See, *e. g.*, S. Rep. No. 960, 70th Cong., 1st Sess., p. 14. The congressional purpose in passing the Natural Gas Act was to prevent exploitation of the natural gas consumer. It was not to prevent natural gas companies from fully developing their nonjurisdictional opportunities, nor to control in any way the form of those activities, nor to appropriate nonjurisdictional assets for the benefit of consumers. *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 593–594.

The Court focuses its analysis on a case, not presented here, in which there are *net* nonjurisdictional losses and the consolidated tax liability is thus less than 52% of the taxable income of the jurisdictional activity. In such a case it is clear that nonjurisdictional assets are being used for tax purposes by the jurisdictional activity and it would blink reality not to recognize this use for ratemaking purposes, just as it would be wholly improper not to recognize the lower cost of discount pipe when a jurisdictional activity actually purchased it from a nonjurisdictional affiliate. When the group's election to file consolidated returns, or its intercorporate arrangements, *require* that nonjurisdictional deductions be utilized to set off jurisdictional income then, and only then, can there, in my opinion, be allocation.[11] That, however, is

[10] Title 18 CFR § 154.63 (f) which deals with joint facilities requires allocation of expenses between jurisdictional and nonjurisdictional activities.

[11] This formulation is, of course, very similar in form to that utilized by the Commission. The essential difference lies in the fact that the Commission substituted the concept of a "regulated corporation" for that of a jurisdictional activity. The regulated-unregulated division made by the Commission has no basis in the Natural Gas Act.

not the situation here where nonjurisdictional income was fully capable of absorbing all nonjurisdictional losses.

II.

In a well-reasoned opinion in *El Paso Natural Gas Co.* v. *FPC*, 281 F. 2d 567, the court held that the Commission properly took account of depletion allowances arising from jurisdictional activities in fixing rates. The gas company there had argued that since Congress intended by the allowance to encourage exploration its benefit could not be passed on to the ratepayers. The court rejected that argument because it concluded that the proper place to reflect the congressional policy was in the ultimate rate of return allowed the company. It made explicit, however, that the Commission could not fail to take account of the congressional policy.

The Court's opinion departs from that sound analysis by sustaining a formula which allocates the entire "tax saving" to the "regulated" corporations and thus fails to take account of the congressional desire to benefit the loss corporations by allowing the profit corporations to retain earnings which could be passed on to them. The consolidated return is the horizontal equivalent of the vertical loss carry-forward and carryback provisions of the Internal Revenue Code. It allows the "business unit" to recoup from the Government some of the loss which has been sustained and, in the words of Mr. Justice Jackson, "it is probable that the intention . . . was to provide salvage for the loser . . . ." *Western Pacific Railroad Case*, 345 U. S. 247, 277 (dissenting opinion). Any rate formula which does not provide a means of allocating benefit to the loss corporation cannot then be "just and reasonable." And if the group as a whole does not benefit from consolidation because the setoff advantages of losses are absorbed by the "regulated" corporations and passed on to the ratepayers, it is most

unlikely that the loss corporations will achieve the benefit Congress intended them to have.[12]

The Court recognizes the adverse effect on the benefits flowing to the loss corporations, but contends there is no frustration of the tax laws because the losses "remain with the system, readily available to reduce the taxes of the profitable affiliates . . . ." But this hypothetical "availability" is meaningless for the "instant cash" produced by the losses is passed on to the ratepayers rather than, as the tax laws intend, to the loss corporations. The fact that the group's tax payment is lower will not satisfy the intent behind the revenue provisions which was not to reduce government collections but to increase resources available to the business unit.[13]

III.

To summarize, I think, first, that no allocation whatever could be required by the Commission in these cases because nonjurisdictional income was more than sufficient to absorb all nonjurisdictional losses and there was no showing that jurisdictional activities would actually benefit from nonjurisdictional losses. To permit the FPC in such circumstances to allocate would in effect

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[12] The Commission has argued that the intended benefit can be disregarded in this case because the loss corporations are in that category for tax purposes solely because of depletion allowances and are actually profitable in economic terms. While this argument might be thought to have some force, it is not for us to decide that the depletion allowances Congress has authorized are not real costs of carrying on the business.

[13] The Commission, if not the Court, was aware of this problem. In its petition for certiorari, p. 10, n. 8, the Commission recognized that "[t]here may indeed be problems in the application of . . . a formula which may result in allocating the entire tax saving resulting from losses on unregulated activities to the regulated members of the consolidated group." The Commission has not attempted to justify its formula to this Court.

extend the Commission's jurisdiction to areas not encompassed within the authority given the Commission by the Natural Gas Act. While the basic purpose of the Act is, of course, to protect ratepayers, Congress has not carried that protection so far as to allow them to share in the benefits of the nonjurisdictional activities of a jurisdictional corporation or those of its corporate affiliates—a result which today's decision permits the Commission to achieve.

Second, in instances where the Commission may allocate, it seems to me that any allocation formula that does not take account of the underlying policy of the tax statute would "plainly [contravene] the statutory scheme of regulation." *Colorado Interstate Gas Co.* v. *FPC, supra,* at 589.

Third, while I thus agree with the Court of Appeals that United, on this record, is entitled to have its rates calculated on the premise of a full 52% tax liability, I cannot subscribe to such intimations as there may be in the opinion relied upon by that court that the Commission may *never* allocate in a consolidated tax situation.

I would affirm the judgment of the Court of Appeals.[14]

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[14] Since, in my view, no allocation is permissible in the circumstances of these cases, as a matter of law, a remand to the FPC is unnecessary. Under the Court's view, however, such a remand would appear to be the appropriate disposition. The Court's "single consolidated tax liability" jurisdictional formulation is essentially the "fused mass" theory proposed by the Commission staff and rejected by the Commission for jurisdictional reasons. *Cities Service Gas Co.,* 30 F. P. C. 158, 160. The Commission should at least be required to re-examine the matter under the Court's jurisdictional premises. *SEC* v. *Chenery Corp.,* 318 U. S. 80; *Connecticut Light & Power Co.* v. *FPC,* 324 U. S. 515, 534. In any event, I cannot understand the Court's remand to the Court of Appeals, the Commission's power to allocate and its allocation formula having already been upheld by this Court.

SWENSON, WARDEN *v.* BOSLER.

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

No. 759. Decided March 13, 1967.

The Court of Appeals' holding that the former Missouri practice of deciding direct criminal appeals by convicted indigents without the appointment of appellate counsel is invalid under *Douglas* v. *California,* 372 U. S. 353, is affirmed. The assistance of appellate counsel is an advantage which may not be denied to a criminal defendant, solely because of indigency, on the only appeal which the State affords him as a matter of right; and when a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, knowing waiver cannot be inferred from his failure specifically to request appointment of appellate counsel.

Certiorari granted; 363 F. 2d 154, affirmed.

Norman H. Anderson, Attorney General of Missouri, and *J. Gordon Siddens* and *Howard L. McFadden,* Assistant Attorneys General, for petitioner.

PER CURIAM.

Petitioner seeks certiorari from a judgment of the Court of Appeals holding invalid under the doctrine of *Douglas* v. *California,* 372 U. S. 353, the State of Missouri's former practice of deciding direct criminal appeals by convicted indigent defendants without the appointment of appellate counsel. We grant the writ of certiorari and, for the reasons below, we affirm.

Under Missouri criminal practice, a convicted defendant's motion for new trial must set forth in detail his specific grounds for relief; and in general, a Missouri appellate court may not consider on appeal questions which were not first presented to the trial court in a motion for new trial. See *State* v. *Mallory,* 336 S. W. 2d

383 (Mo. Sup. Ct.), cert. denied, 364 U. S. 852; *State* v. *Davis,* 251 S. W. 2d 610, 615–616 (Mo. Sup. Ct.); Mo. Sup. Ct. Rule Crim. Proc. 27.20. Prior to March 1, 1964, Missouri had no rule requiring appointment of appellate counsel for indigent defendants.* If trial counsel filed a motion for new trial and notice of appeal and then withdrew from the case, the Supreme Court of Missouri would require preparation of the transcript for appeal and then would consider the questions raised by the motion for new trial on the basis of *pro se* briefs by the defendant-appellant, or on no briefs at all. This is what occurred in this case. We agree with the Court of Appeals that this procedure violated respondent's Fourteenth Amendment rights, as defined in *Douglas,* even though respondent's trial counsel filed the notice of appeal and a motion for new trial which specifically designated the issues which could be considered on direct appeal. The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.

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*On July 9, 1963, after the *Douglas* decision, Missouri altered its appellate practice by adding Subsection (c) to Rule 29.01 of the Supreme Court's Rules of Criminal Procedure, effective March 1, 1964:

"(c) When a defendant is convicted of a felony, is sentenced therefor and desires to appeal, if it appears from a showing of indigency that the defendant is unable to employ counsel the trial court shall appoint counsel to represent him upon such appeal; such counsel may, in the discretion of the court, be the same counsel who represented the defendant at the trial or other counsel."

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Petitioner contends that, since the District Court did not hold a hearing to determine whether respondent actually requested the appointment of appellate counsel, the record as it presently exists does not support the Court of Appeals' express conclusion that respondent did make such a request. Respondent included in the appendix to his petition to the District Court a copy of the full transcript of his Missouri trial, the accuracy of which petitioner does not contest. We think the documents contained in this transcript demonstrate that respondent did indicate to the Missouri courts his desire for counsel on appeal. But even if such a request had not been made, we do not think its absence would amount to a waiver of respondent's rights. It is now settled "that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley* v. *Cochran,* 369 U. S. 506, 513. When a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it simply cannot be inferred from defendant's failure specifically to request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel.

Affirmed.

HESTER *v.* SWENSON, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 397, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Norman H. Anderson, Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Missouri for further consideration. *Swenson* v. *Bosler, ante,* p. 258; *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U. S. 214; *Tehan* v. *Shott,* 382 U. S. 406, 416.

YOUNG *v.* UNITED STATES BOARD OF PAROLE.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 1193, Misc. Decided March 13, 1967.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Solicitor General Marshall, Assistant Attorney General Vinson and *Beatrice Rosenberg* for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ALTERMAN TRANSPORT LINES, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF TENNESSEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 942. Decided March 13, 1967.

259 F. Supp. 486, affirmed.

J. G. Lackey, Jr., for appellants.

George F. McCanless, Attorney General of Tennessee, *Milton P. Rice,* Assistant Attorney General, and *Seymour Samuels, Jr.,* for appellees.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.

HOLLIS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 46, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

RICKS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 36, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Caryl Warner for petitioner.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

FONTAINE *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 50, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

HAENDIGES *v.* FORD.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 925. Decided March 13, 1967.

7 Ohio St. 2d 9, 218 N. E. 2d 434, appeal dismissed.

Leonard P. Gilbert for appellant.

Lawrence E. Stewart for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed, it appearing that the judgment below rests upon an adequate state ground.

ANDERS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 12, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *George J. Roth,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

TETTAMBLE *v.* MISSOURI.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 32, Misc. Decided March 13, 1967.

Certiorari granted; 394 S. W. 2d 375, vacated and remanded.

Petitioner *pro se.*

Norman H. Anderson, Attorney General of Missouri, and *Harold L. McFadden,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Missouri for further consideration in light of *Swenson* v. *Bosler, ante,* p. 258.

HUDGINS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 37, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART is of the opinion that certiorari should be denied because the petition was not timely filed.

FORD *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 140, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

NIELSEN *v.* NEBRASKA STATE BAR ASSOCIATION.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 1180, Misc. Decided March 13, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WHEATON *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 46. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Byron J. Walters for petitioner.

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *C. Anthony Collins,* Deputy Attorney General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case remanded for further consideration in the light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

WACKENHUT CORP. ET AL. *v.* APONTE, SUPERINTENDENT OF POLICE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO.

No. 726. Decided March 13, 1967.

Affirmed.

Donald M. Hall for Wackenhut Corp. et al., and *William B. Graves* for Marvil International Security Services, Inc., appellants.

J. B. Fernandez Badillo, Solicitor General of Puerto Rico, and *Peter Ortiz,* Assistant Solicitor General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

CITY OF GALVESTON ET AL. *v.* UNITED STATES ET AL.

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

No. 827. Decided March 13, 1967.*

257 F. Supp. 243, affirmed.

Harold E. Spencer and *Nuel D. Belnap* for appellants in No. 827. *Don McDevitt, Sterling W. Steves, Harvey Huston* and *Milton E. Nelson, Jr.,* for appellants in No. 828.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Irwin A. Seibel, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al. in both cases. *Frank A. Leffingwell* for appellees Nueces County Navigation District No. 1 et al. in both cases.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

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*Together with No. 828, *Atchison, Topeka & Santa Fe Railway Co. et al.* v. *United States et al.,* also on appeal from the same court.

LOUISIANA ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 938. Decided March 13, 1967.

Affirmed.

Jack P. F. Gremillion, Attorney General of Louisiana, and *Thomas W. McFerrin* and *William P. Schuler,* Assistant Attorneys General, for appellants.

Solicitor General Marshall, Assistant Attorney General Doar and *Alan G. Marer* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for hearing.

DAUGHERTY *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 19, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *C. Anthony Collins,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

GARNER *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 22, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, and *Robert R. Granucci* and *John F. Kraetzer,* Deputy Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

ERB *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 23, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

William A. Dougherty for petitioner.

Thomas C. Lynch, Attorney General of California, *William E. James*, Assistant Attorney General, and *David B. Stanton*, Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California*, *ante*, p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California*, *ante*, at 42.

COTTER *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 38, Misc. Decided March 13, 1967.

Certiorari granted; 63 Cal. 2d 386, 405 P. 2d 862, vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

PROPP *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 39, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

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OTWELL *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 44, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Alf Stavig for petitioner.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

SHAW *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 52, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Valerian J. Lavernoich for petitioner.

Roger Arnebergh and *Philip E. Grey* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

BOYDEN *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 57, Misc. Decided March 13, 1967.

237 Cal. App. 2d 695, 47 Cal. Rptr. 136, vacated and remanded.

Appellant *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would vacate the judgment and remand for reconsideration in light of the views stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

ROY *v.* CALIFORNIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 68, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

McCLELLAN *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 69, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

DAVIS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 157, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, and *Edward P. O'Brien* and *James A. Aiello,* Deputy Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari, vacate the judgment, and remand for reconsideration in light of the views stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

ADAMS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 332, Misc. Filed March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

MICHAEL *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 465, Misc. Filed March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert P. Samoian,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

DECKARD *v.* WARDEN, MISSOURI PENITENTIARY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 533, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Norman H. Anderson, Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Missouri for further consideration. *Swenson* v. *Bosler, ante,* p. 258; *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U. S. 214; *Tehan* v. *Shott,* 382 U. S. 406, 416.

BEATTIE *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 556, Misc. Filed March 13, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

GARRISON *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT.

No. 664, Misc. Decided March 13, 1967.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case remanded for further consideration in light of *Chapman* v. *California, ante,* p. 18.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his opinion concurring in the result in *Chapman* v. *California, ante,* at 42.

COMMISSIONER OF INTERNAL REVENUE *v.* STIDGER ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 173. Argued January 16, 1967.—Decided March 20, 1967.

Expenditures for meals by a military officer stationed at a permanent duty post to which his dependents were prohibited from accompanying him *held* not to constitute deductible "traveling expenses . . . [incurred] while away from home" within the meaning of § 162 (a)(2) of the Internal Revenue Code of 1954. A military taxpayer's permanent duty post is his "home" within the meaning of the statute. Pp. 289–296.

355 F. 2d 294, reversed.

Assistant Attorney General Rogovin argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, Jack S. Levin, Robert N. Anderson* and *Albert J. Beveridge III.*

John A. Reed, by invitation of the Court (385 U. S. 925), argued the cause and filed a brief, as *amicus curiae,* in support of the judgment below.

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

In this case we are required to determine whether, under the 1954 Internal Revenue Code, expenditures for meals by a military officer stationed at a post to which his dependents were prohibited from accompanying him were deductible "traveling expenses . . . [incurred] while away from home" within the meaning of § 162 (a)(2)[1]

[1] "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . . . .

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a

or whether instead they were nondeductible "personal, living, or family expenses" within the meaning of § 262.[2] At all pertinent times, respondent [3] was a captain in the United States Marine Corps, attached to an aviation squadron. Immediately prior to October 1957, his permanent duty station was a Marine Corps base located at El Toro, California, and he lived nearby with his wife and children. On October 1, 1957, however, respondent and his squadron were transferred to Iwakuni, Japan, where they were to be based while serving a standard 15-month tour of duty in the Far East. Because dependents were prohibited from accompanying Marine Corps personnel to that duty station, respondent's wife and children remained in California.

Of the 14½ months' actual duration of respondent's Far Eastern tour of duty, he was physically located at the Iwakuni base for 10 months. The remaining time was consumed by travel and short periods of duty at various other military bases; respondent was declared to be in a "travel status" for a period of 49 days, and he received additional compensation for those days on a per diem basis. During the entire period of his service as a Marine Corps captain, both while he served at bases in the United States and while he served abroad away from his family, respondent also received tax-free monthly allowances for quarters and subsistence.

On his 1958 income tax return, respondent claimed

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trade or business . . . ." § 162 (a) (2) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a) (2) (1958 ed.).

[2] "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." § 262 of the Internal Revenue Code of 1954, 26 U. S. C. § 262.

[3] Since a joint income tax return was filed by Captain and Mrs. Stidger, both are respondents here. In this opinion, however, the terms "respondent" and "taxpayer" refer only to Captain Stidger.

a deduction of $650, representing the cost of his meals at a rate of $65 per month for the 10 months spent at the Iwakuni base. The Commissioner of Internal Revenue disallowed the deduction, ruling that the expenditure for meals was a "personal, living" expense under § 262 and not a travel expense under § 162 (a)(2). In the Commissioner's view respondent's "home" during the period in question was his permanent duty station at Iwakuni rather than California where his family resided; therefore, he was not "away from home" when he incurred the expenditure. The Tax Court upheld the Commissioner (40 T. C. 896), and respondent petitioned for review in the Court of Appeals for the Ninth Circuit. That court, in a *per curiam* decision with one judge dissenting, reversed the Tax Court and rejected the Commissioner's definition of "home" for purposes of the deduction. 355 F. 2d 294. The majority of the Court of Appeals ruled that the word "home" as used in § 162 (a)(2) of the Code must be given its usual meaning as the place of residence, not the place of business, of the taxpayer and his family. And since it was not reasonable for this taxpayer to move his family residence closer to his place of business, the "ordinary and necessary" requirement applicable to all § 162 deductions was met and the cost of meals at Iwakuni was deductible. To resolve a direct conflict between this decision and a 1948 decision of the Court of Appeals for the Fourth Circuit in another case involving a military officer, *Bercaw* v. *Commissioner,* 165 F. 2d 521, we granted certiorari. 385 U. S. 809.

This case then requires us to focus upon one of the three conditions which must be met before an item is deductible as a travel expense under § 162 (a)(2). There is no question but that the expenditure here was "ordinary and necessary" and that there was a "direct con-

nection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer." Cf. *Commissioner* v. *Flowers,* 326 U. S. 465, 470 (1946); *Peurifoy* v. *Commissioner,* 358 U. S. 59 (1958). The essence of the case is whether respondent was "away from home" when he incurred the expenditure. And the answer to that question turns upon a determination of whether, under the circumstances related above, respondent's "home" in 1958 was his permanent duty station at Iwakuni, Japan, or, instead, the residence of his family in California.

From the Revenue Act of 1921 [4] down to § 162 (a)(2) of the 1954 Internal Revenue Code Congress has provided a deduction from taxable income for travel expenses, including amounts expended for meals and lodging, while "away from home." Although Congress has not defined the crucial phrase "away from home," administrative rulings and regulations have been directed toward that problem. In 1921, a general rule was established to the effect that "home" meant the taxpayer's principal place of business or employment whether or not it coincided with his place of residence.[5] This interpretation prevented deductions of day-to-day commuting expenses which were not the unusual type of "traveling expense" to which the statute was directed. Cf. *Commissioner* v. *Flowers,* 326 U. S. 465, 470 (1946). Its logic has been applied to a host of other situations. Although certain refinements have been added,[6] the essential position of the Commissioner has remained unchanged.

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[4] Revenue Act of 1921, c. 136, § 214 (a), 42 Stat. 239.

[5] O. D. 864, 4 Cum. Bull. 211 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921).

[6] See, *e. g.,* I. T. 1490, I–2 Cum. Bull. 89 (1922); Rev. Rul. 60–189, 1960–1 Cum. Bull. 60. See also note 22, *infra.*

While the court below,[7] together with the Courts of Appeals for the Fifth [8] and Sixth [9] Circuits, has not always agreed with this interpretation, the Tax Court [10] and all of the other courts of appeals which have considered it have sustained the Commissioner.[11] The Commissioner's interpretation of the word "home" in connection with travel-expense deductions was also made clear to Congress when in 1936 it was held that Members of Congress could not deduct expenses which they incurred in Washington, D. C., even though each also maintained a residence in the district from which he had been elected. *Lindsay* v. *Commissioner,* 34 B. T. A. 840. Congress did

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[7] In addition to the instant case, see also *Wright* v. *Hartsell,* 305 F. 2d 221 (C. A. 9th Cir. 1962).

[8] *Steinhort* v. *Commissioner,* 335 F. 2d 496 (C. A. 5th Cir. 1964); *United States* v. *Le Blanc,* 278 F. 2d 571 (C. A. 5th Cir. 1960).

[9] *Burns* v. *Gray,* 287 F. 2d 698 (C. A. 6th Cir. 1961).

[10] See, *e. g., Friedman* v. *Commissioner,* 37 T. C. 539 (1961); *Carroll* v. *Commissioner,* 20 T. C. 382 (1953). The facts of the *Carroll* case are closely analogous to the circumstances surrounding the claimed deduction here. The taxpayer there was an employee of the War Department who in 1947 was transferred to a "permanent duty station" in Korea for a minimum of one year. His wife and child remained in the United States. A deduction for the cost of meals and lodging while in Korea was not allowed by the Tax Court which noted that the taxpayer's employer (1) designated Korea as a "permanent duty station" and (2) granted per diem travel allowances only while the taxpayer was en route to and from Korea, not while he was based there. See also *Todd* v. *Commissioner,* 10 T. C. 655 (1948).

[11] See, *e. g., O'Toole* v. *Commissioner,* 243 F. 2d 302 (C. A. 2d Cir. 1957); *Coerver* v. *Commissioner,* 297 F. 2d 837 (C. A. 3d Cir. 1962), affirming 36 T. C. 252 (1961); *Bercaw* v. *Commissioner,* 165 F. 2d 521 (C. A. 4th Cir. 1948); *England* v. *United States,* 345 F. 2d 414 (C. A. 7th Cir. 1965); *Cockrell* v. *Commissioner,* 321 F. 2d 504 (C. A. 8th Cir. 1963); and *York* v. *Commissioner,* 82 U. S. App. D. C. 63, 160 F. 2d 385 (1947). The Courts of Appeals for the First and Tenth Circuits apparently have not taken a position on this question.

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not respond to this ruling by amending the statutory language generally to provide that "home" was intended to be synonymous with "residence," but instead merely carved out an exception to cover the special travel-expense problems inherent in service as a national legislator.[12]

The Commissioner argues that the fact that Congress has reviewed and re-enacted the pertinent language with an awareness of the administrative interpretation constitutes a legislative endorsement of the Commissioner's position and is sufficient reason for reversing the judgment below. *Helvering* v. *Winmill*, 305 U. S. 79 (1938). But it is not necessary for us to decide here whether this congressional action (or inaction) constitutes approval and adoption of the Commissioner's interpretation of "home" in all of its myriad applications since, in the context of the military taxpayer, the Commissioner's position has a firmer foundation. The Commissioner has long held that a military taxpayer's permanent duty station is also his home for purposes of determining deductibility of travel expenses. This position builds on the terminology employed by the military services to categorize various assignments and tours of duty, and also on the language and policy of the statutory provisions prescribing travel and transportation allowances for military personnel. For example, a Marine Corps directive, which was effective during respondent's Far

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[12] 66 Stat. 467. The exception was carried over to the 1954 Code and now reads: "For purposes of the preceding sentence, the place of residence of a Member of Congress . . . within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000." 26 U. S. C. § 162 (a).

Eastern tour of duty, defined the length of standard tours of duty in terms of the commencement and termination dates of "*permanent* change[s] of station." [13] (Emphasis supplied.) Similarly, eligibility for certain statutory travel allowances turns upon whether an assignment constitutes a "change of *permanent* station" (emphasis supplied) or whether the serviceman is "away from his designated post of duty." 37 U. S. C. § 404 (a)(1). Thus, the Commissioner's position recognizes, as do the relevant statutes and the military services themselves, that the "permanence" of location in civilian life cannot find a complete parallel in military life which necessarily contemplates relatively frequent changes of location.

The nondeductibility of expenses incurred by a military taxpayer while at a permanent duty station was previously challenged in *Bercaw* v. *Commissioner,* 165 F. 2d 521 (C. A. 4th Cir. 1948). There, the taxpayer, a reserve army officer who was called to active duty and assigned to Fort Meade in Maryland where there were no quarters for dependents, sought to deduct expenditures for his meals and janitorial service as costs of traveling "away from home" in pursuit of his trade or business. The Court of Appeals affirmed the Tax Court's disallowance of the deduction, stating:

> "The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem travel allowance which would not have been taxable. . . . But whenever he made a permanent change of station that place of duty became his place of business and there was his 'home'

[13] Marine Corps Order 1300.8B, c. 1, issued July 1, 1958. Record, p. 24.

> within the meaning of Section 23 (a)(1)(A). . . . Thus the expenditures for meals . . . while at this post were personal living expenses and nondeductible . . . ." 165 F. 2d, at 524.

Since the *Bercaw* decision, the Commissioner has reiterated his position in Rev. Rul. 55–571, 1955–2 Cum. Bull. 44. And until the decision of the court below in the present case, neither the courts nor Congress had disturbed the Commissioner's interpretation of "home" as it pertained to military personnel.

Additional support for the Commissioner's position is found in the fact that Congress traditionally has provided a special system of tax-free allowances for military personnel.[14] These allowances now range from monthly payments for quarters [15] and subsistence [16] to per diem payments when the serviceman is declared in a "travel status." [17] Provision may also be made for financial relief to assist dependents in relocating when they are prohibited from accompanying a serviceman on a change of permanent duty station.[18] In the present case, respondent received the per diem payments while he was away from his permanent duty station. His quarters at Iwakuni were provided without cost to him, and at the same time he continued to receive a tax-free quarters allowance of approximately $102.50 per month; [19] he also

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[14] See generally Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces, Appendix 13–18 (1948).

[15] 37 U. S. C. § 403.

[16] 37 U. S. C. § 402.

[17] 37 U. S. C. § 404. See also 37 U. S. C. §§ 405–412.

[18] 37 U. S. C. § 406 (h).

[19] 37 U. S. C. § 403 (d) provides: "A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if, because of orders of competent authority, his dependents are prevented from occupying those quarters."

received a tax-free subsistence allowance of approximately $42.50 per month at all relevant times. Moreover, because his assignment to Iwakuni was a change of permanent station, his wife and children could have moved their residence to another part of the United States at the Government's expense; however, they elected not to exercise that option.

Underlying the system of special allowances is congressional recognition of the fact that military life poses unusual financial problems.[20] The system is designed to provide complete and direct relief from such problems as opposed to the incomplete and indirect relief which an income tax deduction affords to a civilian business traveler.[21] If the system of allowances is in fact inade-

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[20] In 1948, the Hook Commission, which had been appointed by the Secretary of Defense to study military compensation, issued its report and recommendations. Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces (1948). That report formed a principal basis for the Career Compensation Act of 1949, c. 681, 63 Stat. 802. On the subjects of subsistence and quarters allowances, the Commission stated (Appendix, p. 17):

"The theory behind the subsistence allowance is that since the officer is required to arrange and provide his subsistence at all times and since he has no choice as to the place where he is to be stationed and therefore does not have the choice of the average citizen as to the place and manner of subsisting himself, it is necessary to provide him with an allowance at all times so that he may bear that expense wherever stationed.

. . . . . .

"Because an officer is transferred frequently from place to place and is required to dig up his roots at the old station and transplant them to the new station, the Government has acknowledged for years its obligation to furnish quarters to the officer for occupancy by himself and his dependents."

[21] Congress has through the years evidenced a determination to maintain the various allowances at levels consistent with the necessary financial burdens borne by servicemen. See, *e. g., id.*, at 35 and Appendix 13–18; H. R. Rep. No. 779, 81st Cong., 1st Sess., p. 19. In 1963, Congress enacted yet another measure designed to provide

quate, or if there are inconsistencies in the Commissioner's application of the travel-expense provision to military personnel,[22] it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments. Given the Commissioner's long-standing and judicially approved interpretation, the knowledge of that interpretation by Congress, and the fact that Congress has chosen to deal specially by tax-free allowances with the financial problems peculiar to military life, we must agree with the Commissioner that the military taxpayer is not "away from home" when he is at his permanent duty station whether or not it is feasible or even permissible for his family to reside with him there. The judgment is, therefore,

Reversed.

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direct relief for dependents separated from servicemen on permanent duty outside this country or in Alaska. 37 U. S. C. § 427 (b). Under specified conditions, this provision authorizes an allowance of $30 monthly. It was established because Congress recognized that separated families incur additional expenses. See H. R. Rep. No. 208, 88th Cong., 1st Sess., p. 29. That recognition is, of course, the same one that underlies the travel-expense deduction for civilian taxpayers.

[22] The Commissioner has taken the position that a naval officer may deduct as a traveling expense the cost of his meals aboard ship while the ship is away from its home port. Rev. Rul. 55–571, 1955–2 Cum. Bull. 44. It is contended that respondent's situation at Iwakuni was directly analogous to that of a naval officer on a ship at sea for an extended period of time. The Commissioner justifies the discrepant treatment by arguing that a naval officer should be treated like the engineer of a train, a bus driver, or an airplane pilot for purposes of the travel-expense deduction; the principal place of business of such taxpayers is their home terminal and they are allowed the deduction when away from that terminal on business trips. We are not convinced that respondent's situation was in all relevant respects analogous to that of a naval officer at sea. In any event, during oral orgument we were advised that the Commissioner is re-examining his position with respect to naval officers.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE FORTAS concur, dissenting.

The resolution of this case depends upon whether respondent was "away from home" when he incurred the expenses.[1] The term "home" is not defined.

The Treasury's administrative rulings for many years have indeed treated the statutory word "home" as meaning a taxpayer's principal place of business or employment. See *Commissioner* v. *Flowers,* 326 U. S. 465, 471–472. To me it is clear that home means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable. *Ibid.* Here the taxpayer was forbidden by military orders to take his family with him. He was, in other words, barred from taking his home with him whenever he went on military orders. The Commissioner points to the difficulty of having any rule other than the fixed one that "home" means the taxpayer's principal place of business or employment. It is said that if the rule is not rigid, a great complex of facts would have to be considered: adequacy of housing at the new post, expense of moving, school facilities, health of the family, the need to care for elderly or ailing relatives, and the like. Only a fixed rule provides certainty, it is said; any other would threaten the desire for uniformity.

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[1] Section 162 of the Internal Revenue Code of 1954 provides in relevant part:

"(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . . . .

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business . . . ."

While equity is seldom an ingredient of the tax laws, while they are indeed inherently discriminatory in many ways, reflecting perquisites obtained by pressure groups,[2] we need not increase their harshness by giving simple words unusual or strained meanings—unless of course Congress has plainly made an arbitrary choice.

If the taxpayer chooses to maintain his residence at a place far removed from his place of business, the travel expenses are not "ordinary and necessary" since not dictated by business needs. *Commissioner* v. *Flowers, supra.* On the other hand, if the taxpayer cannot reasonably maintain his residence at his place of business, the travel expenses are "ordinary and necessary" and hence deductible. Such an interpretation would give effect to the congressional policy of allowing a deduction for expenses dictated by the needs of the taxpayer's employment.

In this case there can be no question that the expenses were incurred in the pursuit of the taxpayer's employment and that respondent could not move his residence to Iwakuni. There can be no question that the expenses were motivated by "[t]he exigencies of business rather than the personal conveniences and necessities of the" respondent. *Commissioner* v. *Flowers, supra,* at 474. I cannot see how the result is changed simply because respondent is a member of the armed services. The fact that Congress has afforded members of the military special allowances is no indication that Congress intended

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[2] ". . . assume that a farmer has a herd of hogs. Each year he selects certain young to be bred. After each sow has one litter, she is turned out to be conditioned for slaughter. The profits on the sale of the pigs unbred are taxable as ordinary income. But the profits on the sale of the pigs bred once are taxable as capital gains. They have been held as business properties producing other pigs. The fact that all the pigs are equally destined to be sold and eaten is unimportant." Eisenstein, The Ideologies of Taxation 174 (1961).

that they not be allowed to deduct "ordinary and necessary" expenses incurred while away from their residence. Respondent received the same pay and basic allowances while in the Far East as he did while residing with his family in the United States. There was no increase to help defray the increased expenses incurred by him while required to live away from his family.

McCRAY *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 159. Argued January 10–11, 1967.—Decided March 20, 1967.

Following receipt of information from an informer, two Chicago policemen made a warrantless arrest of the petitioner for possessing narcotics. At the pretrial hearing on petitioner's motion to suppress the evidence which was found on his person, the officers testified that: the informant had told them that petitioner "was selling narcotics and had narcotics on his person" and the area where petitioner could then be found; they found him in that vicinity; after pointing petitioner out, the informant departed; they arrested petitioner and searched him in their vehicle and found the narcotics on his person. The officers also testified that, during the one to two years respectively that they had known the informant, he had frequently furnished accurate information about narcotics activities which had led to many convictions. Petitioner requested the informant's identity and the State, relying on the testimonial privilege under Illinois law against such disclosure, objected. The State's objections were sustained, petitioner's motion to suppress was denied, and he was thereafter convicted upon the basis of the evidence seized. The judgment of conviction was affirmed by the State Supreme Court, which held the arrest lawful and not vitiated by the application of the "informer's privilege." *Held:*

1. Upon the basis of the circumstances related by the officers, they had probable cause to make the arrest and the search incidental thereto. P. 304.

2. A state court is under no absolute duty under either the Due Process Clause of the Fourteenth Amendment or under the Sixth Amendment as incorporated therein to require disclosure of an informer's identity at a pretrial hearing held for the purpose of determining only the question of probable cause for an arrest or search where, as here, there was ample evidence in an open and adversary proceeding that the informer was known to the officers to be reliable and that they made the arrest in good faith upon the information he supplied. Pp. 305–314.

33 Ill. 2d 66, 210 N. E. 2d 161, affirmed.

R. Eugene Pincham argued the cause for petitioner. With him on the briefs were *Sam Adam, Charles B. Evins* and *Earl E. Strayhorn.*

John J. O'Toole, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William G. Clark,* Attorney General, and *Richard A. Michael,* Assistant Attorney General.

Thomas C. Lynch, Attorney General, *William E. James,* Assistant Attorney General, and *Evelle J. Younger* filed a brief for the State of California, as *amicus curiae.*

MR. JUSTICE STEWART delivered the opinion the Court.

The petitioner was arrested in Chicago, Illinois, on the morning of January 16, 1964, for possession of narcotics. The Chicago police officers who made the arrest found a package containing heroin on his person and he was indicted for its unlawful possession. Prior to trial he filed a motion to suppress the heroin as evidence against him, claiming that the police had acquired it in an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. See *Mapp* v. *Ohio,* 367 U. S. 643. After a hearing, the court denied the motion, and the petitioner was subsequently convicted upon the evidence of the heroin the arresting officers had found in his possession. The judgment of conviction was affirmed by the Supreme Court of Illinois,[1] and we granted certiorari to consider the petitioner's claim that the hearing on his motion to suppress was constitutionally defective.[2]

The petitioner's arrest occurred near the intersection of 49th Street and Calumet Avenue at about seven in the morning. At the hearing on the motion to suppress, he testified that up until a half hour before he was arrested he had been at "a friend's house" about a block away,

[1] 33 Ill. 2d 66, 210 N. E. 2d 161.

[2] 384 U. S. 949.

that after leaving the friend's house he had "walked with a lady from 48th to 48th and South Park," and that, as he approached 49th Street and Calumet Avenue, "[t]he Officers stopped me going through the alley." "The officers," he said, "did not show me a search warrant for my person or an arrest warrant for my arrest." He said the officers then searched him and found the narcotics in question.[3] The petitioner did not identify the "friend" or the "lady," and neither of them appeared as a witness.

The arresting officers then testified. Officer Jackson stated that he and two fellow officers had had a conversation with an informant on the morning of January 16 in their unmarked police car. The officer said that the informant had told them that the petitioner, with whom Jackson was acquainted, "was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time." Jackson said that he and his fellow officers drove to that vicinity in the police car and that when they spotted the petitioner, the informant pointed him out and then departed on foot. Jackson stated that the officers observed the petitioner walking with a woman, then separating from her and meeting briefly with a man, then proceeding alone, and finally, after seeing the police car, "hurriedly walk[ing] between two buildings." "At this point," Jackson testified, "my partner and myself got out of the car and informed him we had information he had narcotics on his person, placed him in the police vehicle at this point." Jackson stated that the officers then searched

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[3] The weather was "real cold," and the petitioner testified he "had on three coats." In order to conduct the search, the arresting officers required the petitioner to remove some of his clothing, but even the petitioner's version of the circumstances of the search did not disclose any conduct remotely akin to that condemned by this Court in *Rochin* v. *California*, 342 U. S. 165.

the petitioner and found the heroin in a cigarette package.

Jackson testified that he had been acquainted with the informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities "fifteen, sixteen times at least," that the information had proved to be accurate and had resulted in numerous arrests and convictions. On cross-examination, Jackson was even more specific as to the informant's previous reliability, giving the names of people who had been convicted of narcotics violations as the result of information the informant had supplied. When Jackson was asked for the informant's name and address, counsel for the State objected, and the objection was sustained by the court.[4]

Officer Arnold gave substantially the same account of the circumstances of the petitioner's arrest and search, stating that the informant had told the officers that the petitioner "was selling narcotics and had narcotics on his

[4] "Q. What is the name of this informant that gave you this information?

"Mr. Engerman: Objection, Your Honor.

"The Court: State for the record the reasons for your objection.

"Mr. Engerman: Judge, based upon the testimony of the officer so far that they had used this informant for approximately a year, he has worked with this individual, in the interest of the public, I see no reason why the officer should be forced to disclose the name of the informant, to cause harm or jeopardy to an individual who has cooperated with the police. The City of Chicago have a tremendous problem with narcotics. If the police are not able to withhold the name of the informant they will not be able to get informants. They are not willing to risk their lives if their names become known.

"In the interest of the City and the law enforcement of this community, I feel the officer should not be forced to reveal the name of the informant. And I also cite People vs. Durr.

"The Court: I will sustain that.

"Mr. Adam: Q. Where does this informant live?

"Mr. Engerman: Objection, your Honor, same basis.

"The Court: Sustained."

person now in the vicinity of 47th and Calumet." The informant, Arnold testified, "said he had observed [the petitioner] selling narcotics to various people, meaning various addicts, in the area of 47th and Calumet." Arnold testified that he had known the informant "roughly two years," that the informant had given him information concerning narcotics "20 or 25 times," and that the information had resulted in convictions. Arnold too was asked on cross-examination for the informant's name and address, and objections to these questions were sustained by the court.

There can be no doubt, upon the basis of the circumstances related by Officers Jackson and Arnold, that there was probable cause to sustain the arrest and incidental search in this case. *Draper* v. *United States,* 358 U. S. 307. Unlike the situation in *Beck* v. *Ohio,* 379 U. S. 89, each of the officers in this case described with specificity "what the informer actually said, and why the officer thought the information was credible." 379 U. S., at 97. The testimony of each of the officers informed the court of the "underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Aguilar* v. *Texas,* 378 U. S. 108, 114. See *United States* v. *Ventresca,* 380 U. S. 102. Upon the basis of those circumstances, along with the officers' personal observations of the petitioner, the court was fully justified in holding that at the time the officers made the arrest "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Brinegar* v. *United States,* 338 U. S. 160, 175–176; *Henry* v. *United States,* 361 U. S. 98, 102." *Beck*

v. *Ohio, supra,* at 91. It is the petitioner's claim, however, that even though the officers' sworn testimony fully supported a finding of probable cause for the arrest and search, the state court nonetheless violated the Constitution when it sustained objections to the petitioner's questions as to the identity of the informant. We cannot agree.

In permitting the officers to withhold the informant's identity, the court was following well-settled Illinois law. When the issue is not guilt or innocence, but, as here, the question of probable cause for an arrest or search, the Illinois Supreme Court has held that police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant.[5] This Illinois evidentiary rule is consistent with the law of many other States.[6] In California, the State Legislature in 1965 enacted a statute adopting just such a rule for cases like the one before us:

> "[I]n any preliminary hearing, criminal trial, or other criminal proceeding, for violation of any provision of Division 10 (commencing with Section 11000) of the Health and Safety Code, evidence of informa-

[5] *People* v. *Durr,* 28 Ill. 2d 308, 192 N. E. 2d 379; *People* v. *Nettles,* 34 Ill. 2d 52, 213 N. E. 2d 536; *People* v. *Connie,* 34 Ill. 2d 353, 215 N. E. 2d 280; *People* v. *Freeman,* 34 Ill. 2d 362, 215 N. E. 2d 206; *People* v. *Miller,* 34 Ill. 2d 527, 216 N. E. 2d 793. Cf. *People* v. *Pitts,* 26 Ill. 2d 395, 186 N. E. 2d 357; *People* v. *Parren,* 24 Ill. 2d 572, 182 N. E. 2d 662.

[6] *State* v. *Cookson,* 361 S. W. 2d 683 (Mo. Sup. Ct.); *Simmons* v. *State,* 198 Tenn. 587, 281 S. W. 2d 487; *People* v. *Coffey,* 12 N. Y. 2d 443, 191 N. E. 2d 263. But see *People* v. *Malinsky,* 15 N. Y. 2d 86, 209 N. E. 2d 694. Cf. *Stelloh* v. *Liban,* 21 Wis. 2d 119, 124 N. W. 2d 101; *Baker* v. *State,* 150 So. 2d 729 (Fla. App.); *State* v. *Boles,* 246 N. C. 83, 97 S. E. 2d 476.

> tion communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, shall be admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure." California Evid. Code § 1042 (c).[7]

The reasoning of the Supreme Court of New Jersey in judicially adopting the same basic evidentiary rule was instructively expressed by Chief Justice Weintraub in *State* v. *Burnett,* 42 N. J. 377, 201 A. 2d 39:

> "If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted. The result would be that the State could use the informant's information only as

[7] In the present case California has filed a helpful *amicus* brief, advising us that the validity of this provision is now before the Supreme Court of California. *Martin* v. *Superior Court* (LA 29078). The statute was enacted to modify that court's decision in *Priestly* v. *Superior Court,* 50 Cal. 2d 812, 330 P. 2d 39. See also *Ford* v. *City of Jackson,* 153 Miss. 616, 121 So. 278.

a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief.

. . . . .

"We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure, but rather as a sanction to compel enforcement officers to respect the constitutional security of all of us under the Fourth Amendment. *State v. Smith,* 37 *N. J.* 481, 486 (1962). If the motion to suppress is denied, defendant will still be judged upon the untarnished truth.

. . . . .

"The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an *ex parte* proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the

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> informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness." 42 N. J., at 385–388, 201 A. 2d, at 43–45.

What Illinois and her sister States have done is no more than recognize a well-established testimonial privilege, long familiar to the law of evidence. Professor Wigmore, not known as an enthusiastic advocate of testimonial privileges generally,[8] has described that privilege in these words:

> "A genuine privilege, on . . . fundamental principle . . . , must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness

[8] See 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961).

> to the government and discourages others from entering into a like relationship.
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> "That the government has this privilege is well established, and its soundness cannot be questioned." (Footnotes omitted.) 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961).

In the federal courts the rules of evidence in criminal trials are governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [9] This Court, therefore, has the ultimate task of defining the scope to be accorded to the various common law evidentiary privileges in the trial of federal criminal cases. See *Hawkins* v. *United States,* 358 U. S. 74. This is a task which is quite different, of course, from the responsibility of constitutional adjudication. In the exercise of this supervisory jurisdiction the Court had occasion 10 years ago, in *Roviaro* v. *United States,* 353 U. S. 53, to give thorough consideration to one aspect of the informer's privilege, the privilege itself having long been recognized in the federal judicial system.[10]

The *Roviaro* case involved the informer's privilege, not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial itself where the issue was the fundamental one of innocence or guilt. The petitioner there had been brought to trial upon a two-count federal indictment charging sale and transportation of narcotics. According to the prosecution's evidence, the informer had been an active participant in the crime. He "had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of

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[9] Rule 26, Fed. Rules Crim. Proc.

[10] See *Scher* v. *United States,* 305 U. S. 251; *In re Quarles & Butler,* 158 U. S. 532; *Vogel* v. *Gruaz,* 110 U. S. 311.

the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged." 353 U. S., at 55. The trial court nonetheless denied a defense motion to compel the prosecution to disclose the informer's identity.

This Court held that where, in an actual trial of a federal criminal case,

> "the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. . . .
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> . . . . . .
>
> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U. S., at 60–61, 62. (Footnotes omitted.)

The Court's opinion then carefully reviewed the particular circumstances of Roviaro's trial, pointing out that the informer's "possible testimony was highly relevant . . . ," that he "might have disclosed an entrapment . . . ," "might have thrown doubt upon petitioner's identity or on the identity of the package . . . ," "might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' . . . ," and that the "informer was the sole participant, other

than the accused, in the transaction charged." 353 U. S., at 63–64. The Court concluded "that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure." 353 U. S., at 65.

What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. Indeed, we have repeatedly made clear that federal officers need *not* disclose an informer's identity in applying for an arrest or search warrant. As was said in *United States* v. *Ventresca,* 380 U. S. 102, 108, we have "recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved '*whose identity need not be disclosed* . . . was "credible" or his information "reliable." ' *Aguilar* v. *Texas, supra,* at 114." (Emphasis added.) See also *Jones* v. *United States,* 362 U. S. 257, 271–272; *Rugendorf* v. *United States,* 376 U. S. 528, 533.[11] And

[11] Some federal courts have applied the same rule of nondisclosure in both warrant and nonwarrant cases. *Smith* v. *United States,* 123 U. S. App. D. C. 202, 358 F. 2d 833; *Jones* v. *United States,* 326 F. 2d 124 (C. A. 9th Cir.), cert. denied, 377 U. S. 956; *United States* v. *One 1957 Ford Ranchero Pickup,* 265 F. 2d 21 (C. A. 10th Cir.). Other federal courts, however, have distinguished between these two classes of cases and have required the identification of informants in nonwarrant cases. *United States* v. *Robinson,* 325 F. 2d 391 (C. A. 2d Cir.); *Cochran* v. *United States,* 291 F. 2d 633 (C. A. 8th Cir.). Cf. *Wilson* v. *United States,* 59 F. 2d 390 (C. A. 3d Cir.). See

just this Term we have taken occasion to point out that a rule virtually prohibiting the use of informers would "severely hamper the Government" in enforcement of the narcotics laws. *Lewis* v. *United States,* 385 U. S. 206, 210.

In sum, the Court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for an arrest or search. Yet we are now asked to hold that the Constitution somehow compels Illinois to abolish the informer's privilege from its law of evidence, and to require disclosure of the informer's identity in every such preliminary hearing where it appears that the officers made the arrest or search in reliance upon facts supplied by an informer they had reason to trust. The argument is based upon the Due

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Comment, Informer's Word as the Basis for Probable Cause in the Federal Courts, 53 Calif. L. Rev. 840 (1965).

In drawing this distinction some of the federal courts have relied upon a dictum in *Roviaro* v. *United States,* 353 U. S. 53, 61:

"Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."

Since there was no probable cause issue in *Roviaro,* the quoted statement was clearly not necessary for decision. Indeed, an absolute rule of disclosure for probable cause determinations would conflict with the case-by-case approach upon which the *Roviaro* decision was based. Moreover, the precedent upon which this dictum was grounded furnishes only dubious support. *Scher* v. *United States,* 305 U. S. 251, the only decision of this Court which was cited, affirmed the trial judge's *refusal* to order arresting officers to reveal the source of their information.

Process Clause of the Fourteenth Amendment, and upon the Sixth Amendment right of confrontation, applicable to the States through the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U. S. 400. We find no support for the petitioner's position in either of those constitutional provisions.

The arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination. The judge was obviously satisfied that each was telling the truth, and for that reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's privilege.

Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury. "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence . . . in their own state courts . . . ." *Spencer* v. *Texas,* 385 U. S. 554, 568–569.

The petitioner does not explain precisely how he thinks his Sixth Amendment right to confrontation and cross-examination was violated by Illinois' recognition of the informer's privilege in this case. If the claim is that the State violated the Sixth Amendment by not producing the informer to testify against the petitioner, then we need no more than repeat the Court's answer to that claim a few weeks ago in *Cooper* v. *California:*

> "Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State

did not produce the informant to testify against him. This contention we consider absolutely devoid of merit." *Ante,* p. 58, at 62, n. 2.

On the other hand, the claim may be that the petitioner was deprived of his Sixth Amendment right to cross-examine the arresting officers themselves, because their refusal to reveal the informer's identity was upheld. But it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself. We have never given the Sixth Amendment such a construction, and we decline to do so now.

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

We have here a Fourth Amendment question concerning the validity of an arrest. If the police see a crime being committed they can of course seize the culprit. If a person is fleeing the scene of a crime, the police can stop him. And there are the cases of "hot pursuit" and other instances of probable cause when the police can make an arrest. But normally an arrest should be made only on a warrant issued by a magistrate on a showing of "probable cause, supported by oath or affirmation," as required by the Fourth Amendment. At least since *Mapp* v. *Ohio,* 367 U. S. 643, the States are as much bound by those provisions as is the Federal Government. But for the Fourth Amendment they could fashion the rule for arrests that the Court now approves. With all deference, the requirements of the Fourth Amendment now make that conclusion unconstitutional.

No warrant for the arrest of petitioner was obtained in this case. The police, instead of going to a magistrate

and making a showing of "probable cause" based on their informant's tip-off, acted on their own. They, rather than the magistrate, became the arbiters of "probable cause." The Court's approval of that process effectively rewrites the Fourth Amendment.

In *Roviaro* v. *United States,* 353 U. S. 53, 61, we held that where a search *without a warrant* is made on the basis of communications of an informer and the Government claims the police had "probable cause," disclosure of the identity of the informant is normally required. In no other way can the defense show an absence of "probable cause." By reason of *Mapp* v. *Ohio, supra,* that rule is now applicable to the States.

In *Beck* v. *Ohio,* 379 U. S. 89, 96, we said:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

For that reason we have weighted arrests with warrants more heavily than arrests without warrants. See *United States* v. *Ventresca,* 380 U. S. 102, 106. Only through the informer's testimony can anyone other than the arresting officers determine "the persuasiveness of the facts relied on . . . to show probable cause." *Aguilar* v. *Texas,* 378 U. S. 108, 113.[1] Without that disclosure neither we nor the lower courts can ever know whether there was "probable cause" for the arrest. Under the present decision we leave the Fourth Amendment exclusively in the custody of the police. As stated by Mr. Justice Schaefer dissenting in *People* v. *Durr,* 28 Ill. 2d 308, 318, 192 N. E. 2d 379, 384, unless the identity of the informer is disclosed "the policeman himself con-

[1] Quoting from *Giordenello* v. *United States,* 357 U. S. 480, 486.

clusively determines the validity of his own arrest." That was the view of the Supreme Court of California in *Priestly* v. *Superior Court,* 50 Cal. 2d 812, 818, 330 P. 2d 39, 43:

> "Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue. Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search."

There is no way to determine the reliability of Old Reliable, the informer, unless he is produced at the trial and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police.[2] What we do today is to encourage arrests and searches without warrants. The whole momentum of criminal law administration should be in precisely the opposite direction, if the Fourth Amendment is to remain a vital force. Except in rare and emergency cases, it requires magistrates to make the findings of "probable cause." We should be mindful of its command that a judicial mind should be interposed between the police and the citizen. We should also be mindful that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v. *United States,* 384 U. S. 855, 870.

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[2] It is not unknown for the arresting officer to misrepresent his connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer. See, *e. g., United States* v. *Pearce,* 275 F. 2d 318, 322.

NEELY *v.* MARTIN K. EBY CONSTRUCTION CO., INC.

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

No. 12. Argued January 16–17, 1967.—Decided March 20, 1967.

At the close of petitioner's evidence and again at the close of all evidence in this diversity action for damages for wrongful death of petitioner's father, respondent moved for a directed verdict. The trial judge denied the motions and submitted the case to the jury, which returned a verdict for petitioner. Respondent then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, under Federal Rule of Civil Procedure 50 (b). The trial court denied the motions and entered judgment for petitioner on the verdict. Respondent appealed, claiming that its motion for judgment *n. o. v.* should have been granted, while petitioner urged that the verdict be upheld. The Court of Appeals held that the evidence was insufficient to establish either respondent's negligence or proximate cause and reversed the judgment of the District Court "with instructions to dismiss the action." Petitioner did not file a petition for rehearing in the Court of Appeals but sought a writ of certiorari presenting the question whether the Court of Appeals could direct dismissal of the action. The order granting certiorari directed the parties to consider the question whether Rule 50 (d) and certain of this Court's decisions permit such disposition by the Court of Appeals despite Rule 50 (c) (2), which gives a party whose jury verdict is set aside by a trial court 10 days to invoke the trial court's discretion to order a new trial. *Held:*

1. Appellate courts are not barred by the Seventh Amendment's right of jury trial from granting a judgment *n. o. v.* and the statutory grant of appellate jurisdiction to the courts of appeals is broad enough to include the power to direct entry of a judgment *n. o. v.* on appeal. P. 322.

2. Rule 50 (d) is applicable where, as here, the trial court denied a motion for judgment *n. o. v.;* the Rule expressly preserves to the party prevailing in the district court the right to urge that the court of appeals grant a new trial if the jury's verdict be set aside on appeal. P. 323.

(a) Rule 50 (d), which is permissive in the nature of its directions to the courts of appeals, contains nothing indicating that such courts may not direct entry of judgment *n. o. v.* in appropriate cases. P. 324.

(b) When the trial court denied judgment *n. o. v.* and respondent appealed, jurisdiction over the case passed to the Court of Appeals and petitioner's right to seek a new trial in the trial court after her jury verdict was set aside became dependent on the disposition by the Court of Appeals under Rule 50 (d). P. 324.

3. While judgment for a defendant-appellant should not be ordered where a plaintiff-appellee urges grounds for a nonsuit or a new trial which should more appropriately be addressed to the trial court, such considerations do not justify an ironclad rule that the courts of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Pp. 325–326.

4. Rule 50 (d) provides a plaintiff-appellee with adequate opportunity to present his grounds for a new trial in the event his verdict is set aside on appeal. In addition, he may bring his grounds for a new trial to the trial court's attention when the defendant first makes a motion for judgment *n. o. v.*, or he may seek rehearing from the court of appeals after his judgment has been reversed. Pp. 328–329.

5. Petitioner did not suggest that she had a valid ground for a new trial until her brief to this Court, and there is no cause for deviating from the policy of not considering issues not presented to the Court of Appeals and not properly presented for review here. P. 330.

344 F. 2d 482, affirmed.

Kenneth N. Kripke argued the cause for petitioner. With him on the briefs was *Charles A. Friedman.*

John C. Mott argued the cause for respondent. With him on the brief were *Anthony F. Zarlengo* and *Joseph S. McCarthy.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner brought this diversity action in the United States District Court for the District of Colorado alleg-

ing that respondent's negligent construction, maintenance, and supervision of a scaffold platform used in the construction of a missile silo near Elizabeth, Colorado, had proximately caused her father's fatal plunge from the platform during the course of his employment as Night Silo Captain for Sverdrup & Parcel, an engineering firm engaged in the construction of a missile launcher system in the silo. At the close of the petitioner's evidence and again at the close of all the evidence, respondent moved for a directed verdict. The trial judge denied both motions and submitted the case to a jury, which returned a verdict for petitioner for $25,000.

Respondent then moved for judgment notwithstanding the jury's verdict or, in the alternative, for a new trial, in accordance with Rule 50 (b), Federal Rules of Civil Procedure.[1] The trial court denied the motions and entered judgment for petitioner on the jury's verdict. Respondent appealed, claiming that its motion for judgment *n. o. v.* should have been granted. Petitioner, as appellee, urged only that the jury's verdict should be upheld.

The Court of Appeals held that the evidence at trial was insufficient to establish either negligence by respond-

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[1] "(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ."

ent or proximate cause and reversed the judgment of the District Court "with instructions to dismiss the action." Without filing a petition for rehearing in the Court of Appeals, petitioner then sought a writ of certiorari, presenting the question whether the Court of Appeals could, consistent with the 1963 amendments to Rule 50 of the Federal Rules [2] and with the Seventh Amendment's guarantee of a right to jury trial, direct the trial court to dismiss the action. Our order allowing certiorari directed the parties' attention to whether Rule

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[2] Principally, the amendments added new subdivisions (c) and (d) to Rule 50:

"(c) *Same: Conditional Rulings on Grant of Motion.*

"(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

"(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

"(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

50 (d) and our decisions in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; and *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, permit this disposition by a court of appeals despite Rule 50 (c)(2), which gives a party whose jury verdict is set aside by a trial court 10 days in which to invoke the trial court's discretion to order a new trial.[3] We affirm.

Under Rule 50 (b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is "deemed" to have reserved decision on the motion. If the jury returns a contrary verdict, the party may within 10 days move to have judgment entered in accordance with his motion for directed verdict. This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, with *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389. And it is settled that Rule 50 (b) does not violate the Seventh Amendment's guarantee of a jury trial. *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243.

The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50 (b)

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[3] Petitioner presented the following question in her petition for a writ of certiorari:

"Do Rules 50 (d) and 38 (a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's motions for new trial and for judgment notwithstanding the verdict and entered judgment for the plaintiff?"

In view of the question presented by petitioner and our order granting certiorari, we do not consider whether the Court of Appeals correctly held that petitioner's evidence of negligence and proximate cause was insufficient to go to the jury.

motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n. o. v.* See *Baltimore & Carolina Line, Inc.* v. *Redman, supra.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n. o. v.* on appeal. Section 2106 of Title 28 provides that,

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

See *Bryan* v. *United States,* 338 U. S. 552.

This brings us to Federal Rules 50 (c) and 50 (d), which were added to Rule 50 in 1963 to clarify the proper practice under this Rule. Though Rule 50 (d) is more pertinent to the facts of this case, it is useful to examine these interrelated provisions together. Rule 50 (c) governs the case where a trial court has granted a motion for judgment *n. o. v.* Rule 50 (c)(1) explains that, if the verdict loser has joined a motion for new trial with his motion for judgment *n. o. v.*, the trial judge should rule conditionally on the new trial motion when he grants judgment *n. o. v.* If he conditionally grants a new trial, and if the court of appeals reverses his grant of judgment *n. o. v.*, Rule 50 (c)(1) provides that "the new

trial shall proceed unless the appellate court has otherwise ordered." On the other hand, if the trial judge conditionally denies the motion for new trial, and if his grant of judgment *n. o. v.* is reversed on appeal, "subsequent proceedings shall be in accordance with the order of the appellate court." As the Advisory Committee's Note to Rule 50 (c) makes clear, Rule 50 (c)(1) contemplates that the appellate court will review on appeal both the grant of judgment *n. o. v.* and, if necessary, the trial court's conditional disposition of the motion for new trial.[4] This review necessarily includes the power to grant or to deny a new trial in appropriate cases.

Rule 50 (d) is applicable to cases such as this one where the trial court has denied a motion for judgment *n. o. v.* Rule 50 (d) expressly preserves to the party who prevailed in the district court the right to urge that the court of appeals grant a new trial should the jury's verdict be set aside on appeal. Rule 50 (d) also emphasizes that "nothing in this rule precludes" the court of appeals "from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." Quite properly, this Rule recognizes that the appellate court may prefer that the trial judge pass first upon the appel-

[4] The Advisory Committee explains: "If the motion for new trial has been conditionally granted . . . [t]he party against whom the judgment n. o. v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n. o. v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict." 31 F. R. D. 645. See *Lind* v. *Schenley Indus. Inc.*, 278 F. 2d 79 (C. A. 3d Cir. 1960), cert. denied, 364 U. S. 835; *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F. 2d 246 (C. A. 9th Cir. 1957), cert. denied, 356 U. S. 968; *Bailey* v. *Slentz*, 189 F. 2d 406 (C. A. 10th Cir. 1951). See also *Tribble* v. *Bruin*, 279 F. 2d 424 (C. A. 4th Cir. 1960).

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lee's new trial suggestion. Nevertheless, consideration of the new trial question "in the first instance" is lodged with the court of appeals. And Rule 50 (d) is permissive in the nature of its direction to the court of appeals: as in Rule 50 (c)(1), there is nothing in Rule 50 (d) indicating that the court of appeals may not direct entry of judgment *n. o. v.* in appropriate cases.

Rule 50 (c)(2), n. 2, *supra,* is on its face inapplicable to the situation presented here. That Rule regulates the verdict winner's opportunity to move for a new trial if the *trial court* has granted a Rule 50 (b) motion for judgment *n. o. v.* In this case, the trial court denied judgment *n. o. v.* and respondent appealed. Jurisdiction over the case then passed to the Court of Appeals, and petitioner's right to seek a new trial in the trial court after her jury verdict was set aside became dependent upon the disposition by the Court of Appeals under Rule 50 (d).

As the Advisory Committee explained, these 1963 amendments were not intended to "alter the effects of a jury verdict or the scope of appellate review," as articulated in the prior decisions of this Court. 31 F. R. D. 645. In *Cone* v. *West Virginia Pulp & Paper Co., supra,* the defendant moved for a directed verdict, but the trial judge sent the case to the jury. After a jury verdict for the plaintiff, the trial court denied defendant's motion for a new trial. On appeal, the Court of Appeals reversed and ordered the entry of judgment *n. o. v.* This Court reversed the Court of Appeals on the ground that the defendant had not moved for judgment *n. o. v.* in the trial court, but only for a new trial, and consequently the Court of Appeals was precluded from directing any disposition other than a new trial. See also *Globe Liquor Co.* v. *San Roman, supra.* In *Johnson* v. *New York, N. H. & H. R. Co.,* 344 U. S. 48, this Court held that a verdict loser's motion to "set aside" the jury's verdict

did not comply with Rule 50 (b)'s requirement of a timely motion for judgment *n. o. v.* and therefore that the Court of Appeals could not direct entry of judgment *n. o. v.* And in *Weade* v. *Dichmann, Wright & Pugh, Inc., supra,* where a proper motion for judgment *n. o. v.* was made and denied in the trial court, we modified a Court of Appeals decision directing entry of judgment *n. o. v.* because there were "suggestions in the complaint and evidence" of an alternative theory of liability which had not been passed upon by the jury and therefore which might justify the grant of a new trial. 337 U. S., at 808–809.

The opinions in the above cases make it clear that an appellate court may not order judgment *n. o. v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50 (b), or where the record reveals a new trial issue which has not been resolved. Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert. Where a defendant moves for *n. o. v.* in the trial court, the plaintiff may present, in connection with that motion or with a separate motion after *n. o. v.* is granted, his grounds for a new trial or voluntary nonsuit. Clearly, where he retains his verdict in the trial court and the defendant appeals, plaintiff should have the opportunity which 50 (d) affords him to press those same or different grounds in the court of appeals. And obviously judgment for defendant-appellant should not be ordered where the plaintiff-appellee urges grounds for a nonsuit or new trial

which should more appropriately be addressed to the trial court.

But these considerations do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials. Nor do any of our cases mandate such a rule. Indeed, in *Pence* v. *United States,* 316 U. S. 332, we affirmed a Court of Appeals decision reversing the trial court's failure to grant judgment *n. o. v.* And in *New York, N. H. & H. R. Co.* v. *Henagan,* 364 U. S. 441, this Court itself directed entry of judgment for a verdict loser whose proper request for judgment *n. o. v.* had been wrongly denied by the District Court and by the Court of Appeals.[5] In view of these cases, the language of Rule 50 (d), and the statutory grant of broad appellate jurisdiction, we think a more discriminating approach is preferable to the inflexible rule for which the petitioner contends.

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[5] Since the decision in *Cone* v. *West Virginia Pulp & Paper Co.,* six courts of appeals have reversed the denial of a Rule 50 (b) motion and directed entry of judgment *n. o. v.* in addition to the Tenth Circuit's decision in this case. See, *e. g., Capital Transit Co.* v. *Gamble,* 82 U. S. App. D. C. 57, 160 F. 2d 283; *Stopper* v. *Manhattan Life Ins. Co.,* 241 F. 2d 465 (C. A. 3d Cir.), cert. denied, 355 U. S. 815; *Richmond Television Corp.* v. *United States,* 354 F. 2d 410 (C. A. 4th Cir.); *Mills* v. *Mitsubishi Shipping Co.,* 358 F. 2d 609 (C. A. 5th Cir.); *Lappin* v. *Baltimore & Ohio R. Co.,* 337 F. 2d 399 (C. A. 7th Cir.); *Massachusetts Mut. Life Ins. Co.* v. *Pistolesi,* 160 F. 2d 668 (C. A. 9th Cir.). The other circuits had rendered similar decisions prior to *Cone.* See *Ferro Concrete Constr. Co.* v. *United States,* 112 F. 2d 488 (C. A. 1st Cir.), cert. denied, 311 U. S. 697; *Brennan* v. *Baltimore & Ohio R. Co.,* 115 F. 2d 555 (C. A. 2d Cir.), cert. denied, 312 U. S. 685; *Connecticut Mut. Life Ins. Co.* v. *Lanahan,* 113 F. 2d 935, modifying 112 F. 2d 375 (C. A. 6th Cir.); *Federal Sav. & Loan Ins. Corp.* v. *Kearney Trust Co.,* 151 F. 2d 720 (C. A. 8th Cir.).

There are, on the one hand, situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation. The court of appeals may hold in an employer's suit against a union, for example, that the case is within the exclusive jurisdiction of the National Labor Relations Board, or in a libel suit, that the defendant was absolutely privileged to publish the disputed statement. In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.

On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. Although many of the plaintiff-appellee's possible grounds for a new trial, such as inadequacy of the verdict, will not survive a decision that the case should not have gone to the jury in the first place, there remain important considerations which may entitle him to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility. Another is that the trial court itself caused the insufficiency in plaintiff-appellee's case by erroneously placing too high a burden of proof on him at trial. But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court. Cf. *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571, 574.

Likewise, if the plaintiff's verdict is set aside by the trial court on defendant's motion for judgment *n. o. v.*, plaintiff may bring these very grounds directly to the court of appeals without moving for a new trial in the district court.[6] Final action on these issues normally rests with the court of appeals.

A plaintiff whose jury verdict is set aside by the trial court on defendant's motion for judgment *n. o. v.* may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S., at 217. The plaintiff-appellee should have this same opportunity when his verdict is set aside on appeal. Undoubtedly, in many cases this question will call for an exercise of the trial court's discretion. However, there is no substantial reason why the appellee should not present the matter to the court of appeals, which can if necessary remand the case to permit initial consideration by the district court.

In these cases where the challenge of the defendant-appellant is to the sufficiency of the evidence, the record in the court of appeals will very likely be a full one. Thus, the appellee will not be required to designate and print additional parts of the record to substantiate his grounds for a nonsuit (or a new trial), and it should not be an undue burden in the course of arguing for his verdict to indicate in his brief why he is entitled to a new trial should his judgment be set aside. Moreover, the appellee can choose for his own convenience when to make his case for a new trial: he may bring his grounds

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[6] The Advisory Committee's Note to Rule 50 (c)(2) explains: "Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n. o. v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial." 31 F. R. D. 646.

for new trial to the trial judge's attention when defendant first makes an *n. o. v.* motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.

In our view, therefore, Rule 50 (d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the court of appeals. If he does so in his brief—or in a petition for rehearing if the court of appeals has directed entry of judgment for appellant—the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court. If appellee presents no new trial issues in his brief or in a petition for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case. Compare *Weade* v. *Dichmann, Wright & Pugh, Inc., supra.*

In the case before us, petitioner won a verdict in the District Court which survived respondent's motion for judgment *n. o. v.* In the Court of Appeals the issue was the sufficiency of the evidence and that court set aside the verdict. Petitioner, as appellee, suggested no grounds for a new trial in the event her judgment was reversed, nor did she petition for rehearing in the Court of Appeals, even though that court had directed a dismissal of her case. Neither was it suggested that the record was insufficient to present any new trial issues or that any other reason required a remand to the District Court. Indeed, in her brief in the Court of Appeals, petitioner stated, "This law suit was fairly tried and the jury was properly instructed." It was, of course, incumbent on the Court of Appeals to consider the new trial question in the light

of its own experience with the case. But we will not assume that the court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question.

In a short passage at the end of her brief to this Court, petitioner suggested that she has a valid ground for a new trial in the District Court's exclusion of opinion testimony by her witnesses concerning whether respondent's scaffold platform was adequate for the job it was intended to perform. This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40 (1)(d)(2). See *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 428–429; *California* v. *Taylor*, 353 U. S. 553, 556–557, n. 2.

Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and therefore affirm.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS, while agreeing with the Court's construction of Rule 50, would reverse the judgment because in their view the evidence of negligence and proximate cause was sufficient to go to the jury.

MR. JUSTICE BLACK, dissenting.

I dissent from the Court's decision in this case for three reasons: First, I think the evidence in this case was clearly sufficient to go to the jury on the issues of

both negligence and proximate cause. Second, I think that under our prior decisions and Rule 50, a court of appeals, in reversing a trial court's refusal to enter judgment *n. o. v.* on the ground of insufficiency of the evidence, is entirely powerless to order the trial court to dismiss the case, thus depriving the verdict winner of any opportunity to present a motion for new trial to the trial judge who is thoroughly familiar with the case. Third, even if a court of appeals has that power, I find it manifestly unfair to affirm the Court of Appeals' judgment here without giving this petitioner a chance to present her grounds for a new trial to the Court of Appeals as the Court today for the first time holds she must.

I.

Petitioner and respondent, both in their briefs on the merits and in their oral argument, have vigorously and extensively addressed themselves to the question of whether the lower court was correct in holding that petitioner's evidence of negligence and proximate cause was insufficient to go to the jury. The Court, however, conveniently avoids facing this issue—which if resolved in petitioner's favor, would completely dispose of this case [1]—by a footnote statement that this issue was not presented in the petition for certiorari nor encompassed by our order granting certiorari. Besides the fact that this seems to me to be an overly meticulous reading of the petition for certiorari and our order granting it,[2]

[1] Heretofore, when faced with this issue, the Court has met it head-on and thus avoided unnecessarily discussing the effect of Rule 50. See, *e. g.*, *Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *United States*, 312 U. S. 450; *Halliday* v. *United States*, 315 U. S. 94.

[2] Petitioner's "Question Presented," as set out in n. 3 of the Court's opinion, is whether—in addition to Rule 50 (d)—Rule 38 (a) and the Seventh Amendment "preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial

I see no reason for the Court's refusal to deal with an issue which is undoubtedly present in this case even though not specifically emphasized in the petition for certiorari. Although usually this Court will not consider questions not presented in the petition for certiorari, our Rule 40 (1)(d)(2) has long provided that "the court, at its option, may notice a plain error not presented," and the Court has frequently disposed of cases by deciding crucial issues which the parties themselves failed to present. See, *e. g., Brotherhood of Carpenters* v. *United States,* 330 U. S. 395; *Silber* v. *United States,* 370 U. S. 717; *Boynton* v. *Virginia,* 364 U. S. 454. If, as I believe, the Court of Appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment, and certainly this is the kind of plain constitutional error that this Court can and should correct.

That the evidence was more than ample to prove both negligence and proximate cause is, I think, inescapably clear from even a cursory review of the undisputed facts in this record. Petitioner's father was killed while work-

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court denied the defendant's motions for new trial and for judgment notwithstanding the verdict and entered judgment for the plaintiff?" Certainly, if there were sufficient evidence to go to the jury, then Rule 38 (a) and the Seventh Amendment preclude the Court of Appeals from directing a dismissal of petitioner's case after she had obtained a jury verdict. To make it further clear that petitioner was challenging the Court of Appeals' ruling on the sufficiency of the evidence, the petition for certiorari also states that "petitioner does not concede for one moment that the trial court and the jury were wrong and that the appellate court was right in interpreting the evidence as to proximate cause and negligence." And our order granting certiorari, while directing counsel's attention to the question of the Court of Appeals' power to dismiss the case under Rule 50 (c) and (d), stated that this question was "[i]n addition to all the questions presented by the petition." 382 U. S. 914.

ing on the construction of a missile-launching silo in Colorado. Neely worked for an engineering firm and his job was to work on certain concrete blocks suspended 130 feet from the bottom of the silo. Respondent, a carpentry firm responsible for the construction, maintenance, and supervision of all scaffolding in the silo, constructed a wooden platform between two of the concrete blocks in order to allow workers such as Neely to go from one block to the other. The platform, however, did not cover the entire distance between the blocks nor was it level with them. Instead, it was two feet horizontally away from either block and was raised two feet vertically above the blocks. Also, a railing was constructed on one side of the platform between it and one of the blocks. No railing was placed on the other side of the platform. When Neely along with three fellow workers arrived at the silo, they were told by respondent's foreman that the platform was ready. The only way they could get from the platform to the blocks was by jumping the gap between the platform and blocks. However, because of the railing on one side of the platform, the workers could not jump directly across the two-foot gap to the block on that side, but had either to jump three feet diagonally to the block or to climb over the railing. One worker successfully leaped to the block, fastened his safety belt, and then looked back and saw Neely, who was to follow, falling head first through the hole between the platform and the block. Neely, failing to make the jump, fell to his death 130 feet below.

Petitioner's case consisted of the testimony of the day foreman, one of the carpenters who constructed the platform, and the worker who was closest to Neely when he fell. Quite understandably, in view of the strong evidence, petitioner did not call to testify the two other workers who witnessed Neely's fall or the other carpenters who worked on the platform. She did, however,

introduce several revealing photographs of the platform, blocks, and intervening gap taken immediately after the accident. On respondent's objection, the trial judge excluded several other photographs which showed nets which, after the accident, were placed under the platform for the safety of the investigators. There was testimony that neither the railing nor platform broke and that there was no grease on the platform. But when petitioner's counsel asked the day foreman whether he considered the platform safe and adequate, he replied in the negative, though this testimony, on respondent's objection, was then ordered stricken as opinion evidence on an ultimate issue. The trial court refused to allow the same question to be asked of the other witnesses. At one time, the carpenter did testify that a railing was put on only one side of the platform because lunch hour was nearing and the platform had to be completed before then.

On this evidence, which the trial judge characterized as presenting a "close case," the Court of Appeals held a verdict should have been directed for respondent. Although the court was willing to assume that there might be some negligence in the size of the platform or the placing of the railing along one side, and though it was willing to concede "that the platform might possibly have had something to do with his [Neely's] fall," 344 F. 2d 482, 486, the court purported to find no evidence, not even circumstantial evidence, that the construction of the platform was the proximate cause of the fall. I think this holding cries for reversal. If constructing a platform 130 feet in the air, at which height workmen use safety belts, with a three-foot diagonal gap over which workers must leap and with a railing which makes a direct jump impossible, does not itself show negligence and proximate cause, then it is difficult to conceive of any evidence that would. Besides the size of the platform and the presence of the railing, the photographs

shown to the jury, and reproduced in this record, reveal other possible defects in its construction: a vertical kickboard extending beyond the railing into the gap through which Neely jumped; rough boards on the floor of the platform. The fact that Neely was coming headfirst by the time he passed the block two feet below might have made it reasonable for the jury to have concluded that he tripped on these impediments rather than merely stepped in the opening. In short, I believe it was a clear violation of the Seventh Amendment to deprive petitioner of a jury verdict rendered on this evidence.

II.

Since the adoption of Rule 50, our cases have consistently and emphatically preserved the right of a litigant whose judgment—whether it be a judgment entered on the verdict or judgment *n. o. v.*—is set aside to invoke the discretion of the trial court in ruling on a motion for new trial. The first of these cases was *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, where the trial judge, unlike here, granted the defendant's motion for judgment *n. o. v.*, but in doing so failed to rule on his alternative motion for a new trial. The Court of Appeals reversed the trial court's grant of judgment *n. o. v.* to the defendant and remanded the case with directions to enter judgment on the verdict for the plaintiff, overruling defendant's contention that the trial judge should be given an opportunity to pass on his alternative motion for new trial. Holding that the trial judge should have initially ruled on this alternative motion, this Court remanded the case to the trial judge for the purpose of passing on that motion. In explaining this result the Court said:

> "The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. . . . If, how-

ever, as in the present instance, the trial court erred in granting the motion the party against whom the verdict went is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge." *Id.*, at 251–252.

The question here, however, unlike that in *Duncan*, is whether the Court of Appeals, after holding that the District Court erred in failing to direct a verdict against the plaintiff, can then order the District Court to dismiss the case and thereby deprive the verdict winner of any opportunity to ask the trial judge for a new trial in order to cure a defect in proof in the first trial. This question was first considered in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212. In *Cone*, as in this case, the question was whether the Court of Appeals could direct the dismissal of a case in which the trial court had erroneously failed to grant a directed verdict. In that case no motion for judgment *n. o. v.* had been made by the verdict loser. We held that the Court of Appeals could not under those circumstances order the dismissal of the case. Noting that "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the *first instance* of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart," *id.*, at 216 (emphasis added), we held that "a litigant should not have his right to a new trial *foreclosed* without having had the benefit of the trial court's judgment on the question," *id.*, at 217 (emphasis added). We clearly indicated that the result would have been the same had the verdict loser, as had the respondent here, unsuccessfully moved for a judgment *n. o. v.* in the trial court, for in that case, likewise, the verdict winner would have had to wait until the Court of Appeals deprived him of his verdict before presenting his grounds

for a new trial. We specifically rejected a suggestion—today accepted by the Court—that the verdict winner should have to claim his right to a new trial in the Court of Appeals or lose it. *Id.*, at 218.

Following *Cone,* we emphasized and re-emphasized in *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571, that the reason why courts of appeals are without power to dismiss cases in situations like this is that the power to determine this issue is vested exclusively in the judge who tried the case. And again, in *Weade* v. *Dichmann, Wright & Pugh, Inc.,* 337 U. S. 801, even where—as in this case—a timely motion for judgment *n. o. v.* had been made, the Court affirmed the Court of Appeals' holding that the verdict could not stand, but, relying on *Cone* and *Globe Liquor,* modified its judgment to provide the trial judge with an opportunity to decide whether the verdict winner was entitled to a new trial. *Id.*, at 809 and n. 8. See also *Johnson* v. *New York, N. H. & H. R. Co.,* 344 U. S. 48; *Fountain* v. *Filson,* 336 U. S. 681.

This issue of whether a new trial is justified after a verdict is set aside either by a trial or an appellate court is a new issue which it was not necessary to decide in the original trial. It is a factual issue and that the trial court is the more appropriate tribunal to determine it has been almost universally accepted by both federal and state courts throughout the years. There are many reasons for this. Appellate tribunals are not equipped to try factual issues as trial courts are. A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold, printed record. Thus, as we said in *Cone,* the trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues "in a perspective peculiarly available to him alone." 330 U. S., at 216. The special suitability

of having a trial judge decide the issue of a new trial in cases like this is emphasized by a long and unbroken line of decisions of this Court holding that the exercise of discretion by trial judges in granting or refusing new trials on factual grounds is practically unreviewable by appellate courts. See, *e. g., Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481–482; cited with approval in *Montgomery Ward & Co.* v. *Duncan, supra,* at 253, n. 12.

Today's decision is out of harmony with all the cases referred to above. The Court's opinion attempts to justify its grant of power to appellate courts by pointing to instances in which those courts, and even assertedly this Court, have utilized this power in the past. The Court cites *Pence* v. *United States,* 316 U. S. 332, and *New York, N. H. & H. R. Co.* v. *Henagan,* 364 U. S. 441, as such instances. In *Pence,* the Court of Appeals reversed the trial court's refusal to grant judgment *n. o. v.* and remanded for further consistent proceedings. We affirmed without the slightest indication that we felt the Court of Appeals' mandate deprived the verdict winner of the chance to move for a new trial on remand. Neither did the Court indicate that this would be the effect of its mandate in *Henagan* where it remanded the case to the District Court to enter judgment *n. o. v.* for the verdict loser. And the same can be said of almost every other post-*Cone* court of appeals decision cited by the Court in note 5. Cf. *Johnson* v. *New York, N. H. & H. R. Co., supra,* at 54, n. 3.

The Court also attempts to justify its new grant of power to appellate judges by a strained process of reasoning. First, the Court suggests that the power of an appellate court to dismiss a case after setting aside a litigant's verdict can be derived from 28 U. S. C. § 2106. This idea, of course, was first suggested by a dissent in

Johnson v. *New York, N. H. & H. R. Co., supra,* at 65, which argued that because of § 2106 "the discretion now rests with the Court of Appeals to grant a new trial or to direct a verdict according to law on the record already made." This contention, however, was not deemed worthy of argument or comment either by the Court in its opinion or by others who dissented in the *Johnson* case. Section 2106 merely deals with the general power of appellate courts and indicates no congressional purpose to overcome the long-standing and established practice, recognized by this Court's decisions and Rule 50, that the discretion to decide whether a new trial should be granted, when the appellate court finds a gap in the supporting evidence, rests with the trial judge and not with the appellate court. It begs the question to argue that it is appropriate for an appellate court in such circumstances to order a dismissal merely because § 2106 provides that a court of appeals may direct the entry of an "appropriate judgment."

The Court further purports to derive this power from the provisions of Rule 50 (c) and (d). The Court notes that under Rule 50 (c)(1), where the trial judge grants a judgment *n. o. v.* and either grants or denies the conditional motion for new trial, an appellate court in reversing the judgment *n. o. v.* has "the power to grant or to deny a new trial in appropriate cases." But, as the Court fails to recognize, the crucial prerequisite to the exercise of this appellate power is a ruling in the first instance, as required in *Cone,* by the trial court on the motion for new trial. Here that crucial prerequisite is missing.

The Court then proceeds to find Rule 50 (c)(2) inapplicable on its face to a situation where the trial court denies a judgment *n. o. v.* but an appellate court orders that one be entered. In doing so, the Court ignores the

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purpose of Rule 50 (c)(2). The Rules Committee explained this provision as follows:

> "Subdivision (c) (2) is a reminder that the verdict-winner is entitled, even after entry of judgment n. o. v. against him, to move for a new trial in the usual course." 31 F. R. D. 646.

The rule does not remotely indicate that the verdict winner loses this right to move for a new trial if the trial court's entry of judgment *n. o. v.* against him is on direction by the appellate court rather than on its own initiative. Sections (c) and (d) were added to Rule 50 in 1963, after all the cases discussed above had been decided. As the Notes of the Rules Committee indicate, these amendments were made to implement those decisions which had emphasized the importance of having trial judges initially determine the factual issue of whether a new trial is justified in cases where judgment *n. o. v.* has been entered against the verdict winner, either by the trial or appellate court. The Committee at no place hinted that the amendments were meant to change the practice established by those cases, and, to the contrary, it specifically stated that, "The amendments do not alter the effects of a jury verdict *or the scope of appellate review.*" 31 F. R. D. 645. (Emphasis added.)

Certainly this is true of Rule 50 (d). This section provides that the verdict winner, who prevailed on the motion for judgment *n. o. v.*, "*may,* as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict" (emphasis added) and that "nothing in this rule precludes it [the appellate court] from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be

granted." Because the Court finds that the rule "is permissive in the nature of its direction to the court of appeals," it concludes "there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment *n. o. v.* in appropriate cases." The Court entirely overlooks the fact that the rule is likewise permissive in the nature of its direction to the verdict winner as appellee: it provides that the verdict winner "may" ask the Court of Appeals for a new trial; it does not provide that he must do so in order to protect his right to a new trial. Contrary to the Court, I think the express failure of Rule 50 (d) to give the appellate court power to order a case dismissed indicates a clear intention to deny it any such power. The practice now permitted by Rule 50 (d) was first embodied in the Notes of the Rules Committee to the proposed, but unadopted, amendments of 1946. The Notes suggested that a verdict winner could, as appellee, assign grounds for a new trial in the event the appellate court set aside his verdict. In *Cone,* however, we expressly rejected the contention that the verdict winner's failure, as appellee, to assign grounds for a new trial in the appellate court gave that court the power to deny him a new trial. *Cone* v. *West Virginia Pulp & Paper Co., supra,* at 218 and n. 6. This rejection was extensively discussed by the commentators, most of whom concluded that under *Cone* the verdict winner should be allowed a chance to present his motion for new trial at the trial court level.[3] Finally, when Rule 50 (d) was adopted, there was not the slightest indication that it was intended to adopt the practice that we found objectionable in *Cone.* In fact, it was carefully worded to avoid giving the appellate court any power to *deny* a

[3] See, *e. g.,* Comment, 51 Nw. U. L. Rev. 397, 400–402 (1956); Note, 58 Col. L. Rev. 517, 524–525 (1958).

new trial. I do not believe this omission unintentional, for the language of Rule 50 (c)(1), adopted at the same time, does purport to give the appellate court this power when it reverses a judgment *n. o. v.* and the trial court has already denied the verdict loser's conditional motion for new trial. It does so clearly by providing that "subsequent proceedings shall be in accordance with the order of the appellate court."

In short, today's decision flies in the teeth of Rule 50 (c)(2), and our cases which that rule was intended to implement, by giving the Court of Appeals the power, clearly withheld by Rule 50 (d), to substitute its judgment for the trial court's and then decide that justice requires no new trial.

III.

Even were I to agree with the Court that courts of appeals have the power to deny a verdict winner a new trial, I could not agree to the affirmance of such a denial here. Here, so far as appears from the record, the Court of Appeals never even gave a thought to the question of whether petitioner was entitled to a new trial, but simply required that the district judge dismiss the lawsuit as though it were an automatic necessity. And petitioner, in seeking to support her verdict without directing the Court of Appeals' attention to any grounds for a new trial, had every right to rely on our past cases which plainly told her that she was entitled to make her motion for a new trial to the trial judge who is far more able to determine whether justice requires a new trial. While in one breath the Court says that it "will not assume that the court [of appeals] ignored its duty" to "consider the new trial question," in another breath it notes that "[t]his matter was not raised in the Court of Appeals." And because petitioner failed to present grounds for a new trial to the Court of Appeals, the Court, while recognizing that she here presents grounds for a new trial

which might require decision by the trial court, refuses to consider these grounds.

In refusing to consider petitioner's grounds for a new trial, the Court completely ignores what was done in *Weade* v. *Dichmann, Wright & Pugh, Inc., supra.* There we ordered the case remanded to the trial court to pass on petitioner's motion for new trial because petitioner suggested to this Court that there was an alternative theory presented by the complaint and evidence. However, nowhere in the record in that case was it indicated that petitioner had argued this alternative theory in the Court of Appeals, and nothing in our opinion indicates any such requirement. The Court correctly summarizes *Weade* as holding that "an appellate court may not order judgment *n. o. v.* where . . . *the record reveals a new trial issue which has not been resolved.*" (Emphasis added.) I think the record here reveals such an issue and that, at the very least, petitioner should now be given a chance to argue that issue to the Court of Appeals.

The record here clearly reveals that there were gaps in petitioner's case which she might, if given a chance, fill upon a new trial. First, only one of the three eyewitnesses to Neely's fall and only one of the carpenters who worked on the platform were called as witnesses. Second, the trial court excluded testimony by all the witnesses as to their opinions of the adequacy of the platform. Third, several of petitioner's very relevant photographs of the platform were excluded by the trial judge. From such circumstances as these the trial judge might properly have concluded that petitioner was entitled to a new trial to fill the gaps in her case. It is particularly pertinent in this respect that the Court of Appeals itself said:

> "It may, of course, be conceded that the platform might possibly have had something to do with his

fall, but there is nothing in the record to show what it was." 344 F. 2d, at 486.

It surely cannot be dismissed as idle conjecture to think that petitioner could, if given a chance, introduce sufficient evidence to prove to the most exacting fact finder that the three-foot diagonal gap in the platform 130 feet above the ground had something to do with this fall and this death.

O'BRIEN ET AL. *v.* UNITED STATES.

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

No. 823. Decided March 20, 1967.

Certiorari granted; 365 F. 2d 601, vacated and remanded.

Philip A. Gillis for O'Brien and *Ivan Barris* for Parisi, petitioners.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Mervyn Hamburg* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, judgment vacated and the case is remanded to the United States District Court for the Eastern District of Michigan for a new trial should the Government seek to prosecute petitioners anew. *Black* v. *United States,* 385 U. S. 26.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Petitioners in this case, Charles O'Brien and Thomas Parisi, were convicted on several counts of removing merchandise from a bonded area under the supervision of the United States Customs Service, in violation of 18 U. S. C. § 549. The items involved were, on the first count, applicable only to petitioner O'Brien, 14 cases of marble slabs; on the second count, a marble statue of St. Theresa; on the third count, 21 cases of valves and valve handles.

The issues raised in the petition for certiorari involve questions as to the sufficiency of the indictment and alleged errors at trial, none of which could well be deemed worthy of review by this Court. However, the

Solicitor General in his response commendably notified the Court that pursuant to a general review of the use of "electronic eavesdropping or wiretapping," he discovered that a microphone had been installed in a commercial establishment owned by an acquaintance of petitioner O'Brien. A conversation in which O'Brien participated, occurring after the indictment and concerning his forthcoming trial, was overheard. The Solicitor General characterizes the episode as follows: "That conversation, although overheard by the monitoring agents and summarized in their logs, was not mentioned in any F. B. I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case."

The Solicitor General further revealed a later conversation which he characterizes as follows: "It also appears from the logs of this surveillance . . . that petitioner O'Brien was on the premises and was overheard in January 1964, when he placed a telephone call and requested one of his attorneys to file an application relating to the territorial conditions of his release on bail. This conversation, like the one in May 1963, was noted in the logs of the monitoring agents but was not communicated in any manner outside the F. B. I." (Footnote omitted.)

On the basis of these representations the Solicitor General indicated that he would "not oppose" a remand of the case for an adversary hearing as to the effect of this activity on the validity of petitioners' convictions. The Court, however, without a word of explanation, vacates the convictions and remands the entire case for a new trial. I must respectfully but emphatically dissent.

As I stated in dissenting from a similar disposition in *Black* v. *United States,* 385 U. S. 26, 31: "I agree, of course, that petitioner is entitled to a full-scale development of the facts, but I can see no valid reason why this unimpeached conviction should be vacated at this

stage. . . . [A] new trial is not an appropriate vehicle for sorting out the eavesdropping issue because until it is determined that such occurrence vitiated the original conviction no basis for a retrial exists. The Court's action puts the cart before the horse."

In *Black* the Court's disposition might conceivably be accounted for by the fact that the Government admitted that the contents of the recorded conversation had been incorporated in memoranda used by the prosecuting attorneys.* In the present case, however, I can think of no justification for going beyond the position of the Solicitor General and forcing the Government to go through the effort and expense of an entirely new trial on the basis of this peripheral, totally insignificant, and uncommunicated eavesdropping. As in *Black,* I consider the Court's action quixotically precipitate.

I would deny this petition for certiorari, but, given the Solicitor General's acknowledgment that electronic eavesdropping or wiretapping did in fact take place, I would remand the case to the District Court for a full hearing as to the circumstances and effects of these activities.

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*In *Schipani* v. *United States,* 385 U. S. 372, the Court properly vacated the conviction because the Solicitor General conceded that evidence used at trial was tainted.

GULF-CANAL LINES, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 947. Decided March 20, 1967.

258 F. Supp. 864, affirmed.

Harry C. Ames, Jr., T. Randolph Buck, Nuel D. Belnap and *Richard J. Hardy* for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al.

Nuel D. Belnap and *Richard J. Hardy* for Waterways Freight Bureau, as *amicus curiae,* in support of appellants.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

NEW YORK *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

No. 968. Decided March 20, 1967.

256 F. Supp. 634, affirmed.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, *Dunton F. Tynan,* Assistant Solicitor General, *Matthew A. Tiffany,* Assistant Attorney General, and *Walter J. Myskowski* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al.

R. J. Murphy and *D. M. Tolmie* for appellee railroads; *William C. Sennett,* Attorney General of Pennsylvania, and *Edward Friedman* for the Commonwealth of Pennsylvania, and *Eugene T. Liipfert* for the Port Authority of Allegheny County et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

ARDEN FARMS CO. ET AL. *v.* STATE DEPARTMENT OF AGRICULTURE ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1004. Decided March 20, 1967.

245 Ore. —, 420 P. 2d 379, appeal dismissed.

James C. Dezendorf for appellants.

Robert Y. Thornton, Attorney General of Oregon, and *Harold E. Burke* and *Don Parker,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

RAILROAD TRANSFER SERVICE, INC. *v.* CITY OF CHICAGO ET AL.

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

No. 209. Argued February 13, 1967.—Decided March 27, 1967.

Petitioner, in 1955, was engaged by the railroads in replacement of another motor carrier to transport passengers between rail terminals in Chicago. To block the replacement the city amended an ordinance primarily regulatory of taxicab companies by requiring new companies seeking to perform transfer services to obtain licenses by, *inter alia,* demonstrating their ability to satisfy the public convenience and necessity. This Court, rejecting the city's contention that the challenge was premature, invalidated that requirement in *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, a suit brought by petitioner and the railroads. Thereafter the city repealed the invalid section, but added or left unchanged other provisions, so that under the amended ordinance the city still requires a license for each vehicle, for which a detailed application has to be filed and a fee paid. An applicant is required to hire only Chicago residents as drivers and to maintain its principal business place in Chicago. A license, which has to be renewed each year following the same detailed application procedure, will be issued if the city after investigation finds the applicant "qualified," and the vehicle for which the license is sought is in "safe and proper condition." The amended ordinance provides for a fine up to $100 a day for each violation of its provisions. Petitioner brought this action seeking a declaration that the ordinance imposes unconstitutional burdens on interstate commerce and regulates an area pre-empted by the Interstate Commerce Act. While that case was pending, the city again demanded that petitioner halt operations unless it "fully complied" with the ordinance, which it again amended to impose additional requirements, including the filing of detailed financial reports. The District Court dismissed petitioner's action as premature. The Court of Appeals affirmed. *Held:*

1. Petitioner's action is not premature. Though petitioner obtained its licenses after filing this suit, it has continued to operate only by paying the license fees into court and the city has con-

tinually demanded that petitioner fully comply with the ordinance or be subjected to penalties for not doing so. Pp. 357–358.

2. The ordinance is invalid as reserving to the city the power which the Interstate Commerce Act gives to the railroads of determining who may transfer interstate passengers and baggage between railroad terminals and as imposing requirements the total effect of which is to burden interstate commerce. *Atchison, T. & S. F. R. Co., supra,* followed. Pp. 358–360.

358 F. 2d 55, reversed.

Amos M. Mathews argued the cause for petitioner. With him on the briefs was *David Axelrod.*

Raymond F. Simon argued the cause and filed a brief for respondents.

Joseph H. Hays, James W. Nisbet, Ed White and *J. D. Feeney* filed a brief for Chicago Terminal Railroads, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case arises from more than a decade of controversy between Railroad Transfer Service, Inc., and the City of Chicago over the city's persistent efforts to regulate Transfer's business, under contract with the railroads, of daily transporting by motor vehicle thousands of interstate railroad passengers between the city's rail terminals. In 1955 the railroads hired Transfer to replace another motor carrier in performing this interterminal transfer service. Bent on blocking this replacement, the city then amended Chapter 28 of its Municipal Code, which had before been primarily directed at regulating taxicab companies, to require that new companies seeking to perform the transfer service obtain licenses from the city by demonstrating, among other things, their ability to satisfy the public convenience and necessity. Because the city threatened to fine Transfer and arrest its drivers if it operated without a city license for each vehicle, Transfer, without attempting to obtain such licenses, and the rail-

roads brought suit against the city to challenge the validity of the public-convenience-and-necessity section of the ordinance. In *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, rejecting the city's argument that the challenge was premature, we held that section "completely invalid insofar as it applies to Transfer . . . ." *Id.*, at 89.

In 1959, after our decision in *Atchison,* the city repealed the invalid section, added some new provisions, and amended or left unchanged others which clearly applied to Transfer but were not specifically dealt with in our *Atchison* opinion. The amended ordinance, still making it unlawful for Transfer to operate without obtaining licenses from the city,[1] provides that an applicant for a license must, among other things:[2] pay a license fee,[3] hire only Chicago residents as its drivers,[4] maintain its principal place of business in Chicago,[5] and file a detailed

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[1] § 28–2. (The provisions herein cited are from the current Municipal Code.)

[2] No vehicle may be licensed until it has been inspected by the city and found to be "in safe operating condition and to have adequate . . . facilities which are clean and in good repair for the comfort and convenience of passengers" (§ 28–4), unless it has at least two doors on each side (§ 28–4.1), and unless the licensee has a specified amount of public liability, property damage, and workmen's compensation insurance evidenced by policies filed with the city (§ 28–12). The validity of these provisions is not specifically challenged by Transfer.

[3] Section 28–7 imposes an annual fee of $40 for each terminal vehicle, clearly defined in § 28–1 (p) to include Transfer's vehicles, and provides that such fee "shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles . . . ."

[4] Provisions of Chapter 28 require that drivers be public chauffeurs licensed by the city, §§ 28–1 (*l*), 28–9, and several provisions of Chapter 28.1 appear to make residence in the city a condition to being licensed as a chauffeur, *e. g.*, §§ 28.1–3, 28.1–9, and 28.1–14.

[5] Section 28–5.1, added for the first time in 1959.

written application.[6] Upon receipt of an application, the city must investigate the applicant's "character and reputation . . . as a law abiding citizen" and his "financial ability" to render "safe and comfortable" service, to replace and maintain equipment, and to pay all judgments arising out of vehicle operation. If the city finds that the applicant is "qualified" and that the vehicle for which the license is sought is in "safe and proper condition," the amended ordinance requires the city to issue the license.[7] Licenses are valid for only one year, and

[6] Section 28–5, describing the information to be contained in the application, was amended in 1959 to provide:

"If the applicant is affiliated or to become affiliated or identified with any person [defined elsewhere to include a corporation] by . . . service agreement, the application shall contain the full name, Chicago business address and telephone number of said affiliate, and a copy of the agreement with said affiliate, if any, shall be filed with the application."

Since Transfer operates under a service contract with the railroads, it is conceivable that the railroads might be considered affiliates of Transfer. However, it is clear that the provisions of the ordinance requiring an affiliate to maintain its principal place of business in Chicago, to register with the Commissioner, to carry certain insurance, and to comply with all provisions of the ordinance and rules issued by the Commissioner, §§ 28–5.1, 28–12.1, 28–13.1, cannot be validly applied to the railroads, and the city does not now suggest that they can.

[7] § 28–6:

"Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. *If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed, and that the applicant is qualified to pursue the occupation*

under the amended ordinance a licensee must annually go through this detailed application procedure. Outstanding licenses are revocable on a number of grounds at the city's discretion.[8] Finally, the ordinance provides a fine of up to $100 for each violation of any of its provisions and specifies that each day such violation continues shall be deemed a separate offense.[9]

With the ordinance thus amended, the city in 1960 demanded that Transfer apply for licenses. Transfer did so, after unsuccessfully attempting to pay the license fees under protest, and then brought this present lawsuit against the city, asking the District Court to declare the above-mentioned provisions of the ordinance invalid as unconstitutional burdens on interstate commerce and as unconstitutional attempts to regulate in an area preempted by the Interstate Commerce Act, 24 Stat. 379, as

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of a cabman or coachman [defined in § 28–1 (m) to include the proprietor of a terminal vehicle], *the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, to terminate on the 31st day of December following the date of issue, provided that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued.*" The italicized sentence was added in 1959.

[8] Prior to 1963 a license was subject to discretionary revocation only if it was obtained by an application in which a material fact was omitted or stated falsely. § 28–15.1. This section was amended in 1963 to authorize revocation also where a licensee fails "to carry out any representation made to the Commissioner before the issuance of such license," and to make clear that revocation under this section may extend to *all* licenses held by a person who obtains any single license by misrepresentation.

Under § 28–14, the city's vehicle commissioner may suspend a license at any time that a vehicle becomes "unsafe for operation or . . . unfit for public use," and "[i]n determining whether any . . . vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city."

[9] § 28–32.

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amended, 49 U. S. C. § 1 *et seq.* While the case was pending, the city again demanded that Transfer cease and desist operations unless it "fully complied" with the ordinance [10] and again amended its ordinance to impose new requirements on Transfer such as filing detailed financial reports and opening its books and records for city inspection.[11] Nevertheless, the District Court dismissed Transfer's action as premature. Because Transfer had continued to operate by paying its license fees into court and because the city had taken no further action to enforce its ordinance, the Court of Appeals affirmed, holding Transfer's complaint premature and the ordinance valid

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[10] The city also ordered Transfer's drivers to submit to medical examinations and fingerprinting.

[11] § 28–30.1:

"Every cabman, *corporation* and affiliate shall keep and provide accurate books and records of account of his operations at his place of business in the city. On or before May 1 of each year, every cabman, *corporation* and affiliate shall file with the Commissioner a profit and loss statement for the preceding calendar year, showing all his earnings and expenditures for operation, maintenance and repair of property, depreciation expense, premiums paid for workmen's compensation and public liability insurance, and taxes paid for unemployment insurance and social security, and all state and local license fees, property taxes and Federal income taxes, and a balance sheet taken at the close of said year.

"The Commissioner . . . shall have access to the property, books, contracts, accounts and records during normal business hours at said place of business, for such information as may be required for the effective administration and enforcement of the provisions of this chapter . . . .

"*In addition to the foregoing reports, each cabman shall within thirty days after the six months' period ended December 31 and within thirty days after the six months' period ended June 30 of each year file a sworn statement with the Commissioner showing his gross fares collected and his operating expenses for the six months immediately preceding said dates.*"

The italicized provisions were added in 1963. As first enacted in 1959, the section was applicable only to taxicab companies.

on its face. 358 F. 2d 55. We granted certiorari to consider these two holdings and conclude that the action is not premature and that the ordinance is invalid.

First. The prematurity arguments which the city makes here are similar to the ones it made and we rejected in *Atchison.* Though the city argues that some of the challenged provisions of the ordinance do not apply to Transfer,[12] the Court of Appeals clearly considered them applicable. Though the city argues that it does not retain as much power to deny Transfer a license as Transfer fears,[13] it is clear that "the City claims *at least some power* . . . to decide whether a motor carrier may transport passengers from one station to another." 357 U. S., at 85 (emphasis added). That was enough in *Atchison* to enable Transfer to attack the public-convenience-and-necessity requirement, even though the city there disclaimed any power to deny a license because of economic considerations. It is enough here. It is difficult to imagine a controversy more actual, alive, and ripe than this one. It has lasted for more than a decade. Though Transfer obtained its 1960 licenses after it filed this lawsuit to challenge the ordinance, it has continued to operate only by paying the license fees into court. The city has continually—and even while this case was pending—amended its ordinance to regulate Transfer further

[12] For instance, the city argues that § 28–30.1 does not apply to Transfer. But, as the Court of Appeals apparently recognized, the 1963 amendments of this section make its first two paragraphs applicable to Transfer. See note 11, *supra.*

[13] The city argues that its commissioner may only consider the so-called "safety factors" specifically enumerated in § 28–6 in determining whether Transfer is "qualified" to perform the interterminal service. See n. 7, *supra.* Transfer, perhaps understandably, is afraid that the word "qualified" gives the commissioner unlimited discretion to consider the very same nonsafety factors that he previously could consider under the invalid public-convenience-and-necessity provision.

and has continually demanded that Transfer fully comply with the ordinance. Though the city now disclaims any power to "stop" Transfer's operations, it does not give up its power under the ordinance to fine Transfer and arrest its drivers for operating without licenses or its power to revoke for discretionary reasons all licenses which Transfer may obtain.[14] In short, although Transfer continues to operate, it is only at the city's reluctant sufferance.[15] If the ordinance is invalid insofar as it applies to Transfer, then, as we said in *Atchison,* "that company was not obligated to apply for a . . . [license] and submit to the administrative procedures incident thereto before bringing this action." 357 U. S., at 89.

Second. The rationale of *Atchison* compels our holding that the provisions of the ordinance now challenged by Transfer cannot be validly applied to it. In *Atchison,* recognizing that Transfer's "service is an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act,"

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[14] At the same time the city was assuring the District Court that its threat to stop Transfer was an "idle" one, it was adding a new provision to the ordinance which seems custom-tailored to make Transfer's already precarious position more precarious. Section 28–31.2, added in 1963, provides:

"No license which has been revoked, surrendered, cancelled or not applied for within a period of seven months after such license application is due, shall hereafter be issued."

[15] The city argues that Transfer cannot challenge the principal-place-of-business requirement because Transfer now has its principal, and only, place of business in Chicago. The provision quoted in n. 14, *supra,* makes it clear that neither Transfer, which might want to change its place of business, nor the railroads, which might want to hire another transfer agent or perform the service themselves, can afford to make any change prior to challenging the place-of-business requirement. Under § 28–15, "[i]f any licensee abandons his . . . place of business in the city . . . all his licenses shall be revoked." After such revocation, no new licenses may be issued.

id., at 89, we pointed to various provisions of the Act [16] which in our view completely precluded the city "from exercising *any veto power* over such transfer service," *id.*, at 85 (emphasis added). The Act, as we said in *Atchison*, gives the railroads, not the city, the "discretion to determine who may transfer interstate passengers and baggage between railroad terminals." *Id.*, at 84–85. That power, that discretion, is precisely what the comprehensive licensing scheme of the amended ordinance purports to reserve to the city. It matters not that the city no longer seeks to exercise that power by requiring a showing of public convenience and necessity. The total effect of the current ordinance on Transfer's operations and the burdens it places on interstate commerce are the same. As we recognized in *Atchison*, the city retains authority to insist that Transfer obey "general safety regulations" such as traffic signals and speed limits. *Id.*, at 88. Many of the provisions of the current ordi-

[16] In particular, we mentioned 49 U. S. C. §§ 1 (4) and 3 (4) requiring the railroads to provide reasonable and proper facilities for the transfer of passengers between terminals, § 15 (3) giving the Interstate Commerce Commission power to establish such service, and § 302 (c) (2) providing that the interterminal service conducted by any motor carrier under contract with a railroad shall be regarded as transportation performed by the railroad and shall be subject to the same comprehensive scheme of regulation which applies to such transportation. Furthermore, under a proviso of § 302 (c), the ICC retains power to treat interterminal service as motor carrier service under § 304 for the purpose of regulating "qualifications and maximum hours of service of employees and safety of operation and equipment."

Although, at the time we decided *Atchison*, the ICC had not adopted any special regulations for interterminal transfer service, we there noted that it could do so at any time under the Act, *id.*, at 86–87, and since then, the ICC has, indeed, promulgated under § 304 certain safety regulations which are specifically applicable to motor carriers engaged in such service. See generally 49 CFR § 190.1 *et seq.*

nance, such as the requirements that Transfer maintain its principal place of business in Chicago, have its drivers reside in Chicago, file annually the most detailed financial reports, and open its books and records for city inspection, bear no resemblance to general safety regulations such as traffic signals and speed limits. Other provisions, if standing alone and enforced by means other than this particular licensing program, might possibly be justified as safety regulations.[17] *Castle* v. *Hayes Freight Lines*, 348 U. S. 61. But we need not decide that question now, for here each of these provisions is an integral part of, and cannot be divorced from, the comprehensive licensing scheme that the city seeks to impose as a whole on Transfer. See *Adams Express Co.* v. *New York*, 232 U. S. 14. Here the city seeks to enforce each and all of these related requirements by denial of a license for noncompliance and then criminal sanctions for operation without a license. This is the "veto power" which *Atchison* held the city may not exercise.

Reversed.

MR. JUSTICE HARLAN would affirm the judgment below substantially for the reasons given in the opinion of Chief Judge Hastings for the Court of Appeals, 358 F. 2d 55.

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[17] In *Atchison* we noted that the city retains authority to "exact reasonable fees for . . . use of the local streets." *Id.*, at 88. The license fees exacted here, however, were for the purpose of enforcing this invalid licensing scheme. See note 3, *supra*. Transfer cannot be compelled to pay them.

UNITED STATES *v.* FIRST CITY NATIONAL BANK OF HOUSTON ET AL.

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

No. 914. Argued February 20–21, 1967.—Decided March 27, 1967.*

Application for approval of two bank mergers was made with the Comptroller of the Currency by two banks in Houston and two banks in Philadelphia. The Comptroller, applying the standard of the Bank Merger Act of 1966, in 12 U. S. C. § 1828 (c)(5)(B) (1964 ed., Supp. II), found that the anticompetitive effect of each merger was "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." He thereupon approved the mergers notwithstanding the adverse reports made to him by the Attorney General and Federal Reserve System Board of Governors that the overall effects of the mergers would be seriously anticompetitive. The United States, acting under § 7 of the Clayton Act and without reference to the 1966 Act, thereafter brought these civil actions against the banks to prevent the mergers. The Comptroller intervened and moved to dismiss the complaints as not stating facts sufficient to support a cause of action. The District Courts, holding that the Government had the burden, which it had not satisfied, of showing that the mergers did not come within the exception embraced by § 1828 (c)(5)(B), dismissed the complaints and dissolved the statutory stays of the effectiveness of the Comptroller's approvals of the mergers. *Held:*

1. Since an action challenging a bank merger lies under the *antitrust* laws, the Government's failure to base its actions on the Bank Merger Act of 1966 does not constitute a defect in pleading. Pp. 363–364.

2. The defendant banks in an action to prevent their mergers as being anticompetitive have the burden of proving that they come within the exception in the 1966 Act which allows a merger where its adverse effects are outweighed by considerations of community convenience and need. P. 366.

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*Together with No. 972, *United States* v. *Provident National Bank et al.*, on appeal from the United States District Court for the Eastern District of Pennsylvania, argued February 21, 1967.

3. The court under the 1966 Act, which provides for *de novo* judicial review of the issues presented, shall make an independent determination of the legality of a bank merger and not merely review the banking agency's action to determine whether it is supported by substantial evidence. Pp. 366–370.

4. The stays of the effectiveness of the merger should continue pending termination of the antitrust litigation. Pp. 370–371.

No. 914; No. 972, 262 F. Supp. 397, reversed.

Assistant Attorney General Turner argued the cause for the United States in both cases. With him on the brief were *Solicitor General Marshall* and *Richard A. Posner.*

David T. Searls argued the cause for appellees First City National Bank of Houston et al. in No. 914. With him on the brief were *Harry M. Reasoner, Leon M. Payne* and *William R. Lummis. Frederic L. Ballard* argued the cause for appellees Provident National Bank et al. in No. 972. With him on the brief were *Charles I. Thompson, Jr., Tyson W. Coughlin* and *Richard C. Bull. Eugene J. Metzger* in No. 914 and *Joseph J. O'Malley* in No. 972 argued the cause for appellee Comptroller of the Currency. With them on the brief were *Robert Bloom, Charles H. McEnerney, Jr.,* and *Philip L. Roache, Jr.*

Mr. Justice Douglas delivered the opinion of the Court.

These civil suits were filed by the United States under § 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18, to prevent two bank mergers—one in Texas between the First City National Bank of Houston and the Southern National Bank of Houston, and one in Pennsylvania between the Provident National Bank and the Central Penn National Bank, both in Philadelphia.

The Comptroller of the Currency approved the mergers under the Bank Merger Act of 1966, 80 Stat. 7, 12 U. S. C.

§ 1828 (c) (1964 ed., Supp. II). The United States thereupon brought these suits in the respective District Courts and the Comptroller intervened in them. The District Courts dismissed the complaints. No. 914 (unreported); No. 972, 262 F. Supp. 397. The United States appealed, 32 Stat. 823, as amended, 15 U. S. C. § 29, and we noted probable jurisdiction, 385 U. S. 1023, 1024.

I.

It is suggested that the complaints are defective in that they fail to state that the actions are brought under the Bank Merger Act of 1966, do not even mention the Act, and that, therefore, these cases should be remanded to allow the Government to amend the complaints.

The Bank Merger Act of 1966 provides that "[a]ny action brought under the *antitrust laws*" shall be brought within a specified time (12 U. S. C. § 1828 (c)(7)(A)); it also specifies the standards to be applied by a court in a judicial proceeding challenging a bank merger "on the ground that the merger . . . constituted a violation of any *antitrust laws* other than section 2 of [the Sherman Act]" (12 U. S. C. § 1828 (c)(7)(B)); and it provides immunity from such an attack if those standards are met. Section 1828 (c)(8) provides that, "[f]or the purposes of [§ 1828 (c)], the term 'antitrust laws' means . . . [the Sherman Act, the Clayton Act], and any other Acts in pari materia." (Emphasis added.) Thus, an action challenging a bank merger on the ground of its anticompetitive effects is brought under the antitrust laws. Once an action is brought under the antitrust laws, the Bank Merger Act provides a new defense or justification to the merger's proponents—"that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to

be served." 12 U. S. C. § 1828 (c)(5)(B). There is no indication that an action challenging a merger on the ground of its anticompetitive effects is bottomed on the Bank Merger Act rather than on the antitrust laws. What is apparent is that Congress intended that a defense or justification be available once it had been determined that a transaction would have anticompetitive effects, as judged by the standards normally applied in antitrust actions. Thus, the Government's failure to base the actions on the Bank Merger Act of 1966 does not constitute a defect in its pleadings. Nor is the Government's failure to mention the Bank Merger Act fatal, for, as we shall see, the offsetting community "convenience and needs," as specified in 12 U. S. C. § 1828 (c)(5)(B), must be pleaded and proved by the defenders of the merger.

II.

An application for approval of the Texas merger was made to the Comptroller of the Currency pursuant to 12 U. S. C. § 1828 (c)(5)(B), which provides that he shall not approve the merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless [he] finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Requests were made of the Attorney General and the Federal Reserve Board pursuant to 12 U. S. C. § 1828 (c)(4) for their views and both submitted reports to the Comptroller that the merger would have serious anticompetitive effects. The Comptroller nonetheless approved it.

The same procedure was followed in the Pennsylvania case, and the Attorney General and Federal Reserve sub-

mitted adverse reports. Nonetheless the Comptroller approved this merger also. And, as we have said, these civil suits were instituted to enjoin the mergers under § 7 of the Clayton Act.

Section 7 of the Clayton Act condemns mergers where "the effect of such acquisition may be substantially to lessen competition." The Bank Merger Act of 1966 did not change that standard or the machinery for obtaining the prior approval of the Comptroller and a preliminary expression of views by the Attorney General and the Federal Reserve, but it added an additional standard for the Comptroller. Section 1828 (c)(5)(B) says, as already noted, that no merger shall be approved where the effect "may be substantially to lessen competition" unless the responsible agency, in this case the Comptroller, "finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." And that subsection goes on to say: "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

Section 1828 (c)(7)(B) provides that in a judicial proceeding attacking a merger on the ground that it violates the antitrust laws "the standards applied by the court shall be identical with" those the banking agencies must apply. And 12 U. S. C. § 1828 (c)(7)(A) states that "In any such action, the court shall review *de novo* the issues presented." (Emphasis added.)

Section 1828 (c)(7)(A) also provides that the commencement of an antitrust action in the courts "shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order."

It is around these new provisions of the 1966 Act and their interplay with § 7 of the Clayton Act that the present controversy turns.

First is the question whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the exception of 12 U. S. C. § 1828 (c)(5)(B) or whether it is on the Government. We think it plain that the banks carry the burden. That is the general rule where one claims the benefits of an exception to the prohibition of a statute. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 44–45. The House Report (No. 1221, 89th Cong., 2d Sess.) makes clear that antitrust standards were the norm and anticompetitive bank mergers, the exception: ". . . the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an *exception* in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served . . . that it would be in the public interest to permit it." (Emphasis added.) *Id.*, at 3–4.

The sponsor of the bill that was finally enacted, Congressman Patman, flatly stated: "It should be clearly noted that the burden of establishing such 'convenience and needs' is on the banks seeking to merge; and when we say clearly outweighed we mean outweighed by the preponderance of the evidence." 112 Cong. Rec. 2333–2334 (Feb. 8, 1966).

We therefore disagree with the views of the lower courts to the contrary.

This problem is, of course, subtly merged with the question whether judicial review of the Comptroller's decision is in the category of other administrative rulings which are sustained unless a court is persuaded that the

agency's action is clearly unsupported or not supported by substantial evidence.

The 1966 Act was the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversy that finally abated in Congress to be finally resolved in the courts. So far as review of administrative agency action is concerned, we have only this to say. Prior to the 1966 Act administrative approval of bank mergers was necessary. Yet in an antitrust action later brought to enjoin them we never stopped to consider what weight, if any, the agency's determination should have in the antitrust case. See *United States* v. *Philadelphia National Bank,* 374 U. S. 321; *United States* v. *First Nat. Bank,* 376 U. S. 665. Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure. *United States* v. *Radio Corporation of America,* 358 U. S. 334; *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651; *United States* v. *Philadelphia National Bank, supra; United States* v. *First Nat. Bank, supra.* We have found no indication that Congress designed judicial review differently under the 1966 Act than had earlier obtained.

In fact, as already noted, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply." 12 U. S. C. § 1828 (c) (7)(B). This language does not express the conventional standard, *i. e.,* whether the agency's action is supported by substantial evidence. In the latter instance it is the agency's function to determine whether the law has been violated, while it is the court's function to ascertain whether, absent error in statutory construction, the agency's action has substantial support in the evidence.

There is no indication that Congress took that course here. Indeed the 1966 Act provides that the court in an antitrust action "shall review *de novo* the issues presented." (Emphasis added.) 12 U. S. C. § 1828 (c)(7)(A). It is argued that the use of the word "review" rather than "trial" indicates a more limited scope to judicial action. The words "review" and "trial" might conceivably be used interchangeably. The critical words seem to us to be "*de novo*" and "issues presented." They mean to us that the court should make an independent determination of the issues. Congressman Patman, the Chairman of the House Committee that drafted the Act, in speaking of this *de novo* review, said that the court would "completely and on its own make a determination as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5 (B) of the bill." He added that the "court is not to give any special weight to the determination of the bank supervisory agency on this issue." 112 Cong. Rec. 2335 (Feb. 8, 1966). Indeed the momentum of judicial precedents is in that direction. For immunity from antitrust laws "is not lightly implied." *California* v. *Federal Power Commission,* 369 U. S. 482, 485. And the grant of administrative power to give immunity unless the agency's decision is arbitrary, capricious, or unsupported by substantial evidence, would be a long step in that direction. Moreover, the Comptroller's action is informal, no hearings in the customary sense having been held prior to the 1966 Act (*United States* v. *Philadelphia National Bank, supra,* at 351) and none being required by Congress in the 1966 Act. We would therefore have to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even though no hearing had been held and no record in the customary sense created.

The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal. That was the practice prior to the 1966 Act; and we cannot find a purpose on the part of Congress to change the rule. This conclusion does not raise serious constitutional questions by making the courts perform nonjudicial tasks. The "rule of reason," long prevalent in the antitrust field (see, *e. g., Chicago Board of Trade* v. *United States,* 246 U. S. 231), has been administered by the courts. A determination of the effect on competition within the meaning of § 7 of the Clayton Act is a familiar judicial task. The area of "the convenience and needs of the community to be served," now in focus as part of the defense under the 1966 Act, is related, though perhaps remotely, to the failing-company doctrine, long known to the courts in antitrust merger cases. *United States* v. *Diebold, Inc.,* 369 U. S. 654. The appraisal of competitive factors is grist for the antitrust mill. See, *e. g., United States* v. *Philadelphia National Bank, supra,* 357–367. The courts are not left at large as planning agencies. The effect on competition is the standard; and it is a familiar one.[1] If the anticompeti-

[1] 12 U. S. C. § 1828 (c) (5) (B) provides, as we have seen, that a merger shall not be approved "whose effect in any section of the country may be substantially to lessen competition." It is pointed out that that standard omits the phrase "in any line of commerce" which is present in § 7 of the Clayton Act. It is argued that Congress meant that commercial banking is no longer to be considered as an area of effective competition and that the Act establishes in banking "a market test measurable only by larger commercial realities."

We do not reach this question and we intimate no opinion on it nor any views on the merits of these mergers or on the justifications that are urged in their support. All questions except the procedural ones treated in the opinion are reserved.

tive effect is adverse, then it is to be excused only if "the convenience and needs of the community to be served" *clearly* outweigh it. We see no problems in bringing these standards into the area of judicial competence. There are no constitutional problems here not present in the "rule of reason" cases.

There is left only the stay issue. As we have seen, the 1966 Act provides that a timely antitrust action "shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order." 12 U. S. C. § 1828 (c)(7)(A). The lower courts dissolved the statutory stays on dismissing the antitrust suits.

Our remand will direct that the stays continue until the hearings below are completed and any appeal is had. A stay of course is not mandatory under any and all circumstances. But absent a frivolous complaint by the United States, which we presume will be infrequent, a stay is essential until the judicial remedies have been exhausted. The caption of the 1966 Act states that it is designed "[t]o establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks." Moreover, bank mergers may not, absent emergency conditions, be consummated until 30 days after approval by the Comptroller in order to enable the Attorney General to commence an antitrust action, 12 U. S. C. § 1828 (c)(6), which, apart from emergency situations, must be started within 30 days of the agency's approval, 12 U. S. C. § 1828 (c)(7)(A). The legislative history is replete with references to the difficulty of unscrambling two or more banks *after* their merger.[2] The normal procedure there-

[2] The Chairman of the Federal Reserve System testified in the hearings that preceded enactment of the Bank Merger Act of 1966 that "a Federal court order cannot recreate the two banks that formerly existed . . . . [N]o matter how one may feel about whether the merger should have taken place in the first instance, there is

fore should be maintenance of the *status quo* until the antitrust litigation has run its course, lest consummation take place and the unscrambling process that Congress abhorred *in the case of banks* be necessary.

Reversed.

MR. JUSTICE CLARK took no part in the consideration or decision of these cases.

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no turning back. To unscramble the resulting bank clearly poses serious problems not only for the bank but for its customers and the community." Hearings on S. 1698 and related bills before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 89th Cong., 1st Sess., 11. The president of the American Bankers Association declared that " '[u]nmerging' a bank after the two banks have operated as a single unit is nightmarish even in the abstract." Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., 63. Senator Robertson stated, "you are dealing with a physical impossibility," and "the community gets hurt," when divestiture is attempted in a bank merger case. *Id.*, at 4. Senator Proxmire spoke of "the agony and the inequity and the financial loss, disruption of the economy in the community, of being required . . . to unscramble." *Id.*, at 202.

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BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 642. Argued January 9–10, 1967.—Decided March 27, 1967.*

By order of April 6, 1966, the ICC permitted the merger of the Pennsylvania and the New York Central railroads, the largest and third largest railroads in the Northeast, pursuant to § 5 (2) of the Interstate Commerce Act. The ICC found that the merger might divert substantial traffic from the Erie-Lackawanna, Delaware and Hudson, and Boston and Maine railroads, three smaller carriers designated as "protected railroads." These protected lines had filed applications for inclusion not only in the Penn-Central merger, but also in the Norfolk & Western-Nickel Plate merger, which the ICC had previously approved. In the latter case the ICC retained jurisdiction to consider inclusion of the three lines upon equitable terms if "found consistent with the public interest" and it provided that consummation of the merger would constitute "irrevocable assent" by Norfolk & Western to such inclusion. The applications for inclusion in the Penn-Central system have been held in abeyance pending decision on inclusion in Norfolk & Western-Nickel Plate, presently under consideration by the ICC. On the merits of the Penn-Central merger, the ICC found that the protected railroads rendered essential service which required preservation, and concluded that immediate consummation of the merger would be consistent with the public interest if "conditions are imposed to obviate impairment or serious weakening" of the three lines. Without such conditions or the inclusion of the protected roads in one of the major rail systems, the ICC found that it was doubtful if the "three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time,

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*Together with No. 680, *Delaware & Hudson Railroad Corp.* v. *United States et al.*, No. 691, *Erie-Lackawanna Railroad Co.* v. *United States et al.*, No. 813, *City of Scranton et al.* v. *United States et al.*, No. 814, *Shapp* v. *United States et al.*, and No. 815, *Chicago & Eastern Illinois Railroad Co.* v. *United States et al.*, also on appeal from the same court.

even though approving the merger." The ICC, *sua sponte,* specified in Appendix G certain conditions to the immediate consummation of the merger "to prevent any loss of revenue over the three [protected] railroads." These conditions concerned traffic practices and indemnification for loss of income. On September 16, 1966, the ICC modified its order, apparently on the objection of most of the parties, and, though retaining the traffic practices condition, it lifted the revenue indemnification condition until further order. Erie-Lackawanna and other railroads filed suit seeking an interlocutory injunction restraining the consummation of the merger. A three-judge court declined to grant the injunction. *Held:* In the light of its findings as to the necessity for interim protection for the three "protected railroads," the ICC erred in withdrawing all of the protective conditions of Appendix G save the traffic ones and permitting immediate consummation of the Penn-Central merger without determining the ultimate fate of the three protected roads. Pp. 378–392.

259 F. Supp. 964, reversed and remanded.

Howard J. Trienens, Lloyd N. Cutler, Edward W. Bourne, Harry G. Silleck, Jr., Leon H. Keyserling and *Gordon P. MacDougall* argued the cause for appellants in all cases. With *Messrs. Trienens* and *Cutler* on the brief for appellant Baltimore & Ohio Railroad Co. in No. 642 were *George L. Saunders, Jr.,* and *Edward K. Wheeler.* With *Mr. Cutler* on the brief for appellant Central Railroad Co. of New Jersey in No. 642 was *Richard B. Wachenfeld.* With *Mr. Bourne* on the brief for appellant Erie-Lackawanna Railroad Co. in No. 691 were *J. Kenneth Campbell* and *John T. Rafferty. Mr. Silleck* also filed briefs for appellant in No. 680, and *Messrs. MacDougall* and *Keyserling* for appellants in Nos. 813 and 814. *Frank F. Vesper, Patrick C. Mullen* and *James H. Durkin* were on the briefs for appellant in No. 815.

Solicitor General Marshall argued the cause for the United States in all cases. With him on the brief were *Assistant Attorney General Turner, Louis F. Claiborne* and *Richard A. Posner. Robert W. Ginnane* argued the cause for appellee Interstate Commerce Commission in all cases. With him on the brief were *Fritz R. Kahn,*

Arthur J. Cerra and *Jerome Nelson. Hugh B. Cox, Joseph Auerbach, Walter J. Myskowski, Samuel Kanell,* Special Assistant Attorney General of Connecticut, *David Berman,* Assistant Attorney General of Massachusetts, and *John H. Chafee,* Governor of Rhode Island, argued the cause for the remaining appellees. With *Mr. Cox* on the brief for appellee Pennsylvania Railroad Co. was *Henry P. Sailer. Mr. Auerbach* also filed a brief for appellees Smith et al., trustees of New York, New Haven & Hartford Railroad Co. With *Mr. Myskowski* on the brief for appellee State of New York were *Louis J. Lefkowitz,* Attorney General, and *Dunton F. Tynan,* Assistant Solicitor General. With *Governor Chafee* and *Messrs. Kanell* and *Berman* on the brief for the State of Connecticut et al. were *Harold M. Mulvey,* Attorney General, *F. Michael Ahern, David B. Beizer* and *Robert L. Hirtle,* Assistant Attorneys General, and *William J. Lynch* for the State of Connecticut; *Edward W. Brooke,* Attorney General, and *Joseph L. Tauro,* Special Assistant Attorney General, for the Commonwealth of Massachusetts; and *J. Joseph Nugent,* Attorney General, and *Robert M. Schacht,* Assistant Attorney General, for the State of Rhode Island. *Donald L. Wallace* was on the brief for appellees Greater Philadelphia Chamber of Commerce et al. *Levy Anderson* was on the brief for appellee City of Philadelphia.

Edward Friedman, Attorney General, and *Edward Munce* and *Robert M. Harris,* Assistant Attorneys General, filed a brief for the Commonwealth of Pennsylvania, as *amicus curiae,* urging affirmance in Nos. 642, 680 and 691.

Mr. Justice Clark delivered the opinion of the Court.

These six appeals involve the validity of an order of the Interstate Commerce Commission permitting the merger of the Pennsylvania Railroad Company and the

New York Central Railroad Company (Penn-Central) pursuant to § 5 (2) of the Interstate Commerce Act, as amended, 41 Stat. 481, 49 U. S. C. § 5 (2). In its original order of April 6, 1966, the Commission found that the merger might divert a substantial amount of traffic from the Erie-Lackawanna Railroad Company (E–L), the Delaware and Hudson Railroad Company (D & H) and the Boston and Maine Corporation (B & M), three smaller competing carriers designated as the "protected railroads" by the Commission. These protected railroads had filed under § 5 (2)(d) of the Act applications for inclusion in both this merger and in *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger,* 324 I. C. C. 1. In the latter case inclusion of E–L and D & H has been recommended and, together with B & M, is pending before the Commission. The applications of the protected roads in the *Penn-Central* proceeding have been held in abeyance pending decision in the *Norfolk* proceeding.

On the merits of the Penn-Central merger, the Commission found that the service the protected railroads "render their shippers is essential and the public interest dictates that [such service] be preserved." The Commission concluded "that immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed to obviate impairment or serious weakening" of the three lines. Without such conditions or the inclusion of the protected roads in a major system, the Commission further found, it would be doubtful if the "three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." 327 I. C. C. 475, 532. It, therefore, applied, *sua sponte,* certain conditions to the immediate consummation of the merger which were "designed to prevent any loss of revenue over the

three railroads [the protected railroads] as a direct result of immediate consummation of this merger." Its "approval of the merger for undelayed consummation" was made "subject . . . to the conditions specifically described in appendix G," *ibid.*, which was attached as an appendix to the April 6, 1966, order, and which we likewise attach as an Appendix here. The Commission, apparently because of the necessity for the conditions and the urgency of the merger, required compliance with Appendix G even though it had neither the benefit of a report from a Hearing Examiner thereon, nor the advantage of a hearing before the Commission itself. These conditions detailed the protection which must be given the protected railroads and made them a prerequisite to the consummation of the merger.

The Commission, therefore, not only found that protection of the three railroads was necessary, but fixed the terms thereof and required compliance prior to permitting the merger. There was nothing tentative about Appendix G. The conditions were divided into two general categories and provided that: (1) On traffic for which the protected railroads are "competitive factors" [1] the merged company shall not, pending final determination of the inclusion proceedings, provide any new or changed routing practice, freight rates, or service which would divert or tend to divert traffic from routes in which the protected railroads, or any of them, participate or participated at the time of the merger. And (2) the protected railroads would be indemnified by the merged company against revenue losses by reason of the merger. Appendix G to the order detailed the manner in which

[1] "Competitive factor" was defined as any particular route, rate, or service on which any of the "protected railroads" were handling traffic at the time the merger application was filed or at the date of the order.

such indemnity would be calculated and provided for the accelerated processing of complaints as to new or changed routes, practices, rates, or services. Section 7 of Appendix G provided that if the merged company did not accede to all of the conditions, the merger would be deferred for two years or "such time as the Commission may determine to be necessary to protect the interests of D & H, B & M and E–L." And § 8 provided that the conditions "shall be construed, administered and enforced with the view to protecting the E–L, D & H and B & M and the shipping public which depends upon them for transportation, against the effects of the merger for the period and purposes set forth above."

Thereafter, and without a hearing, but apparently on the objection of most of the parties, the Commission on September 16, 1966, modified its April 6 order and reopened the hearing. 328 I. C. C. 304. The objectors, among other things, pointed to the fact that the conditions of Appendix G were made without any notice or hearing and would create irreconcilable conflicts between the protected carriers and others adversely affected by the merger. In reopening the hearing the Commission limited it to the conditions imposed in Appendix G, the prevention of possible manipulation of such conditions and the enlargement of the indemnity provision to include capital loss. In the reopening order of September 16, 1966, the Commission left intact its order of April 6, 1966, as to the undelayed consummation of the merger, continued in effect the ban on new or changed routes, practices, and rates as to traffic in which any of the protected railroads participated, but lifted the indemnification condition until further order, at which time any such provision found necessary could be made retroactive to the date of the merger. None of the previous findings, as to the necessity for the immediate imposition of the conditions included in the original order, were

amended or withdrawn. The traffic conditions alone were left in effect.

This suit was filed on September 7, 1966, and arose upon the complaint of E–L and other railroads seeking an interlocutory injunction to restrain the consummation of the merger. A three-judge court was convened, 28 U. S. C. § 2284, and thereafter it declined, by a divided vote, to grant the interlocutory injunction. *Erie-Lackawanna Railroad Co.* v. *United States*, 259 F. Supp. 964. The appellants sought a stay from MR. JUSTICE HARLAN who referred the application to the Court and it was granted on October 18, 1966. At the same time we expedited the case for consideration. 385 U. S. 914. The sole question before us is whether, in light of the findings as to the necessity for interim protection for the so-called protected railroads, the Commission erred in permitting the consummation of the merger prior to and without awaiting determination of the inclusion proceedings. We believe that the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads. We, therefore, reverse the judgment and remand the case to the District Court with instructions to remand the matter to the Commission for further proceedings in accordance with this opinion.

I.

Questions not here decided.

At the outset we make it clear that we do not pass on the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties. We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger.

II.

The merger, its background, its participants and relative position.

The Penn-Central merger has been under study and discussion by the Commission for some 10 years. After the initial study was completed in 1959, Central withdrew from the plan and began negotiations for a merger with the Chesapeake and Ohio Railway Company (C & O) for joint control of the Baltimore and Ohio Railroad Company (B & O). However, when at a later date C & O had contracted for the purchase of some 61% of B & O stock, Central gave up its plan and renewed negotiations with Penn. The two roads signed an agreement of merger in 1962. The New York, New Haven and Hartford Railroad Company (NH) approached Penn and Central for inclusion in the plan but was given a deaf ear. The merger agreement provided that all properties, franchises, etc. (permitted by respective state law), would be transferred to the merged company and appropriate stock exchange, debt arrangements, etc., effected.

As the Commission found, the merger would "create an hour-glass shaped system flared on the east from Montreal, Canada, through Boston, Mass., to Norfolk, Va., and on the west from Mackinaw City, Mich., through Chicago, Ill., to St. Louis, Mo." 327 I. C. C., at 489. It would operate some 19,600 miles of road in 14 States between the Great Lakes, with a splash in Canada on the north, and the Ohio and Potomac Rivers on the south. After the two systems are connected as planned and new and expanded yards are provided, the merger will consolidate trains now moving separately between the same points. The combined systems will have a substantial amount of parallel trackage and routes, with 160 common points or junctions. Terminals will be consolidated, present interchanges be-

tween the two systems will be eliminated and only the most efficient yards and facilities of the respective systems will be utilized. The merger plan calls for 98 projects that will intermesh their long-haul traffic at key points, creating a nonstop service between the principal cities with "locals" covering the multiple-stop routes and branch lines. It is estimated that enormous savings in transit time can be effected. Certain chosen yards—such as Selkirk—will be remodeled and modernized into electronically operated yards with capacities of from 5,000 to 10,000 cars per day. The through trains to the West will be formed at Selkirk and those from the West broken up for dispatch to terminals or consignees in New England, New York, and northern New Jersey. The plan calls for some New York City traffic to be routed over Central's Hudson River East Shore line to lessen cost. By consolidating traffic on fast through lines, filling out trains, re-routing over the most efficient routes, eliminating some interchanges and effecting other improvements, the merged company will reduce by 6,000,000 the number of train miles operated. A single-line service will be operated between more points, with less circuity and less switching. The plan also calls for 31 daily trains to be withdrawn from the Pennsylvania with seven new ones added, leaving a total of 319 trains daily.

The Pennsylvania is the largest and Central the third largest railroad in the Northeastern Region. Together the operating revenue of the two roads was over $1,500,000,000 in 1965. Their net income in 1964 totaled almost $57,000,000 and in 1965 ran in excess of $75,000,000. In 1963 the total net was barely $16,000,000. The cost of operation of the two systems runs $90,000,000 a month and their working capital was some $72,000,000 in 1965. As of December 31, 1963, their combined investments were $1,242,000,000. The Pennsylvania and Central systems are each made up of underlying corpo-

rations. As of the date of the Examiners' Report the merged company would have ownership interest in 182 corporations and 10 railroads under lease. Thirty-six of the corporations are rail carriers, in six of which the merged company would have a voting control. All six are Class I railroads. It would likewise control six Class II railroads, five switching and terminal railroads, a holding company, five car-leasing companies, four common carriers and 34 noncarrier corporations.

The NH [2] is the sixth largest railroad in the Northeastern Region and the largest in New England. On a national basis it ranks fourth among passenger-carrying railroads and is one of the largest nontrunkline freight roads. It has some 1,500 miles of railroad in four States—Massachusetts, Rhode Island, Connecticut, and part of New York. NH has been in reorganization under § 77 of the Bankruptcy Act, 47 Stat. 1474, as amended, 11 U. S. C. § 205, since 1961.[3] While its gross revenues have run in excess of $120,000,000, it has run deficits since 1958. During the trusteeship its deficits have run from $12,700,000 in 1962 to $15,100,000 in 1965.

III.

The protesting parties, their setting in the Northeastern Region and their position on the merger.

Altogether some 200 parties participated in the proceedings before the Commission, some in support of and others in opposition to the merger. None of the appellant railroads challenge the merits of the merger; however, appellants Milton J. Shapp and the City of Scranton both attack the merger on its merits. Aside from Penn-

[2] We include it in this discussion since the Commission intends to include it in the Penn-Central system as soon as terms and conditions are agreed to or fixed.

[3] *In the matter of the New York, New Haven and Hartford Railroad Company—Debtor,* No. 30226 U. S. D. C. Conn.

Central and NH, there are 10 other carriers involved in this proceeding.

Three of these are the protected carriers—B & M, D & H and E–L. B & M operates a freight and passenger service in Maine, New Hampshire, Vermont, Massachusetts and New York over some 1,500 miles of road. It has suffered consecutive deficits in net income for some years and has not appealed from the decision of the District Court. D & H operates about 750 miles of road with some 600 in New York, less than 50 in Vermont and the balance in Pennsylvania. Its net income in 1965 was $5,000,000, its highest year since 1960. E–L operates some 3,000 miles of railroad located in New Jersey, New York, Pennsylvania, Ohio, Indiana and Illinois. Its net income was over $3,000,000 in 1965 but it suffered heavy deficits in the seven preceding years. As we have previously noted, these three railroads have filed applications for inclusion in both this case and in *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger,* 324 I. C. C. 1.[4] The Commission has withheld action on the inclusion of E–L, B & M and D & H, in Penn-Central until there is a final determination of their inclusion proceeding with Norfolk and Western (N & W). In the latter proceeding Commissioner Webb filed his report on December 22, 1966, recommending the inclusion of E–L and D & H in the N & W system but was unable to prescribe terms for inclusion of B & M—this was left to private negotiation between the railroads. On argument here the Commission has indicated that it antici-

[4] This proceeding involved the merger of the Nickel Plate. E–L sought inclusion in this proceeding along with B & M and D & H. After E–L had withdrawn its application the Commission found that the merger "should have no harmful effects" on B & M and D & H. The Commission retained jurisdiction for five years to permit E–L, B & M and D & H to again petition for inclusion. See 324 I. C. C. 1, 19–31. Each of the roads so petitioned and it is this inclusion proceeding that is now before the Commission.

pated entering a final order in the matter by July or August 1967. If this is favorable these three roads would be included in the N & W system, which has indicated its acquiescence in such a plan.

Six additional railroads involved here are the C & O, B & O, the Central of New Jersey (CNJ), the Reading Company, the Norfolk and Western, and the Western Maryland Company (WM). The C & O–B & O system is the result of a control proceeding in 1962. See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I. C. C. 261, sustained, *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, aff'd, *per curiam*, 375 U. S. 216 (1963). Together these two roads operate some 10,000 miles of railroad. Their lines extend from Michigan through Ohio and West Virginia to Virginia and from Chicago, Ill., and St. Louis, Mo., to Rochester, N. Y., and Washington, D. C. Their net operating income in 1965 totaled over $80,000,000. In addition, B & O owns 38% voting control of Reading which in turn controls CNJ. Reading has 1,200 miles of railroad in eastern Pennsylvania with net operating revenue of some $8,000,000 in 1965. CNJ has 514 miles of railroad extending from Scranton, Pa., to Jersey City, N. J. In 1965 it had a net operating deficit in excess of $3,000,000. C & O–B & O also own jointly 65% of the voting stock of WM. The latter has 741 miles of railroad extending from Connellsville, Pa., and Webster Springs, W. Va., to Baltimore, Md. In 1965 its net operating income was nearly $8,500,000.

N & W has 7,000 miles of railroad extending in a double prong from Des Moines, Iowa, and Kansas City, Mo., on the west to Buffalo, N. Y., and Pittsburgh, Pa., on the east and from Cincinnati, Ohio, and Bristol, Va., on the west to Hagerstown, Md., and Norfolk, Va., on the east. Its net operating income for 1965 was approximately $118,000,000. As we have noted, an inclusion proceeding

is now pending under which B & M, D & H and E–L seek inclusion in the N & W system.

On October 11, 1965, C & O–B & O and N & W filed an application with the Commission asking approval of their merger into a single system and offering to include B & M, D & H, E–L, the Reading and CNJ therein, subject to various conditions. If this were effected and the Penn-Central–NH merger were effected, the Northeastern Region would then have two giant systems, *i. e.*, Penn-Central and C & O–B & O–N & W.

Only one additional railroad remains a party here, the Chicago and Eastern Illinois Railroad Company (C & E I). It has approximately 750 miles of railroad operating between Chicago, Ill., St. Louis, Mo., and Evansville, Ind., with a net operating income of nearly $3,500,000 in 1965. The Missouri Pacific Railroad Company has already been authorized by the Commission to make C & E I a part of its system. The fear of C & E I here was that the Penn and Central merged would be a more formidable competitor than the Central alone and it, accordingly, sought the imposition here of special routing and traffic conditions.

The only other appellants are the City of Scranton, Pa., and Milton J. Shapp. Scranton is served by E–L, D & H and CNJ. It fears that the merger will have adverse effects upon the city and therefore opposes the merger. Shapp sues as a citizen and stockholder of Penn and is likewise in opposition to the merger.

The United States has filed a memorandum in which it does not "quarrel with the merits of the Penn-Central merger proposal itself." The agencies of the Executive Branch, the Solicitor General reports, "believe that the merger is in the public interest and that its consummation should be promptly effected." This view, however, is based on the assumption "that a place in the emerging pattern of consolidation in the Northeast can be found

for the lesser roads of the region." It is the Commission's approval of the immediate consummation of the merger prior to the completion of the proceedings to determine the place of the lesser roads to which the United States objects. It contends that since the very survival of the three protected railroads is threatened by the Penn-Central merger, the Commission must first provide protection for them until their absorption by "a major system like Norfolk and Western." To this end the United States suggests that we hold the case to enable the Commision to conclude the related proceedings which it now has under consideration. The United States concludes that: "Only if the Commission is unable to promptly resolve the problems resulting from the merger would we deem it appropriate to urge this Court to reach the merits of the appeals and reverse the judgment below."

The appellant railroads take varying positions all short of attacking the merits of the merger. The three protected railroads contend that the merger should not be consummated prior to the final determination of their inclusion in some major system or the enforcement of effective protective conditions in the interim. Judicial review, they say, of the protective conditions would otherwise be illusory. The C & O–B & O group and the N & W system maintain that the conditions of the April 6, 1966, order give the protected railroads a vested interest in the Penn-Central merger which would result in the protected railroads diverting traffic to Penn-Central which would normally have gone to them. They say, as does the United States, that the conditions were drawn without the benefit of notice and hearing, are deficient and enforcement thereof would be to their detriment. C & E I points to what it calls inconsistent findings as to the benefits it will have "of intensified competitive efforts" by its connecting carriers on routes in competition with

Penn-Central. It contends that the indemnity conditions would "compound the economic injury" which would befall the C & E I as a result of the merger and which prompted it to request protective measures.

IV.

The national transportation policy and practices of the Commission thereunder.

This Court has often pointed out that the national transportation policy "is the product of a long history of trial and error by Congress . . . ." *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80 (1944). In that case it found that the Transportation Act of 1920 "marked a sharp change in the policies and objectives embodied in those efforts." *Ibid.* In that Act the Congress directed the Commission to adopt a plan for consolidation of the railroads of the United States into "a limited number of systems." 41 Stat. 481 (1920). Consolidation would be approved by the Commission upon a finding that the transaction was in harmony with and in furtherance of the complete plan of consolidation and that the public interest would be promoted. But the Commission was warned that "competition shall be preserved as fully as possible." *Ibid.* The initiation of this unification, however, the Congress left wholly with the carriers. The Commission was given no power to compel mergers. This pattern was carried forward in the Transportation Act of 1940, 54 Stat. 898; however, § 5 of the former Act was amended to authorize the Commission to approve carrier-initiated proposals which it found to be consistent with the public interest and upon just and reasonable conditions. Under § 5 (2)(d) additional power was given the Commission to condition its approval of a merger upon the inclusion, upon request, of other railroads operating in the territory involved. As we said in *County of Marin* v. *United States,* 356 U. S.

412 (1958), "the result of the [1940] Act was a change in the *means,* while the *end* remained the same. The very language of the amended 'unification section' expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *Id.,* at 417–418. The Commission has, therefore, not proceeded by or under "a master plan" for consolidation in the various regions. Following this procedure the Commission has refused to consolidate the Northeastern Region railroad merger or control proceedings into one case. See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., supra,* at 265–266, and *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger, supra,* at 18. Also *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19, at 29–31; aff'd *per curiam,* 375 U. S. 216 (1963).

It is contended that the order here is fatally defective for failure to comply with § 5 (2)(b) of the Act which requires the Commission to "enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable." The claim is that by leaving the indemnity provisions open for future determination the Commission did not meet the requirements of the section. Once a valid order is entered by the Commission, it, of course, has the power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances or to assist in compliance with prior conditions previously required or, of course, to correct any errors. The Commission also has power under § 5 (9) of the Act to make certain supplemental orders and under § 17 (3) may correct clerical errors in certificates. We do not find it necessary to pass upon the question of naked power in the Commission to

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do what has been done here. Even assuming that it does have that power, we find that its order approving immediate consummation of the merger is insupportable on its findings.

V.

Conclusions.

The Commission found in its April 6, 1966, order that the protected railroads would be adversely affected to a "serious degree" by the Penn-Central merger; that they would be "severely handicapped" in providing required transportation to the highly industrialized areas that they serve, which service is "essential" and "the public service dictates that it be preserved." It then held that immediate consummation of the merger would be consistent with the public interest only if the conditions of Appendix G were immediately imposed. And, significantly, it concluded that even though it approved the merger, consummation of it would not be permitted unless the protected railroads "are protected during the period necessary to determine their future . . . ." 327 I. C. C., at 529, 532. But after this suit was brought and strong opposition to Appendix G was voiced, the Commission, on September 16, 1966, withdrew all of the conditions of Appendix G save the traffic ones. This left the protected railroads without sufficient protection according to the Commission's own findings. This was done apparently because of the vehement objections of the appellant railroads that Appendix G would cause havoc rather than give shelter. We cannot say, as did the District Court, that the September 16, 1966, order meant nothing more than that the traffic conditions left imposed by it were in themselves sufficient to protect the three protected railroads during the interim between the merger and the decision as to their future in one of the major railroad systems. This interpretation runs in the face of not only the prior findings enumerated above but the specific terms and conditions of Appendix G found

to be necessary to prevent "impairment or serious weakening" of the three carriers. *Id.*, at 532. Indeed, rather than being tentative, the requirements of Appendix G were rigidly fixed and established for the entire period preceding inclusion of the protected roads in some major system. The finding of consistency with the public interest was predicated entirely upon the unqualified acceptance of Appendix G by Penn-Central. Otherwise the merger would be put off for two years. In its effort to expedite the merger the Commission failed to provide the very protection that it at the same time declared indispensable to the three roads. This leaves the ultimate conclusion—that prompt consummation of the Penn-Central merger clearly would be in the public interest—without support and it falls under the Commission's own findings.

In view of these facts and since none of the findings of the Commission were disturbed, attacked, or amended, we believe it was error to permit the merger to be effected. And we also note that even in the ultimate order of approval dated September 16, 1966, the Commission pointed out that its "finding [as to the merger being consistent with the public interest] was that, if the immediate consummation were to be authorized E–L, D & H and B & M would require special protection during the pendency of their petitions for inclusion in a major system." Nevertheless, in spite of this confirmation of its finding, the Commission ordered the merger immediately consummated without the "special protection" afforded by Appendix G. Having found that the finding of consistency with the public interest could only be sustained by the imposition of the Appendix G "special protection," the Commission failed to meet its statutory obligation when it arbitrarily removed the special conditions of Appendix G while leaving the prior finding standing.

In view of the patent invalidity of the order permitting immediate consummation of the merger and in light of the present status of the proceeding before the Commission, we can only conclude that it is necessary that the decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger. This is especially true since the findings and recommendations of Commissioner Webb, as to the inclusion of the three protected railroads, are now under submission to the full Commission and a decision should be reached thereon by July or August 1967, we are advised by counsel. This short time would have little effect upon the ultimate consummation of the merger—which has been in the making for some 10 years now—and if it resulted in the future of the protected railroads being finally decided, serious losses to them would be obviated. Furthermore, there would be no occasion for the conditions of Appendix G to be imposed and hearing and decision on this highly controversial matter would not be necessary insofar as the three protected railroads are concerned. Finally, such action would provide the solution to the problem of the necessary and indispensable protection to the three railroads that the Commission found prerequisite to the merger.

Furthermore, the serious charge that the conditions of Appendix G were imposed without notice and hearing would in a large part be dissipated by this course of action. As to the three protected roads it would be entirely obviated if and when their fate is determined. As to the other railroads affected, the Commission could more quickly conclude its present hearing and make a decision as to the effect of the merger upon them and the protection, if any, required.[5]

[5] Among these, CNJ claims it has been deprived of a hearing on the effect on it of the inclusion of the NH in the Penn-Central merger. As the Commission points out, however, the terms and

This disposition is also buttressed by the fact that should the immediate consummation of the merger be permitted and at a later date neither the interim conditions nor the inclusion proceedings be disposed of favorably to the continued existence of the merger, the only remedy remaining would be to set it aside and unscramble the consolidation. It is said that this does not follow since only the indemnity terms are at issue and they involve only money. This is blinking at reality. The fact is that traffic, trackage, terminals, etc., as well as financial and corporate structures can and will, beyond doubt, be quickly combined, changed, abandoned, or consolidated. The only condition now imposed for the maintenance of the *status quo* is the provision against any change of routes, traffic, rates, etc., as to business in which the three protected roads participate. They are comparatively small lines located for the most part in northeastern coastal States and would, percentagewise, be a small part of the total routes, traffic, rates, etc., of the whole Penn-Central system. There would be no restriction as to other routes, traffic, rates, etc., as well as all other operations of the merged company, including terminals, warehouses, etc., financial and corporate structures. The plan that the Penn-Central proposes to follow, as we have briefly sketched it, indicates not only

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conditions of the NH's inclusion are subject to further proceedings and the Commission has specifically given to CNJ leave "to seek protection for [its] traffic and gateways," at that time. 327 I. C. C., at 527. Moreover, CNJ also says, it has not been afforded a hearing on its claim that the merger will also deprive it of important overhead coal traffic now delivered by CNJ to D & H at Wilkes-Barre, Pa. This might be lost, it alleges, because of the direct connection between D & H and N & W which will be available over the trackage rights that Penn-Central is being required to grant D & H. We know nothing of the merits of these claims and, of course, indicate no decision thereon. However, we assume that the Commission will in each instance afford the CNJ an opportunity to be heard concerning them.

major changes but quick action. Our experience with other mergers, and common sense as well, indicate that the "scrambling" goes fast but the unscrambling is interminable and seldom effectively accomplished.

The Penn-Central merger has been studied for a decade. Indeed, the parties to the merger agreed to it over five years ago and it has been under Commission consideration ever since that time. This is, of course, the more reason for expedition. We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N & W should be concluded in "a relatively short time." Our remand should, therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties. After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation.

The judgment of the District Court is reversed and the cause is remanded with instructions that it be remanded to the Commission for further proceedings not inconsistent with this opinion. *It is so ordered.*

APPENDIX TO OPINION OF THE COURT.

Appendix G.*

Provisions for the Protection of E–L, D & H, and B & M.

1. Pending final determination of the petitions for inclusion filed by E–L, D & H, and B & M in this proceed-

*327 I. C. C. 475, 561.

ing and in Finance Docket No. 21510 et al., or such other period of time as the Commission may prescribe, hereinafter called the protective period, and on traffic for which E–L, D & H and B & M are competitive factors, the merged company shall not publish or provide for any new or changed routing practice and/or freight rates or services, either locally or jointly with other carriers, which would divert or tend to divert traffic from routes in which E–L, D & H or B & M, now participates, or participated at the time this merger application was filed, or take any action or engage in any practice or conduct contrary to the purpose and general objectives of this condition as explained in this report.

For the purpose of illustrating—but in no way limiting—the application of this condition, the following specific provisions are prescribed:

A. During the protective period, and as to the described traffic, the railroads which shall make up the merged system will be considered separate railroads, as they now are, for the purposes of establishing new routes or rates or privileges and changes in present routes, rates or privileges.

B. When any of the described freight traffic is delivered to carriers of the merged system, it shall be allocated among the routes of the system in accordance with practices employed by the system's railroads at the time this merger application was filed.

C. Where through routes and joint rates are now in existence via any component railroad of the merged system and E–L, D & H or B & M, the participation therein of such components shall be maintained during the protective period with the same vigor as such components have heretofore exercised in competition with each other and other carriers, to the end of preventing noticeable diversion from such routes to any other route in which the merged company participates.

D. The merged company for the protective period shall agree to joint rates and divisions thereof on its freight traffic interlined with E–L, D & H or B & M under terms no less advantageous to E–L, D & H and B & M than are the terms which those three carriers now have with the component carriers of the merged system, and, in the event of any changes in such joint rates, the divisions shall not be changed in any manner which will result in E–L, D & H or B & M receiving proportionally less than they now receive on joint rates with such component carriers.

E. In conjunction with E–L, D & H and B & M, the merged company shall, during the protective period, keep open all routes now in force for the transportation of freight over the lines of the three companies and the component carriers of the merged system; shall maintain thereon service equal to or better than that being given on the date this merger application was filed; shall improve such service, to the extent within its power, at least as necessary to make the said through routes fully competitive with other routes in which the merged company participates; and, where joint rates are now in effect or were in effect when this merger application was filed, it shall maintain such rates; and where change in those rates becomes appropriate, changes shall conform to the requirement of provision D above.

2. The term "competitive factor" shall be construed to mean that at the date of this order or at the time this merger application was filed, E–L, D & H or B & M was both participating in the particular route, rate or service and was handling traffic thereon.

3. E–L, D & H and B & M shall be indemnified by the merged company under the circumstances and according to the plan specified in the report, *supra*.

4. This appendix constitutes a plan for protection against the effects of the applicants' merger and does not

apply to loss caused by: (a) hostile or warlike action by (1) any government or sovereign power (*de jure* or *de facto*) or (2) military, naval or air forces; (b) insurrection, rebellion, civil war, et cetera; (c) national disaster; (d) economic depression; (e) strikes; (f) act of God; or (g) other similar state of affairs.

5. The interpretation, application and enforcement of the conditions in this appendix shall be governed exclusively by the following provisions:

A. All controversies arising under this appendix shall be determined with finality by the Interstate Commerce Commission in the manner indicated below.

B. (1) Except as to section 3, *supra,* whenever E–L, D & H or B & M considers that these protective conditions are being violated, or that a violation will result from the effectuation of a tariff publication in which the merged company participates, they may (individually or collectively) file a complaint with the Commission, Board of Suspension, and with the merged company, specifying the rate, route, practice, privilege, or such matters constituting the alleged violation and setting forth in a statement verified by an appropriate official of the complainant all the data giving rise to the complaint.

(2) In the event the Board of Suspension shall determine that, as to the matter complained of, E–L, D & H or B & M is a competitive factor (as defined in these conditions), it shall in the case of a tariff publication not yet effective, suspend the tariff forthwith for the protective period (as defined in these conditions), and shall conduct an investigation into the matter complained of; and if the alleged violation is found not to exist, the Board shall thereupon order the suspension removed; and, in all matters not involving a tariff not yet in effect, the Board shall investigate the matters complained of; and, if in any investigation, it finds that these protective

conditions are being violated, it shall order the cancellation of the violative tariff provisions or, where a tariff is not involved, the termination of the violative conduct. Orders of the Board shall have force and effect as orders of this Commission and shall be enforced as such.

C. All controversies arising under section 3 above, shall be determined by the Commission, Finance Board No. 2. Complaints, verified by an appropriate officer of the complainant, shall be addressed to such Board and the merged company, specifying both the basis of the complaint and the relief sought.

D. (1) All determinations as to whether E–L, D & H or B & M is a competitive factor shall be made within 10 days after a complaint is filed; and final decisions as to issues raised by a complaint shall be rendered within 90 days after the complaint is filed.

(2) Appeal shall lie to the Commission, division 2, from orders of the Board of Suspension; and to the Commission, division 3, from orders of Finance Board No. 2.

(3) Special rules for proceeding before the Boards and appealing therefrom shall be promulgated by this Commission at a future time.

6. Notwithstanding the provisions of sections 1, 2, 3, 4, and 5, an agreement pertaining to the interests of E-L, D & H and/or B & M may be hereinafter entered by the merged company and the protected carriers, or any of them, which shall supersede the protection provided by such sections to the extent the agreement does not violate the provisions of the Interstate Commerce Act or the Commission's rules and regulations thereunder.

7. In the event applicants fail to accede to the above-named conditions, consummation of the proposed merger will be deferred for 2 years or such time as the Commission may determine to be necessary to protect the interests of D & H, B & M and E–L.

8. These conditions shall be construed, administered and enforced with the view to protecting the E–L, D & H, and B & M and the shipping public which depends upon them for transportation, against the effects of the merger for the period and purposes set forth above.

9. These conditions are to be applied in addition to the standard conditions set out in appendix I hereof.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. In its determination whether the merger is consistent with the public interest, the ICC did not discharge its statutory duty to consider the effect upon that interest of the inclusion, or failure to include, the E–L, D & H and B & M. The ICC order authorizing immediate consummation of the merger as consistent with the public interest must therefore be set aside.

I.

The ICC's approval of the Penn-Central merger is the last of three authorizations for consolidation of major eastern roads. In the first, the C & O was allowed to control the B & O.[1] In the second, the N & W was permitted to merge with the Nickel Plate.[2] The ICC has been confronted with the problem of what to do with the E–L, D & H and B & M since they petitioned for inclusion in the proposed N & W-Nickel Plate system as a condition of approval. E–L's precarious financial condition led to that carrier's withdrawal of its petition in favor of inclusion by negotiation, 324 I. C. C. 1, 21, and as a consequence of the denial of the D & H and

[1] *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I. C. C. 261, sustained *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (D. C. E. D. Mich.), aff'd *per curiam*, 375 U. S. 216.

[2] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I. C. C. 1.

B & M petitions, 324 I. C. C., at 31–32. In the meantime, the Penn-Central proposal had come before the Commission, and D & H, fearful that the Penn-Central merger might be approved and consummated before its inclusion in a major system was assured, argued that approval of Penn-Central be held up by consolidating the two proceedings, or that immediate consummation of N & W-Nickel Plate should be made contingent on inclusion upon equitable terms of the three roads in the event Penn-Central is later approved. 324 I. C. C., at 30–31. The ICC denied these requests, but recognizing there was substance to D & H's fears, it retained jurisdiction for five years to permit the roads to file petitions for inclusion in the N & W system. Inclusion was to be required upon equitable terms if "found consistent with the public interest," and consummation of the merger would constitute "irrevocable assent" by N & W to the condition. 324 I. C. C., at 148.

Before N & W-Nickel Plate was approved, the Penn-Central proposal had been filed. The three roads, appreciating the danger Penn-Central would pose to their survival, sought inclusion, conditioned upon denial of their inclusion in N & W. Soon after, negotiations between E–L and N & W for voluntary inclusion apparently broke down, because at approximately the same time the three roads filed petitions for inclusion in N & W, and N & W and C & O filed applications to merge with each other, stating that only such a merger could support the inclusion of the three roads in N & W on equitable terms and consistently with the public interest. The three roads urged in their applications both for inclusion in Penn-Central and for inclusion in N & W, that Penn-Central be delayed until their inclusion in one of the systems was assured. This was tantamount to a request that the two proceedings be consolidated for decision, and the Department of Justice supported their position.

The ICC found, as the three roads alleged, (1) the service rendered by the three roads "is essential and the public interest dictates that it be preserved," and (2) it is "doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged . . . ." 327 I. C. C. 475, 529, 532. All the parties concerned recognized, however, that inclusion of the roads in N & W would be preferable to inclusion in Penn-Central, and that it would be some time before the N & W inclusion proceeding was completed. Rather than delay consummation of Penn-Central, which the ICC found would result in substantial savings and improved service, the ICC ordered immediate consummation. It pointed out that the three roads had petitions for inclusion in N & W pending, and provided that, in the event inclusion in N & W was denied, the three roads could petition the ICC for one year following the judgment of denial to allow or require inclusion of the roads in Penn-Central, on equitable terms, if found to be in the public interest. 327 I. C. C., at 553. Meanwhile, in addition to usual conditions for preserving existing routes and gateways, the ICC prescribed "unprecedented" conditions of two kinds: (1) traffic conditions requiring Penn-Central to continue existing practices and route patterns with respect to traffic competed for by the three roads; (2) conditions guaranteeing the three roads an indemnity computed on the basis of a fixed share of the combined total of the revenues realized by them and Penn-Central; this was to compensate the roads for income lost from diversion of their traffic to Penn-Central. 327 I. C. C., at 532. These conditions were acceptable to Penn and Central but not to the three roads or to N & W and C & O–B & O.

Proceedings to set aside the ICC order were brought in the District Court and petitions for reconsideration were also filed with the ICC. Some of the latter attacked

the validity of the conditions on the ground that they were imposed without hearing. E–L and D & H, however, renewed their complaint against the approval before assurance of their inclusion in a major system and alternatively attacked the conditions as indefinite and inadequate, demanding in addition to be indemnified for capital loss. C & O–B & O and their family lines for the first time introduced evidence that the merger would adversely affect them, and argued that the indemnification condition of the original order would create a community of interest between the protected roads and Penn-Central. The Department of Justice urged postponement to consider the questions raised concerning the conditions and the evidence of adverse effect offered by C & O–B & O.[3]

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[3] Pennsylvania and Central claim we should not pass upon the Department of Justice's contention that the Commission should have delayed consummation until inclusion of the smaller roads in a major system was assured. The issue is, however, presented by the ICC itself, in its statement of Questions Presented, where it recites that, whether the District Court erred in refusing to enjoin consummation pending assurance of inclusion, is a question embraced within the general question presented on these appeals. Brief of the ICC, p. 4. A number of the railroad appellants, moreover, claim they have properly presented the question of delay pending inclusion. These representations amply fulfill the requirement of this Court's Rule 15 (1)(c)(1), and the point has in fact been fully briefed and argued.

Neither is there merit to the claim that this issue, clearly raised before the ICC, 327 I. C. C., at 528, was not raised before the District Court. Counsel for D & H complained that the Commission found "the only way the D & H could be protected is through inclusion in some system, but they have not yet made a finding . . . as to whether our inclusion in any system is consistent with the public interest," Transcript, p. 58, and counsel for C & O was unable to answer meaningfully Judge Friendly's comment that his "position is really that the merger cannot be consummated until all these other proceedings are carried to a conclusion . . . ," *id.*, at 80. The District Court explicitly rejected "the claims that con-

The ICC rescinded the indemnity conditions pending a hearing on whether they should be modified and whether a capital loss indemnification condition should be added, but refused on the ground of laches to hear the evidence offered by the C & O. 328 I. C. C. 304, 318. The ICC reaffirmed its approval of the merger subject to Penn-Central's acceptance of the conditions as finally formulated, although not foreclosing Penn-Central from seeking judicial review of any provision for capital loss indemnification. 328 I. C. C., at 329. The District Court denied interlocutory relief enjoining Penn and Central from going forward with the merger.[4]

II.

The statutory duty of the ICC is clear. Section 5 (2)(b) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, authorizes the agency to approve only those consolidations it finds "will be consistent with the public interest . . . ." 54 Stat. 906, 49 U. S. C. § 5 (2)(b). The statute creates no presumption that mergers generally are either consistent or inconsistent with that interest; rather, it requires that each proposal be examined in depth to determine its effects upon the national transportation system. Thus, the ICC is explicitly directed to consider "(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees

summation of the merger should be deferred until conclusion of all pending rail merger proceedings . . . ." 259 F. Supp. 964, 972.

[4] Although this case arises as an appeal from the District Court's denial of motions for interlocutory injunction, the parties recognize that the lawfulness of the ICC's order permitting immediate consummation of the merger is in issue before this Court.

affected." 49 U. S. C. § 5 (2)(c). The National Transportation Policy is the controlling guide, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82, and that policy requires the Commission "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 49 U. S. C., note preceding § 1. These provisions call for the application of discerning judgment to a wide range of factors, and preclude the position that the purpose of the 1940 Act is simply to promote railroad consolidation.[5] The ICC has recognized that inquiry into a proposed transaction does not end with the possibilities for increased economies, but extends to "the effect of the transaction upon adequate transportation service to all parts of the public which would be so affected," [6] which encom-

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[5] The ICC's most recent pronouncement on the issue is in *Great N. P. & B. L. R. Co.—Merger,* F. D. No. 21478, p. —, decided March 31, 1966, reconsideration granted January 4, 1967:

"The legislative history of section 5 clearly shows that the Congress did not adopt a policy fostering or encouraging railroad unifications. It was the Transportation Act of 1920, not the Transportation Act of 1940, that embodied a policy favoring railroad consolidations. . . . No such policy is expressed in section 5. To interpret section 5 as implying such a policy is a perversion of legislative history and intent. The public interest scale is balanced. It is not to be tipped by the slightest presumption for or against merger."

It is meaningless, of course, to contend that the Act favors unifications that are otherwise consistent with the public interest; it also disfavors unifications inconsistent with the public interest.

[6] *Chicago, B. & Q. R. Co.—Control,* 271 I. C. C. 63, 146. See also *Detroit, T. & I. R. Co.—Control,* 275 I. C. C. 455, 489, sustained *sub nom. New York, C. & St. L. R. Co.* v. *United States.* 95 F. Supp. 811 (D. C. N. D. Ohio).

passes the "duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy." *McLean Trucking Co.* v. *United States, supra,* at 87. "The public interest is the prime consideration, and in making that determination we must have regard for all relevant factors." *Toledo, P. & W. R. Co.—Control,* 295 I. C. C. 523, 547.

A critical factor, not in my view properly applied in this case, is "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction . . . ."[7] The Commission is authorized, "as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest." 49 U. S. C. § 5 (2)(d). The ICC recognizes that it is required to consider the issue of inclusion even when no petition is filed,[8] because if a proposed transac-

[7] The Staff Study by the Commission's Bureau of Transport Economics and Statistics on "Railroad Consolidations and the Public Interest" (p. 46), accurately labels this factor "a highly important criterion, since it involves the basic problem of competition among railroads." Reprinted as Exhibit 11, Hearings before the Subcommittee on Antitrust and Monopoly on S. 3097, 87th Cong., 2d Sess., pt. 2, p. 859 (1962).

[8] When E–L, for example, withdrew its petition for inclusion in N & W the Commission expressly stated that the Transportation Act of 1940 "does not limit our participation in carrier-initiated consolidations to passing upon a proposal on a take-it-or-leave-it basis. We are specifically enjoined to consider, among other things, the effect . . . upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transactions." 324 I. C. C., at 26. Accord, *N. Y. Central Securities Corp.* v. *United States,* 287 U. S. 12, 28; *Toledo, P. & W. R. Co.—Control, supra,* 295 I. C. C., at 529.

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tion "would endanger or impair the operations of other carriers contrary to the public interest," *Chicago, B. & Q. R. Co.—Control, supra,* 271 I. C. C., at 157, inclusion of the affected carriers is *required* by and not merely consistent with the public interest.

In this case the ICC, although determining that the three roads perform an essential service and that their inclusion in some major system is required by the public interest, takes the position that its duty as to inclusion is sufficiently discharged when it provides for the possibility of inclusion in either N & W or Penn-Central, and meanwhile promises to impose protective conditions. My disagreement is not with the proposition that the Act vests wide discretion in the agency to allow a merger to go forward while conditions as to inclusion are worked out. The Commission has broad authority to approve transactions "subject to such terms and conditions and such modifications as it shall find to be just and reasonable . . . ," § 5 (2)(b), and "may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), of this section, as it may deem necessary or appropriate," § 5 (9). It has in fact occasionally reserved jurisdiction (1) to work out equitable terms for an inclusion it has already determined is required by the public interest, *New York Central Unification,* 154 I. C. C. 489, 493–494; [9] and even (2) to determine after consummation whether inclusion will be consistent with or required by the public interest, *Union Pac. R. Co. Unification,* 189 I. C. C. 357, 363.[10] But

[9] Accord, *Alton R. Co.—Acquisition,* 175 I. C. C. 301, 313, where the Commission later concluded, 189 I. C. C. 271, 285, that the public convenience and necessity did not require acquisition of the short lines involved. This is also the course followed by the ICC with respect to the New Haven in the Penn-Central proceeding.

[10] Accord, *New York, C. & St. L. R. Co.—Control,* 224 I. C. C. 259, 269, where the Commission, in approving a control application,

decisions of this sort proceed upon the assumption that inclusion will later be possible, and that therefore the finding that the proposed consolidation is in the public interest will not be undermined. This assumption is not always warranted. An inclusion may turn out to be impossible, either because of inability to work out equitable terms, a circumstance upon which inclusion orders have invariably been conditioned, or because upon full consideration the effects of the contemplated inclusion might be regarded as so detrimental that the proposed merger which made necessary the inclusion would be against the public interest.

The Commission must decide, in the first instance, whether the risk of such ultimate developments is acute enough to counsel against approval of a consolidation subject to the working out of the terms of an inclusion or to the working out of both the terms and the inclusion. See Jaffe, Judicial Control of Administrative Action 565–567 (1965). But resort to the practice of deferring the accomplishment of inclusions or other ends required by the public interest must be carefully weighed and reviewed. Where there is little or no danger that inclusion consistent with the public interest and upon equitable terms might turn out to be impossible, it is sufficiently likely, despite deferral, that the Commission will have fulfilled its basic statutory duty. Where there is a significant possibility, however, that a deferred inclusion upon which a finding of public interest is premised will be unattainable or attainable only by setting into motion new forces which have not been weighed in evaluating the basic proposal, then the Commission's statutory duty to consider all the relevant factors has

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imposed a condition requiring the applicant to abide by its findings concerning whether the applicant should acquire certain affected short lines.

not been properly discharged. And ICC action of this sort generally creates dangers far greater than those which normally accrue when an agency or court fails to apply the governing standard to all the relevant facts, since the decision to allow consummation is often irreversible, as it concededly is in this case, or reversible only at enormous expense.

Prior authorizations deferring decision on inclusions held to be required by the public interest entailed no significant risk that the ICC had approved a consolidation without fulfilling its statutory duty. When, in *New York Central Unification, supra,* the Commission authorized immediate consummation but retained jurisdiction to assure that terms would be worked out for the purchase of lines whose purchase it had required because their preservation was found to be essential to the public interest, there was no doubt that equitable terms could be arranged. The roads to be included were short lines, complementary to the New York Central system, so consummation of the proposed unification created no reason to expect a detrimental effect. Moreover, the roads were required to submit the issue of value to arbitration in the event they failed to agree. 154 I. C. C., at 493. When, in *Union Pac. R. Co., supra,* the Commission deferred until after consummation both the question whether the public interest required inclusion and the matter of working out terms, there was no indication that inclusion might be impossible because of its effects without rendering the proposed transaction against the public interest, or that equitable terms for inclusion might be unattainable, or that the short lines involved would be subjected to danger from traffic diversion or otherwise during the period between consummation and inclusion. The transaction authorized only accounting changes; no change in

operation was either contemplated or possible. 189 I. C. C., at 363.[11]

This case is in striking contrast. Allegations are made by the Department of Justice and numerous other parties that inclusion of the protected roads in either of the major systems contemplated by the Commission might not be possible consistent with the public interest or upon equitable terms. These arguments demonstrate that, because of possible difficulties involved in the inclusion proceeding and in establishing acceptable interim conditions, the "opportunities for the ultimate inclusion of E–L, D & H and B & M in a major rail system . . ." which the Commission has endeavored to preserve create serious uncertainties.

The first and more obviously uncertain alternative is inclusion in Penn-Central itself. The Commission

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[11] In *New York, C. & St. L. R. Co.—Control, supra,* one of the two short lines seeking inclusion introduced no evidence at all, while the other made an inadequate showing that the public interest required its preservation and no showing whatever that the proposed control transaction would result in diversion of its traffic. 224 I. C. C., at 266–268. Going out of its way "to the end that the intents and purposes of section 5 may be accomplished . . . ," the ICC left open the door to the short lines' inclusion if they could demonstrate its necessity or desirability. 224 I. C. C., at 269. Other examples of deferral of agency action cited by appellees are inapposite. The ICC has deferred employee protection, reserving jurisdiction to impose necessary terms and conditions. *A. C. Allyn & Co.—Control,* 50 M. C. C. 305, 310–311. The likelihood that this sort of problem will have unexpected consequences is very slight. In *Atlantic Rfg. Co.* v. *Public Serv. Comm'n,* 360 U. S. 378, 392, the Court ruled the FPC could issue a certificate without making a final determination of the vital matter of price, so long as the certificate was conditioned so "that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined" in subsequent hearings. No injury was contemplated, and the ultimate issue was not likely to be prejudged.

retained jurisdiction to allow the three carriers to seek inclusion in Penn-Central within one year after final denial of any of their petitions for inclusion in N & W. All concerned recognize that inclusion in N & W is the preferable solution, since inclusion of the roads in Penn-Central would create a virtual monopoly of all rail traffic in most of New England and New York.[12] (See Appendix A for a map depicting this result.) It is true that Commissioner Webb said in the N & W inclusion proceeding that "the *Penn-Central* reports indicate that the merger would be consistent with the public interest notwithstanding any lessening of intramodal competition resulting from inclusion of EL, D & H, and B & M," *Norfolk & W. R. Co.—Merger,* F. D. No. 21510, p. 27, but this statement is refuted by the *Penn-Central* reports themselves. Both the Examiners and the Commission expressly reserved for a later time the question whether inclusion of the roads in Penn-Central would be consistent with the public interest,[13] and rather than implying that the merger would be in the public interest despite inclusion of the protected roads, the Examiners' Report and the Commission's opinions indicate that the merger

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[12] The Examiners found it "highly likely that the public interest" lies in the direction of inclusion in N & W. Penn-Central Report, F. D. No. 21989, Feb. 26, 1965, at 415. The Commission had indicated in the N & W-Nickel Plate proceeding its receptiveness to inclusion in N & W, and it postponed consideration of inclusion in Penn-Central pending the outcome of the N & W inclusion proceeding.

[13] The Examiners stated: "No consideration has been given to the effect of the proposed inclusion here of the D & H, B & M and/or E–L upon competition, and no effort has been made to assess or accommodate the anti-trust laws in light of such action. We believe resolution of such issues would be premature." Penn-Central Report, at 418. The Commission adopted these findings, 327 I. C. C., at 481–482, and explicitly reserved, until after inclusion in N & W was denied, the question "whether inclusion of any one or all of E–L, B & M and D & H in the Transportation Company's system would be consistent with the public interest . . . ," 327 I. C. C., at 531.

was approved under the assumption that the protected roads would be included in N & W.[14]

The "opportunity" for inclusion in the N & W hardly presents a less risky alternative. The N & W proceeding has gone to hearing and Commissioner Webb, acting as Presiding Officer, has issued a report recommending inclusion in N & W of E–L and D & H, and authorizing inclusion of B & M if the parties are able to agree to terms. There has as yet been no action by the ICC on the report; and based upon its contents and the objections raised in this Court, there is a significant possibility, given the present state of circumstances, that inclusion in N & W might be unattainable or attainable only at the price of

[14] An elimination of competition in New England and New York was not among even the possible anticompetitive effects of the merger contemplated and weighed. To the contrary, the Examiners drew up a chart (Appendix T–2 of their Report) which incorporated the three roads in the N & W system, and which they used to measure competitive impact. Moreover, the Examiners recommended as a condition of approval that Penn agree to grant trackage rights to N & W between Hagerstown, Maryland, N & W's northernmost terminus in the East, and Wilkes-Barre, Pennsylvania, the southwestern terminus of D & H operations, thereby connecting the roads and enabling them to compete with Penn-Central for traffic between northern New York-New England and the South-southwest. Penn-Central Report, at 429–430. The Commission found it unnecessary to uphold the Examiners' action, since the parties had voluntarily entered into an agreement effectuating the Examiners' views, and since an application for Commission approval of the agreement had not yet been filed. 327 I. C. C., at 528. Finally, in appraising the effect of the merger upon service to New York City, the Examiners anticipated that E–L and N & W together would provide one line of competition. Penn-Central Report, at 433. The Commission likewise assumed in appraising anticompetitive effect that E–L would continue to compete with the applicants in the New York port area, and specifically cited as an example of continuing lines of competition that "N & W can join with E–L, LV [the Lehigh Valley], D & H and B & M, among others, in handling transcontinental traffic to and from the Port of N. Y. and New England . . . ." 327 I. C. C., at 517, 514.

rendering the Penn-Central merger against the public interest, and that, even if inclusion could be accomplished consistent with the public interest, it might be impossible to work out equitable terms. Appellees make much of the fact that N & W, by consummating its merger with Nickel-Plate, "irrevocably agreed to include these three petitioners in their system upon terms agreed upon among themselves or, if necessary, prescribed by [the ICC], provided such inclusion is found to be consistent with the public interest." 327 I. C. C., at 529. But this condition expressly assumes a favorable resolution of both of the questions in dispute. As Commissioner Webb said in the N & W inclusion report:

> "the only obligation expressly imposed on N & W . . . was to include the petitioners if the Commission found such inclusion to be consistent with the public interest and if the Commission also found that the inclusion could be effected on terms 'equitable to all parties involved,' both findings to be subject to full judicial review." N & W Inclusion Report, at 16.

Commissioner Webb's recommended disposition reveals clearly that the dangers stemming from deferral exist even as to inclusion in N & W. He rejected an argument of C & O that its plan for absorption of the three roads into a merged C & O–N & W system was mutually exclusive with inclusion of the roads into an independent N & W, and the contentions of C & O and others that they would be adversely affected by the inclusion. He found inclusion of all three roads consistent with the public interest, pointing out that the roads would be able to survive in N & W despite significant losses to Penn-Central, and that greater intramodal and intermodal competition and better services would become possible. N & W Inclusion Report, at 31–32. However, he found substance to arguments relating to each of the three roads

that their required inclusion would be against the public interest. Since authorization of the Penn-Central merger is premised on a finding that the roads must be included in a major system, these arguments are of great relevance here, and I address myself to them.

As to E–L, N & W argued inclusion would be too great a burden in light of its financial condition; for, although E–L showed a modest profit in 1965 for the first time in years, N & W contended it was too soon to draw any optimistic conclusion and that it was no more able now to absorb E–L than it had been a few years before when the Commission refused to require E–L's inclusion in N & W because of E–L's "precarious financial plight" and "the burden another railroad would assume if it absorbed the Erie-Lackawanna now . . . ." 324 I. C. C., at 25. Commissioner Webb recognized that this argument had some merit, and characterized E–L's growth as "erratic." N & W Inclusion Report, at 17, 10. So enormous is E–L's debt, in fact, that the parties themselves agreed it "precludes a merger of N&W and EL now or at any time in the near future." *Id.*, at 84. As a consequence, the Commissioner recommended that only control of E–L by N & W be required, looking to eventual merger with assumption of liabilities when circumstances would permit. D & H has no financial problem which would interfere with immediate merger, but Commissioner Webb found that the only sufficient connection between D & H and N & W was E–L, and therefore recommended that an order requiring inclusion of D & H in N & W be conditioned on inclusion of E–L, *id.*, at 139, which consequently makes the arguments relating to E–L applicable to D & H as well. With respect to B & M, Commissioner Webb agreed with N & W and refused to recommend that its inclusion in any form be required, because of B & M's poor financial condition and limited prospects for recovery. He recommended only that inclusion be

authorized, in the unlikely event N & W saw fit to agree to pay, within five years of the inclusion, a minimum rate for B & M shares equal to almost twice their value under Commissioner Webb's own appraisal. *Id.*, at 153, 156.

It is not entirely clear, therefore, that E–L and D & H will be ordered included in N & W, and the likelihood that B & M will not be included under present circumstances is great. Therefore, it is reasonably possible that the premise upon which the Commission has proceeded in authorizing consummation of Penn-Central—that all three must be included in a major system—may be unattainable through inclusion in N & W because the required inclusion of at least one and possibly all three may not be consistent with the public interest. Neither is it a sufficient answer to this uncertainty that B & M could be included in Penn-Central, since its value to that system because of the monopoly it would make possible in large areas of New England would make inclusion economically feasible at equitable terms. As we have seen, whether Penn-Central would be worth the price despite this result is a matter of some dispute, which the ICC has never considered.

The Commission's duty to consider all the relevant effects of a consolidation before authorizing it extends, moreover, not only to whether an inclusion necessary to make the proposed transaction consistent with the public interest is in fact attainable, but also to whether such an inclusion, even though attainable, might set in motion events which could put the basic transaction proposed in a less favorable light. Thus, even if it is assumed that inclusion of E–L and D & H in N & W will occur, and that leaving B & M temporarily independent would not undermine the consistency of the Penn-Central merger with the public interest, it is incumbent upon the ICC to consider the potential effects on the public interest of

such an outcome before authorizing consummation. Clearly, the ICC has not done so, and on this record there is a substantial likelihood that effects of enormous significance to the public interest might result.

Commissioner Webb refused to consider N & W and C & O's plan for merger with inclusion of the smaller roads, because he concluded the issue of inclusion could be settled without regard to the plan. It is clear, however, from the Commissioner's recommendations, that adoption of the N & W–C & O plan may well be a consequence of the Penn-Central merger both through its effect on the smaller roads and its effect directly upon N & W and C & O. The uncertainties with respect to inclusion of the roads in N & W will be highly probative evidence when the Commission gets around to considering the N & W–C & O proposal. E–L's large debt, for example, which now prevents its outright merger in N & W, would be less of an obstacle if N & W and C & O were combined and thereby strengthened. Even more significant is the fact that B & M's inclusion, presently regarded as impossible in N & W, would probably be possible if N & W were combined with C & O–B & O.[15]

[15] In refusing to recommend requiring B & M's inclusion, Commissioner Webb pointed out that such a course would expose N & W to serious risk "and would foreclose B & M from seeking inclusion in the Penn-Central system or in the proposed N & W–C & O system on terms which, by reason of its strategic value or improved earnings, are more favorable than those justified by the record herein." N & W Inclusion Report, at 154. An N & W–C & O system would, as the Commissioner recognized, be far more able financially to absorb the risk of including B & M, and would be willing to offer more than B & M's actual value, possibly out of the savings contemplated in the N & W–C & O merger. In fact, under the plan offered by N & W–C & O for merger and inclusion, B & M shareholders would receive almost twice the actual value of their holdings, and, significantly, Commissioner Webb settled on this same amount as the minimum rate which N & W must pay if it decides to absorb B & M. *Id.*, at 156.

There is no doubt, moreover, that C & O and N & W will, in addition to offering a solution to the inclusion problem, allege that they stand to be seriously hurt by the Penn-Central system unless they are allowed to combine. Although Commisioner Webb refused to hear evidence offered by C & O to prove such allegations, and although the Commission also refused on the ground of laches to grant C & O's petition to reopen *Penn-Central* to introduce evidence of traffic diversion, the ICC agreed to modify the finding of the Examiners in this case, Penn-Central Report, at 305, that the net effect of Penn-Central will not be detrimental to C & O, CNJ and other carriers or to their ability to provide general transportation service. Instead, the Commission substituted the finding that a detrimental effect "has not been shown of record . . . ," 328 I. C. C., at 318, and thereby left it open to C & O to allege and prove at some later time that its merger with N & W is in the public interest at least in part because of traffic diversion caused by Penn-Central. With respect to N & W, some evidence of adverse effect from Penn-Central seems probable in light of Commissioner Webb's refusal to deduct from the value of the three roads the losses anticipated through diversion of traffic to Penn-Central, because "N & W has resisted corresponding adjustments in its own earnings despite its admissions that it would suffer serious losses of traffic to Penn-Central . . . ." N & W Inclusion Report, at 44. The refusal to deduct any of the anticipated losses meant, in effect, that Commissioner Webb proceeded upon the assumption that N & W would lose the same proportion of traffic to Penn-Central as E–L expected to lose.[16]

It therefore appears that Penn-Central will increase the likelihood of, and may actually cause, an affiliation

[16] N & W Inclusion Report, at 43. See note 18, *infra,* for further explanation.

of N & W and C & O. The ICC has given no thought to whether such an affiliation would be in the public interest. It would create a virtual rail monopoly in some southeastern States (see Appendix B for a map depicting this result), which includes important traffic in coal between the border States and the Norfolk port area, from where it is exported abroad, and it is strongly opposed by both Penn and Central. Had the ICC faced the problem of inclusion, it might have been led to consider the possibility that Penn-Central could cause or increase the likelihood of an N & W–C & O affiliation. Only by considering this possibility could the ICC fulfill its obligation to consider all the relevant factors before approving the merger.

The "opportunity" reserved by the ICC for inclusion of the roads in N & W is therefore, like the "opportunity" reserved for inclusion in Penn-Central, shrouded in doubt as to whether inclusion could be required consistent with the public interest. Concededly, there is far more reason to believe that voluntary inclusion in N & W could at least be accomplished consistent with the public interest than could inclusion in Penn-Central. But on the other hand, while equitable terms could probably be arranged for inclusion in Penn-Central, it is open to serious controversy whether equitable terms will be attainable for inclusion of the roads in N & W. Commissioner Webb has found, of course, that equitable terms for B & M's inclusion in N & W cannot be worked out, and a possible consequence of this will be to create pressure in favor of the N & W–C & O plan or compel inclusion of B & M in Penn-Central. But even as to E–L and D & H (because its inclusion will probably be dependent on E–L's), the present controversy surrounding the conditions designed for interim protection makes considerably uncertain whether equitable terms will be possible once Penn-Central is consummated.

The purpose of the traffic and indemnity conditions originally imposed but now being reconsidered is to maintain the preconsummation *status quo* between Penn-Central and the three roads. One obvious end inferred from this purpose is to prevent irreparable harm to the three roads. But inherent in the finding that the public interest requires eventual inclusion of the roads in a major system and in the fact that the protective conditions are interim only is the purpose of keeping the roads intact so their inclusion on equitable terms will be possible. There is substantial controversy, however, over the validity and effectiveness of each of the proposed conditions. The Commission has, in fact, reopened the *Penn-Central* proceeding for hearings to determine in what respects the conditions originally imposed should be modified and whether or not a capital loss indemnity should be imposed. 328 I. C. C., at 328. Modifications are to be applied retroactively, and Penn-Central is to have judicial review only on the capital indemnity issue. But despite these assurances, the three carriers and other non-protected carriers attack the conditions on several grounds, at least some of which cannot lightly be dismissed.

There are three types of conditions involved: (1) traffic conditions; (2) indemnity for loss of revenue; and (3) indemnity for capital loss. The traffic conditions are expressly devised to prevent Penn-Central from increasing its competition with the protected roads. In brief, they restrain Penn-Central from taking any action or engaging in any practice "which would divert or tend to divert traffic . . . ," either directly or indirectly, from the protected roads. 327 I. C. C., at 561. While the ICC's authority to impose this restriction is unquestioned, great controversy exists concerning its intended scope. The three roads, relying upon the ICC's expressed intention to prevent "any" loss of revenue "as a direct result" of con-

summation, 327 I. C. C., at 532, claim that Penn-Central may take no step to improve service on routes in which they participate, even if the improvement is designed, for example, to meet truck competition. They also claim that the conditions should be applied retroactively to April 27, 1966, when the ICC released its original decision, in order to eliminate the possibility that Penn and Central could defeat the purpose of the conditions by continuing competitive practices begun between April 27 and consummation or by instituting changes during the intervening period. Penn and Central, on the other hand, take a far more limited view of the conditions' scope, despite their assurances before the District Court that the conditions prevent even solicitation of shippers.[17] Their position at the reopened proceeding, based upon the Commission's reference to maintaining the pre-consummation "status quo," 327 I. C. C., at 532, is that they should be free to offer any amount or quality of service after merger which they could perform individually or jointly before merger. This interpretation apparently would leave Penn-Central free, for example, to reduce rates on any route which was formerly all-Central or all-Penn, or on any presently existing joint route of Penn and Central, or to pool their cars for better flexibility, even though these actions might result in diversion of traffic from a protected line. See generally Brief for the United States on Appendix G Conditions, F. D. Nos. 21989 and 21990, Jan. 16, 1967, pp. 8–12. Whether the traffic conditions will succeed in preventing the deterioration of the three roads to the point at which equitable terms may be unattainable is a question of some diffi-

[17] Counsel for Penn and Central represented in the District Court that he construed the traffic conditions to prevent Penn-Central from using its solicitation force to get traffic normally moving on the lines of the three roads routed to the lines of Penn-Central. Transcript, p. 132.

culty. Traffic conditions are limited in their usefulness because they cannot eliminate entirely the more general benefits often obtainable through consolidation (such as unified management, better schedules, simplified tracing of cars, less switching and inspection of cars, and greater advertising resources), and because they cannot be operative upon the shipper. Since the ICC deemed the traffic conditions imposed essential to protect the roads, and since even the most rigid traffic conditions are of limited value, the question whether the view of the three roads or that of Penn and Central should be adopted is as important as it is difficult, and its unsettled state contributes to the doubt as to inclusion.

The indemnity for loss of revenue, now being reconsidered by the ICC, is to be payable to any of the three threatened lines in the event that it fails to realize, during the indemnity period, gross revenues in the same proportion to the combined gross revenues of Penn-Central and the protected line as the indemnity formula fixes for the protected line in the base period. The indemnity is obviously designed to make up for losses of traffic to Penn-Central despite the traffic conditions. The three roads have argued that the indemnity should be modified to increase payments, but take the position that, even as modified, the conditions would be inadequate. The nonprotected roads claim the indemnity condition is unlawful. Quite clearly, the indemnity would provide a financial interest to the protected lines to divert to Penn-Central traffic they would normally handle in connection with other carriers, such as N & W and C & O, in order to increase Penn-Central's proportion of their combined revenues and thereby to increase their own indemnities. Correspondingly it would provide an interest to Penn-Central to divert traffic to the protected lines to increase their proportion of combined revenues and thereby to reduce or avoid indemnity payments.

Whether this community of interest is unlawful or would otherwise be against the public interest has not definitively been settled, since the ICC is still in the process of reconsidering its position. It is relevant here, however, simply to note that the indemnity, viewed by the ICC as essential to interim protection, is meaningfully challenged both as unlawful and as inadequate, and therefore that it too cannot be relied upon to eliminate the doubt concerning whether the protected roads may be damaged during the interim to an extent that would make equitable terms unattainable.

The indemnity for capital loss is advanced by the three roads as essential if the merger is to be consummated prior to inclusion. It is directly related to the problem of assuring that equitable terms for inclusion in N & W can later be reached. Commissioner Webb's definition makes clear the proposed condition's purpose:

> "The term 'capital loss,' as used by N & W, EL, D & H and B & M in their petitions for reconsideration in the *Penn-Central* case, refers to losses of EL, D & H, and B & M traffic to Penn-Central to the extent not offset by traffic gains attributable to their inclusion in the N & W system, with the net annual loss of income, if any, capitalized at an appropriate rate." N & W Inclusion Report, at 25, n. 21.

In effect, this condition would guarantee the three roads the difference between what they would lose to Penn-Central and what they would gain by inclusion in N & W. Unquestionably, its adoption would facilitate inclusion, but the fact is that it has not been adopted, and its adoption in any form would be subject to judicial review at the request of Penn and Central. Moreover, the usefulness of the capital indemnity approach has been vigorously challenged by C & O and N & W. They assert that the indemnity will not succeed in keeping the three

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roads in viable condition, since traffic, once diverted, is likely to stay diverted. The ICC should not, they claim, rely upon an indemnity provision which fails to accomplish the continuation of service it has found to be so essential. C & O–B & O Brief on Capital Loss Indemnification, F. D. No. 21989, November 28, 1966. In this connection they raise once again the specter of an N & W–C & O merger, arguing that their proposal is the only acceptable solution to the inclusion problem.

There appears to be some merit in the arguments that some sort of capital indemnity is necessary to assure the attainability of equitable terms for inclusion. While Commissioner Webb left to the ICC in the *Penn-Central* case the issue whether capital loss indemnification should be paid, he did conclude that inclusion of the three roads "in the system chosen by the Commission in the furtherance of national transportation objectives should not be on terms which reflect any diminution of capital value attributable to the traffic diversion impact of the other system. In other words, the petitioners should not be penalized for anticipating the Commission's desire to preserve rail competition in the territory they serve." N & W Inclusion Report, at 28. His valuation of the smaller roads, therefore, did not reflect the diminution of value anticipated to be caused by Penn-Central, and his apparent conviction was that equitable terms could not be worked out on any other basis, unless a capital indemnity were granted. See, *id.*, at 43.[18] In light of these conclusions it can

[18] In working out the value of E–L's stock for the purpose of an exchange with N & W, Commissioner Webb, applying the principle of reciprocal adjustments, refused to deduct from E–L's value the estimated impact of Penn-Central without also deducting from N & W's value the estimated impact of Penn-Central. Since N & W submitted no evidence, he proceeded upon the assumption that the impact upon N & W would be proportionate with the estimated impact upon E–L. The result of this was to enable him to discount

readily be seen that the unresolved issue of capital indemnity is important, and therefore that the objections to it create uncertainty on this score as well as over whether equitable terms are possible.

What the ICC has done here by deferring inclusion of the three roads is to defer confronting numerous difficult and important issues which cast substantial doubt upon whether the roads can be included in any major system contemplated for the purpose consistent with the public interest and on equitable terms. In the process it has approved an irreversible consolidation which it found to be in the public interest only upon the premise that the affected roads would be included in a major system. By proceeding in this manner, the ICC has in my view failed to fulfill its fundamental duty to determine whether consolidations are in the public interest on the basis of all the relevant facts. The problems created by a required inclusion obviously are relevant to the question whether the proposal which makes their inclusion necessary is in the public interest. And where, as here, the many problems created are serious and far-reaching, the Commission must consider them before arriving at and implementing with finality its ultimate conclusion.

While I consider it the ICC's responsibility to weigh the feasibility and effects of an inclusion it deems required by the public interest, I recognize the importance of leaving great flexibility with the agency to deal with emergency situations in order to avoid serious damage to the national transportation system. But it is clear there is no pressing need here which could justify the ICC's action. Commission counsel represent in this Court that the ICC has found "that the merger would

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completely E–L's capital loss. If this method of valuation were approved, he noted, "the question of capital loss indemnification . . . [in *Penn-Central*] will become moot." *Id.*, at 47.

result in substantially improved service for the shipping public and in annual savings of at least $80 million for the merged company . . . ." Brief of the I. C. C., p. 52. Improved service and economies are commonly the claimed results of rail consolidations, and proportionately the improvements and savings anticipated in this case are no more substantial than in many other mergers. Moreover, the anticipated $80,000,000 annual saving is to be reached about eight years after consummation, 327 I. C. C., at 501, and even this estimate does not take into account the sharp curtailment that would result from the interim protective conditions which were formulated with the avowed intention of maintaining the pre-consummation *status quo,* see 327 I. C. C., at 532.[19] The ICC stressed the financial condition of Penn and Central, including their "persistently low rates of return" and their need for improved equipment, as a ground for authorizing immediate consummation, 327 I. C. C., at 501–502, but once again, this is a stock reason for merger, usually alleged by at least one party. The fact that a merger will provide financial assistance militates in favor of approval, but it is only one of the many important factors which must be considered, and in the case of Penn and Central this point has lost much of its force, since both have had substantial and consistent increases in their earnings in recent years. See Brief of the I. C. C., p. 55. While this does not necessarily lessen the long-

[19] In fact, the more effective are the protective conditions, the greater will be their interference with achievement of the planned economies and improvements. Penn Vice-President Large recently testified at the reopened hearings that "the first two million dollars we save as a result of merger is a good five years away." Transcript of Hearing of December 15, 1966, F. D. 21989, p. 22343. Qualified by the statement that he had made no studies on the matter, he testified that he saw "no chance of any substantial savings in the next two years." *Id.,* at 22344.

term need for consolidation, it does show there is little need for immediate consummation on this ground.

The argument that the survival of the New Haven depends upon undelayed consummation is not pressed here with the same intensity with which it was embraced at the agency level. See 328 I. C. C., at 312. Judge Friendly's opinion put this matter in proper perspective by pointing out that it is "unrealistic to suppose that inclusion of NH in the Transportation Company can be accomplished before conclusion of the Commission's reconsideration in this case . . . ." 259 F. Supp., at 973. The tenable argument here is that, the longer consummation is delayed, the more difficult will become the task of NH's Trustees in reorganizing the company, and the more possible it becomes due to some unanticipated change of circumstance that the merger may fall through entirely. While every effort consistent with the public interest should be made to protect the invaluable services the NH performs, the difficulties anticipated are largely speculative. If this merger is to benefit its proponents as greatly as they contend, it is no fragile package. And although no unnecessary risks should be taken even with a plan so enthusiastically supported and elaborately designed, a proper concern for the public interest and for the protection of the roads threatened by this merger should have led the ICC to delay consummation.

The projected effects of Penn-Central on E–L, D & H and B & M are anything but speculative. Those roads unquestionably will be destroyed unless included in a major system, and the fact that inclusion somewhere is implicitly assured us may be further cause for concern, in light of the contemplated alternatives and of the difficulty and consequences involved in the adoption of either of them. If the ICC should ever be allowed to depart from its statutory duty to consider all the relevant factors before determining the public interest, it certainly should

not be upon the mere recitation of factors favorable to the plan's adoption and of speculative dangers and the inconveniences of private parties. The reason Congress has ordered that all factors, including the effects of inclusion or failure to include, be considered, is to avoid danger to the public interest caused by precipitate action, and there is more than ample evidence of danger to the public interest in this case to warrant unhesitating enforcement of Congress' directive.

III.

The ICC argues that to delay the merger until the three roads are assured inclusion would amount to a consolidation of the proceedings in *Penn-Central* with the N & W inclusion proceeding, at least for decisional purposes, and that this would constitute a return to the "master plan" approach for railroad unification "unsuccessfully tried under the Transportation Act of 1920, and would probably preclude the consummation of any major rail unification, regardless of its merits." Brief of the ICC, pp. 43–44. The Commission points out that it "consistently has refused to consolidate the Eastern railroad merger or control proceedings," *id.*, at 48, and that the Government's position here is the same as its unsuccessful contentions for consolidation in the *C & O–B & O* and *N & W-Nickel Plate* proceedings.

It is difficult to understand exactly what the ICC is arguing. Certainly no one contends that the Commission is required, as it was by the Act of 1920, to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." 41 Stat. 481. Nor is it argued that the ICC is required to draw up regional plans for consolidation.

On the other hand, it can hardly be said that the ICC is powerless to consolidate proceedings, or for that matter

to plan or to take any other reasonable step to enable itself to perform its statutory obligation as custodian for the development in the public interest of a national transportation system; that the ICC is no longer told to plan does not mean it is unable to do so when planning is necessary to fulfill its duties. The ICC is told in the 1940 Act to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice," 49 U. S. C. § 17 (3), and it has in fact recognized that it possesses "the power in appropriate circumstances either to consolidate proceedings in which the issues are similar or closely related, or to postpone a particular decision when so required by the public interest." *C & O—Control, supra,* 317 I. C. C., at 266. But apart from this explicit power, it is clear from a close appraisal of the 1920 and 1940 Acts that the ICC's responsibilities are far broader now and, therefore, that it would be anomalous to find in a comparison of these two pieces of legislation a basis for the sweeping contention that the Commission can no longer plan.

The 1920 and 1940 Acts are similar in several respects. Under both, applications for consolidation are initiated by the parties and approved if found to be in the public interest, and under neither may a consolidation be compelled. The salient difference is that under the 1920 Act the ICC was required to draw up a plan for all the Nation's railroad properties, and was called upon to judge the proposals for railroad consolidation filed with it by private parties in terms of the master plan it had created. Proposals that advanced the plan's fulfillment stood a far greater chance of approval than those that did not, and only in this sense could it be said that parties were unable to initiate plans of their own choice. While the planning function is broad procedurally, however, it was designed to serve only limited ends. Congress'

concern was "largely with financial problems," its chief aim being to overcome the problem which arose from the fact that "rates which would provide reasonable returns for strong systems would not permit weak lines to survive, and if rates were raised to take care of the weak roads, the more prosperous roads would enjoy excessive returns." Leonard, Railroad Consolidation Under the Transportation Act of 1920, at 57, 59 (1946). The decision to encourage consolidation into a limited number of systems was of course designed to establish a stronger railroad industry, but it "was not grounded on the premise that economies from operation and the avoidance of competitive wastes would be the principal means of insuring an efficient and economic railway system . . . , but, rather, on the conclusion that the financial prosperity of rail carriers would be promoted and effectuated if the weak and the strong railroads which exist side by side in the same territory were to be consolidated into balanced railroad systems with respect to earning power." S. Rep. No. 445, Report on the National Transportation Policy by the Special Study Group of the Committee on Commerce, 87th Cong., 1st Sess., p. 234 (1961). In fact, the Act specifically directed the ICC, in drawing up the plan, to preserve competition as fully as possible and to maintain existing routes and channels of trade wherever practicable. In other words, although the ICC was directed to draw up a national plan against which it was to judge whether applications for consolidation were in the public interest, the judgment was to be made rather mechanically, and the plan itself was to be designed to achieve limited, primarily financial goals.

In contrast, as we have seen, the purposes sought through consolidation under the 1940 Act are wide-ranging, and the public interest includes consideration of all factors relating to the National Transportation

Policy. Financial manipulation was deemed inadequate, and the ICC was ordered to weigh numerous, often conflicting, considerations. In light of this "enlarging of the factors or values which an agency must take into consideration," Reich, The Law of the Planned Society, 75 Yale L. J. 1227, 1248 (1966), it seems incongruous to assert that the change from the 1920 Act approach to that of the 1940 Act signifies a change from planning to strictly *ad hoc* adjudication.

It should be clear, in fact, from a full consideration of the ICC's powers, and of the consequences of failing to use those powers, that consolidation and the use of other procedural techniques is not only within the agency's authority, but is often essential if it is to fulfill its function as guardian of the public interest. Section 17 (3), referred to above, appears sufficient to authorize the Commission to adopt procedures calculated to develop complete records with respect to the public interest in particular merger proceedings, and to coordinate separate merger proceedings when necessary to secure the best possible results. Tucker & O'Brien, The Public Interest in Railroad Mergers, 42 B. U. L. Rev. 160, 184 (1962). Within the context of a case-by-case approach, the Commission is authorized under § 16 (11) to "employ such attorneys as it finds necessary . . . for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the commission's own instance or upon complaint . . . ," and it has done so.[20] It may and often has called upon its staff to develop information in pending cases. In the *N & W-Nickel Plate* proceeding, for example, it called upon its Bureau of Inquiry and Compliance to study

[20] Under this power, the Commission called upon Mr. Louis D. Brandeis, later Mr. Justice Brandeis, to represent the public in a general rate increase case. *The Five Per Cent Case,* 31 I. C. C. 351.

and report on which railroads would be affected by the merger. It possesses, with appropriate safeguards, broad powers of official notice,[21] and in recent merger cases it has frequently referred to facts and arguments in other, related merger cases. Moreover, like most other agencies assigned similar functions, it has broad investigative power, which may be used in the context of adjudication or simply to provide background. Section 13 (2) confers "full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing . . . concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter," which includes § 5. The ICC has resorted to various forms of investigations and studies to enable itself to perform its obligations. See generally S. Doc. No. 10, Monograph of the Attorney General's Committee on Administrative Procedure, Part 11: Interstate Commerce Commission, 77th Cong., 1st Sess., pp. 93–96 (1941). Particularly noteworthy is the Staff Study on Railroad Consolidations and the Public Interest, by the Commission's Bureau of Transport Economics and Statistics, which contains an analysis of the Commission's decisions in railroad consolidation cases. Reprinted as Exhibit 11, Hearings before the Subcommittee on Antitrust and Monopoly on S. 3097, 87th Cong., 2d Sess., pt. 2 (1962).

Finally, although the ICC does not promulgate general plans for consolidation, it has the power under § 5 (2)(b) to approve consolidations "subject to such terms and conditions and such modifications as it shall find to be just and reasonable . . . ." This authority encompasses the power under § 5 (2)(d) to make inclusion of a railroad a prerequisite to approval of a merger, and it does

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[21] See generally 2 Davis, Administrative Law §§ 15.01–15.14 (1958).

not depend upon the request of any private party involved. It has been broadly construed to enable the ICC to implement previously found conditions and to cope with changed circumstances, *e. g., United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419; *American Trucking Assns.* v. *United States,* 355 U. S. 141; *American Trucking Assns.* v. *Frisco Co.,* 358 U. S. 133, and the Commission has applied this power, when it has seen fit to do so, with great liberality. It has even gone to the point of conditioning its approval of applications to consolidate upon actions to be taken by railroads not even party to the proceeding.[22] In sum, the Commission's practice certainly is not consistent with its assertion here that its "only 'planning' power" under the 1940 Act is to include railroads in the region. Brief of the ICC, p. 46.

The ICC is pre-eminently an agency "directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the 'guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected." H. R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., p. 53 (1944); see *Southern Class Rate Investigation,* 100 I. C. C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best

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[22] In the *Penn-Central* case, the Examiners recommended, as a condition to approval of the merger, that Penn be required to sell the Lehigh Valley to C & O–B & O, if such sale were later found to be in the public interest, in order to assure New York City an additional competitive line. Penn-Central Report, at 434–435. The Commission felt it did not have to pass upon this recommendation, since Penn agreed after the Examiners' Report was issued to sell LV to C & O–B & O. 327 I. C. C., at 517.

serves the public interest.[23] To the same end, the agency has wide latitude in fashioning procedures, and a broad power to condition its approval of proposals. In other words, the ICC is not the prisoner of the parties' submissions.[24] Rather, the agency's duty is to weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy.[25]

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[23] "A regulatory body such as the Interstate Commerce Commission cannot properly discharge its duty if it remains ignorant of relevant facts simply because they were not introduced in evidence. The Commission should itself supply deficiencies in the record. It should bring to light material which the parties have either overlooked or have willfully failed to call to its attention. It should aid those parties who through lack of resources are unable adequately to present their cases. It should make full use of the expert knowledge of commissioners and staff, and of the mass of transportation information that it has accumulated through the years." H. R. Doc. No. 678, *supra*, p. 70. See *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194, 208–210, 212, 216–217.

[24] It was the position of the Chairman of the Board of Pennsylvania before Congress that the ICC should leave the fate of the smaller roads to be worked out after the principal mergers had been approved. Hearings on S. 3097 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 87th Cong., 2d Sess., p. 385 (1962). He testified that if an attempt was made to stop the three main proceedings, the entire process "would stop, there is no doubt about it," *id.*, at 384, and responded to the query whether the ICC "has no alternative but to buy the package or nothing at all," that "It is the fact . . . ," *id.*, at 397.

[25] There are indications that the ICC has planned all along for three systems. The most striking of these is the use by the Penn-Central Examiners of a chart to evaluate the merger's anticompetitive effect which accounts for all the smaller roads. Penn-Central Report, Appendix T–2. It need hardly be said that the ICC would be proceeding unlawfully if it had determined, without notice or hearing, that a three-system structure was essential, and had then gone through the motions of adjudication.

I am therefore not reassured by the ICC's representation that it has "consistently" refused to consolidate the eastern railroad merger proceedings for any purpose or to any degree. The ICC's prior refusals to consolidate are entirely distinguishable, since none of them entailed the risk under the Commission's own findings that a railroad performing essential public service could be destroyed.[26] But more generally, while consolidated consideration provides no simple answer to the ICC's problems, see generally Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965), the very complexity of its task suggests that consolidated consideration may be a useful procedural device, short of an investigation or prearranged plan, for offsetting at least in part the disadvantages inherent in the isolated case-by-case approach, both in formulating and applying policy.

Although a case-by-case adjudication may offer advantages in flexibility and continual exposure to concrete situations, "the disadvantages of developing policy through a sequence of limited cases are both numerous and impressive." H. R. Doc. No. 678, *supra,* p. 81. A significant disadvantage is that individual proceedings "seldom if ever produce sufficiently comprehensive records for the adequate solution of questions of major importance." *Id.,* at 82. Obviously, without all the relevant facts, the chance of a satisfactory disposition is diminished. Although the ICC has tools to assemble complete factual records, it employed virtually none of them in these highly interrelated proceedings,[27] including the

[26] The ICC made no finding that either C & O–B & O or N & W–Nickel Plate would lead to the destruction of any other road. See 317 I. C. C., at 265–266, 282; 324 I. C. C., at 27–31.

[27] There is abundant evidence that the three recent proceedings are highly interrelated. Central petitioned for a general Commission

power to consolidate the proceedings on common issues. Rather, the cases have been rigidly segregated, leading the ICC to resort to extraordinary interim conditions instead of resolving definitively the fate of the three threatened roads. This has had the undesirable effect of enabling each of the major carriers to control the basis for judgment by deciding what evidence to offer or withhold, depending on which course best served its own interest. Evidence of competitive impact has been withheld in one proceeding only to appear at later pro-

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investigation during the *C & O–B & O* proceeding, alleging that the ICC should not upset the existing competitive balance before evaluating all the facts and determining the part each proposal should play in the solution of the eastern railroad problem. Numerous other parties in that case also petitioned for consolidation of the proceedings, either for hearing or decision, with N & W-Nickel Plate and later with Penn-Central.

In the *N & W* case, the Justice Department argued that the record was inadequate to determine competitive impact and stated "that only through consolidation can a clear picture be obtained of the effects of the Norfolk & Western-Nickel Plate and Pennsylvania-Central mergers on the Erie-Lackawanna, the Delaware & Hudson, and the New England lines." The relationship between the *N & W-Nickel Plate* and *Penn-Central* proceedings was palpable, not only on the ground that Nickel Plate competed with Central, but also because of the facts that (1) Penn controlled N & W and had taken the position that it would divest only when it knew how it stood with respect to its application to merge with Central, and (2) it was only through Penn's acquiescence that N & W managed to contract for the purchase of the 108-mile Sandusky line which enabled it to link its main line with Nickel Plate's main line, 324 I. C. C., at 74.

Commissioner Webb felt that neither the N & W inclusion proceeding "nor the *Penn-Central* case can be fully understood if consideration of one is divorced from the other. Unfortunately, the Commission's action in deciding the cases separately has tended to blur vital issues common to both proceedings." N & W Inclusion Report, at 23.

ceedings in the form of evidence that the company affected must be permitted to merge with another company to protect itself, or that the anticompetitive impact of the later merger will be limited in light of the increased strength and ability to compete of the companies already allowed to merge.[28] The carriers have been well aware of the opportunity the Commission's practice provides them, as is illustrated by the statement of the Chairman of the Board of Pennsylvania that "if the C. & O.–B. & O. is approved, that is going to help the Nickel-Plate case and if that is approved, it is going to help our case, going to go right around the circle." Hearings, *supra,* n. 24, at 397.

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[28] The best possible example is what happened in this case. Evidence which Central might have presented earlier in the form of an appraisal of the effects of C & O–B & O and N & W-Nickel Plate upon its ability to operate, took the form in the *Penn-Central* proceeding of the contention that, without a Penn-Central merger, both Penn and Central would be at a competitive disadvantage since neither "separately would compare with C & O–B & O or N & W–Nickel Plate in any element of strength, whether tested by traffic volume, financial results, or the means for improving service." Brief of Applicants, F. D. Nos. 21989–21990, dated June 1, 1964, p. 141. And in appraising the anticompetitive effects of a Penn-Central merger, the Examiners in this case stated that, "[a]lthough in certain . . . categories, the increases [to be brought about by the merger] are significant, the degree of relative dominance by P. R. R. in comparison with the other roads, has been decreased significantly as a result of the consummation of the N & W and C & O–B & O transactions by reason of the fact that these latter two systems have also increased their relative share." Penn-Central Report, at 424. The Commission, too, indicated its conviction that Penn-Central became more justifiable now that the other systems were authorized, by citing "the growing strength of the N & W and C & O–B & O systems" as a check against possible abuse of economic power by Penn-Central, and by pointing out "that applicants will face increasing competition from those two greatly strengthened rail systems." 327 I. C. C., at 514, 519.

It is not that the ICC has been unaware of what has been going on. Commissioner Tucker, in the first of the recent trilogy, pointed out that the "failure of the large eastern railroads to present evidence against consolidation is . . . a natural consequence of their own self-interest which dictates a reciprocity of silence." *C & O—Control, supra,* 317 I. C. C., at 326. The fact is that, despite some lip-service to the contrary,[29] the Commission has proceeded under the assumption that competitive impact is to be evaluated with the position of the railroads affected very much in mind. Thus the Examiners in this case, when called upon by the Justice Department to weigh the possibly serious adverse effect of Penn-Central upon N & W, C & O–B & O and others, pointed out that the roads allegedly affected had introduced no evidence of adverse effect. They added, realistically and revealingly:

> "We are fully cognizant of the fact that in the evolving merger picture in the northeast section of the nation, the carriers involved may well have refrained from participation in these proceedings or influenced their subsidiaries not to participate on the grounds that they did not desire to upset their own merger program. Such action, however, infers a managerial decision by each that the anticipated benefits from its individual merger program will

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[29] The Commission said, for example, in the *C & O–B & O* case: "Notwithstanding Central's withdrawal from these proceedings, the effect of the proposed transaction on the operations and traffic of Central and other carriers is an issue to be considered." 317 I. C. C., at 280. It took insignificant steps, however, to resolve the conflicts of evidence concerning competitive impact upon Central, and failed entirely to weigh the combined effects on Central of both C & O–B & O and the pending N & W-Nickel Plate merger. See 317 I. C. C., at 319.

outweigh any injury or harm which may result from other merger plans." Penn-Central Report, at 304.[30]

The approach which this statement and many of the Commission's rulings and practices reveal is based upon a series of unacceptable assumptions. It is simply unrealistic, for example, to believe that all the railroads will always be correct in their estimate even of their own best interests. When a railroad has incorrectly estimated its self-interest, moreover, its reaction may well upset the private agreements or understandings upon which the Commission has in effect allowed its findings to rest. Thus when E–L realized that Penn-Central might be approved before it had secured voluntary inclusion in N & W, it abandoned its agreement with N & W, upon which the Commission relied, and petitioned for inclusion in Penn-Central, thereby setting into motion the controversy in this case. See 324 I. C. C., at 61–62 (representation of counsel quoted in dissenting opinion). Most recently, C & O–B & O, and their family lines, sought to reopen *Penn-Central* to introduce evidence of traffic diversion. The Commission observed, in refusing to hear the evidence, that the Examiners' findings that the net

[30] The District Court, in the *C & O–B & O* case, took basically the same position when, in rejecting the Justice Department's contention that the proceeding ought to be consolidated with others, it considered "significant" the fact that no railroad had joined the Department in its request and stated that self-interest would have required them to do so if the adverse impact was actually serious. 221 F. Supp., at 31. The Penn-Central Examiners were more accurate in their appraisal, since they impliedly recognized that the decision not to appear meant only that the road had decided the benefits from its own merger plans outweighed the disadvantages to it of another merger, and not that the railroad in fact contemplated no serious adverse impact upon itself.

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effect of the merger would not be detrimental to these carriers or to their ability to provide adequate service "are as much based on a failure of the several petitioners to come forward with assertions or proof of injurious traffic diversion as on any affirmative showing of no effect." 328 I. C. C., at 317. For the first time revealing indignation toward a practice long condoned, the ICC stated that the "measured and deliberate silence" of the railroads at the hearing supports "the inference that they saw more to be gained thereby in their own system-building aspirations than would result from forceful opposition likely to arouse counter opposition. Now, with the N & W-Nickel Plate merger and the C & O–B & O control transactions safely beyond challenge, . . . petitioners have nothing to lose and perhaps much to gain by breaking their silence." *Ibid.*

Ultimately, however, the reason reliance upon the estimates of railroads of their own best interests is objectionable is simply that the best interests of the railroads are not necessarily consistent with the public interest, and it is the latter which the Commission is directed to advance. It may be, as Commissioner Tucker stated early in this "gigantic game of dominoes" the Commission has been playing, 327 I. C. C., at 550, "that each carrier has the unalienable private right to abdicate its prerogatives to oppose any consolidation. It is the primary responsibility of the Commission, however, to preserve the development of a sound transportation system in the public interest, and where an application may offer the possibilities of public injury, the Commission must strive to obtain a record which comprehensively covers public considerations." *C & O—Control,* 317 I. C. C., at 326. See generally, The Railroad Merger Problem, Report of the Subcommittee on Antitrust and Monopoly of the Senate

Judiciary Committee, 88th Cong., 1st Sess. (Comm. Print 1963). The commendable industrial statesmanship demonstrated by the railroads on many occasions in these recent proceedings only serves, because of the cohesion this demonstrates, see Jaffe, *op. cit. supra,* p. 405, at 11–13, to aggravate the danger that "grows out of the tendency of these giant corporations to compromise their own differences at the expense of the unorganized public," 2 Davis, *op. cit. supra,* n. 21, at 378. The regulatory agency must be the bulwark against such compromise. It is "a requisite for administrative viability," [31] that "[t]he outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests." *I. C. C.* v. *Chicago, R. I. & P. R. Co.,* 218 U. S. 88, 103. See *Scenic Hudson Preservation Conference* v. *F. P. C.,* 354 F. 2d 608 (C. A. 2d Cir.), cert. denied, 384 U. S. 941.

This merger may well be in the public interest, as well as in the interests of the railroads involved. But the Commission has failed to go about deciding this question in a manner designed to accomplish its statutory responsibility. "Deference to administrative decisionmaking assumes procedures which assure a fair hearing to the affected interests . . . ." Jaffe, *op. cit. supra,* at 566. "As soon as the search for the public interest, even seemingly, becomes a secondary consideration in cases involving more than the adjudication of private rights, no matter how conclusive the exigencies of the situation

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[31] Huntington, The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest, 61 Yale L. J. 467, 509 (1952). Compare Morgan, A Critique of "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," 62 Yale L. J. 171 (1953).

appear, the independent Commission is doomed to impotency as an instrument of government." *C & O—Control,* 317 I. C. C., at 297 (dissenting opinion).[32]

[Appendices A and B follow this page.]

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree with the Court that the terms of the conditions which the Commission proposes to attach to this merger should be known before we approve it and while I join the opinion of the Court, I would go much further. There are underlying issues brought to us by a few of the parties which we should face. Those issues present not the merits of the merger but the adequacy of the Commission's findings. It is, of course, not for us to determine whether the merger is desirable or undesirable. We do not sit as a planning agency. Nor are we entrusted with the task of making the large policy decisions that underlie approval or disapproval of this new concentration of transportation power and wealth. Our task is one of review within the narrow confines of § 5 (2)(c) of the Act by which Congress has provided standards for the Commission. Our sole task is to determine whether the Commission has satisfied by its findings the standards provided by Congress. I do not think it has.

A word should be said as to the background of this irresponsible ICC decision. The Commission early indi-

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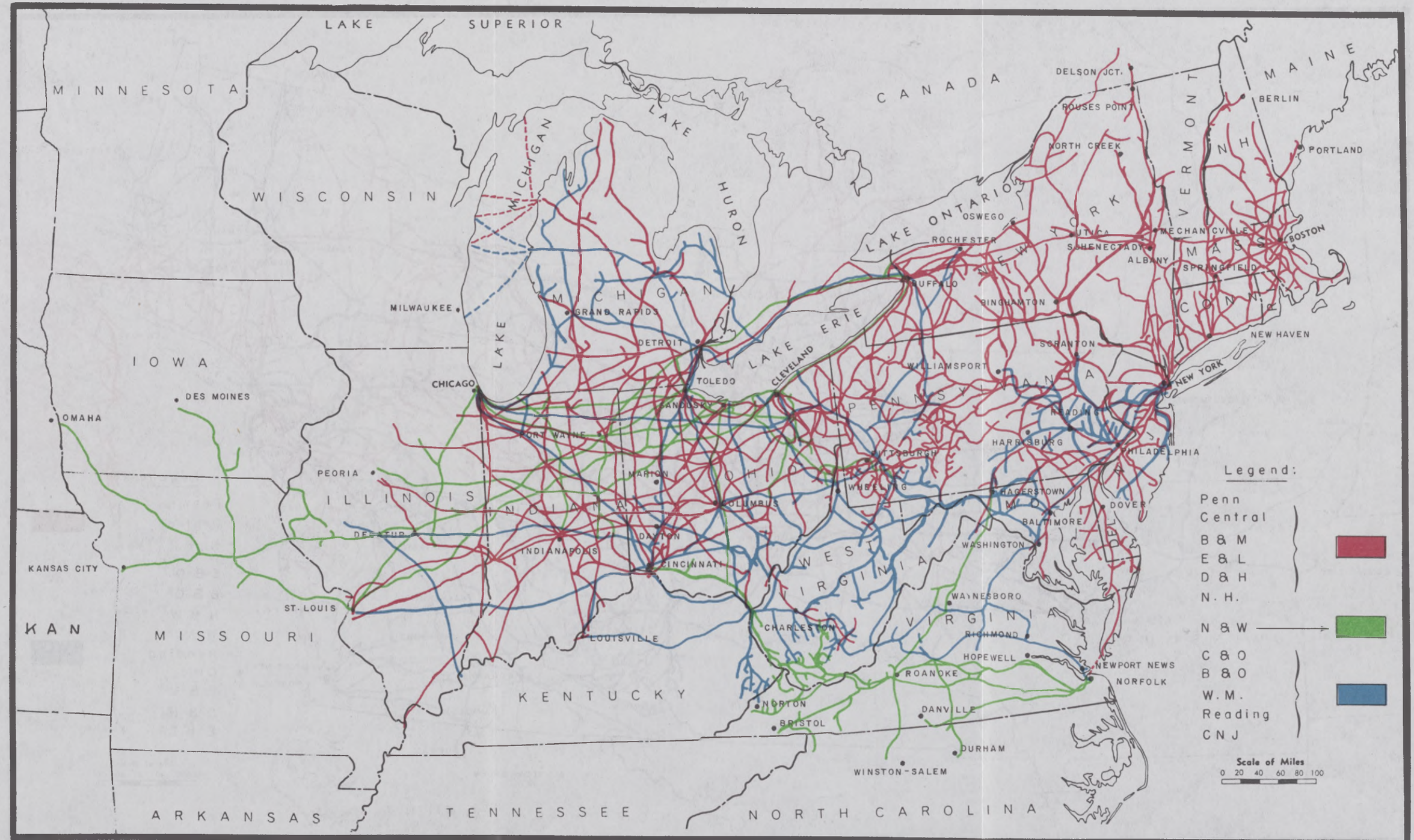
[32] I find it surprising that my Brother FORTAS refers to today's decision as "a reversion to the days of judicial negation of governmental action in the economic sphere." In those days the Court took a restricted view of the power of Congress and its agencies to regulate our economy. That view "has long since been discarded." *Ferguson* v. *Skrupa,* 372 U. S. 726, 730. Our position today, shared by the Solicitor General and the Department of Justice, is not one of judicial negation but of insistence that the ICC fulfill Congress' directive to supervise in the public interest the destiny of this Nation's transportation system.

APPENDIX A TO OPINION OF BRENNAN, J.

THREE SYSTEM EASTERN DISTRICT, WITH SMALLER LINES INCLUDED IN PENN-CENTRAL



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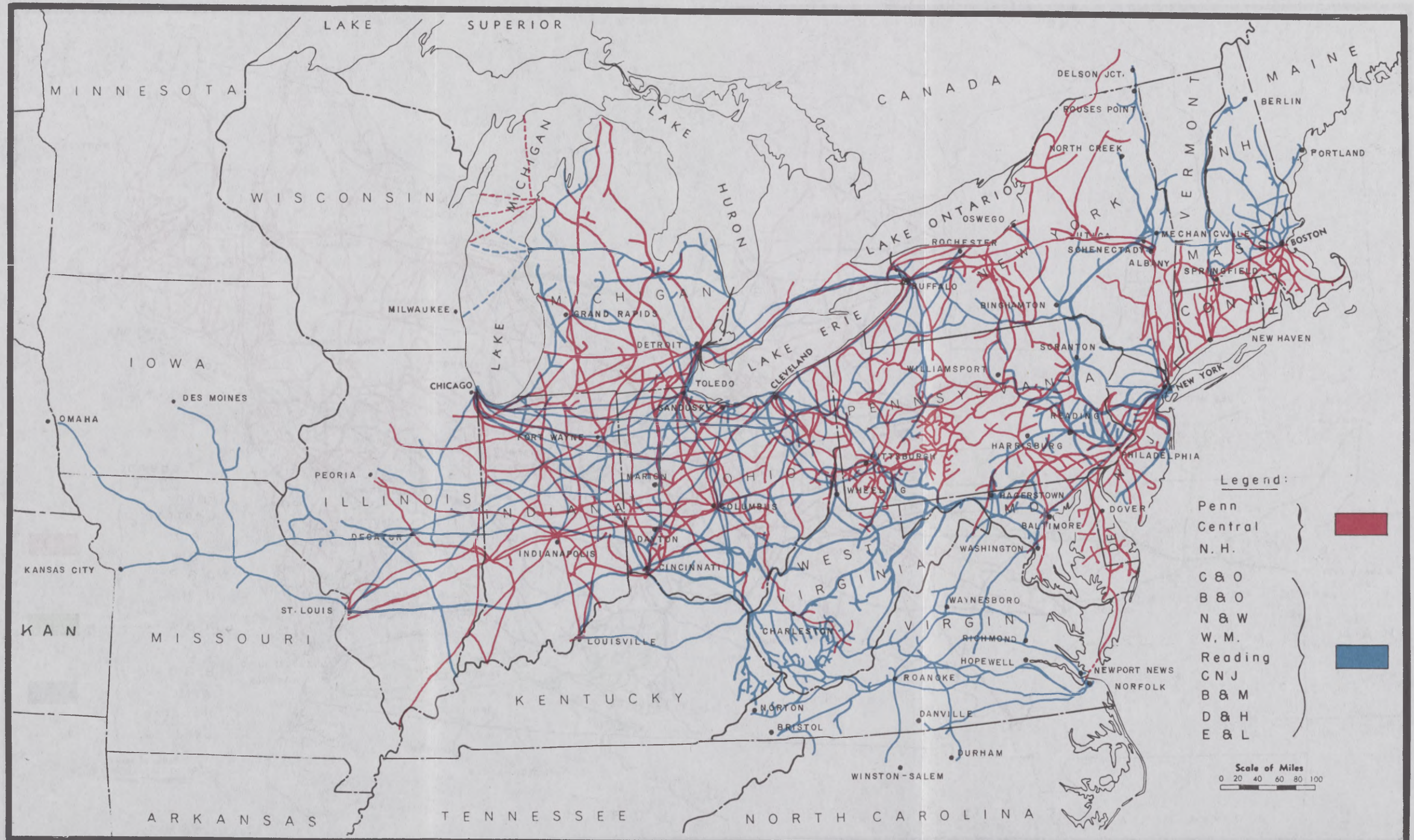
APPENDIX B TO OPINION OF BRENNAN, J.

TWO SYSTEM EASTERN DISTRICT, SHOWING N&W MERGED INTO C&O-B&O



cated its preference for a consolidation of most eastern rail carriers into three systems: (1) C & O–B & O; (2) N & W-Nickel Plate; (3) Penn-Central. The initiative was left to the carriers. The Commission never sought, proposed, or examined into a master plan. On June 27, 1960, it indeed denied a petition of New York Central requesting the Commission "to embark upon a general investigation of the unification, consolidations, and mergers of the rail carriers within Central Freight and Trunk Line Association territories" with a view to formulating "principles by which both [the Commission] and the carriers shall be governed in Section 5 cases in the future." [1] The making of mergers was based upon "attainable" alliances rather than upon "any truly balanced competitive basis." [2] Today's predicament was prophetically forecast only a few years ago: [3]

> "Although superior lineups may exist, it is suggested that it is better to have 'attainable mergers' (approved by the big financial interests) rather than none at all. However, the helter-skelter method by which these mergers have become 'attainable' for decision has developed into a complicated problem

[1] Petition of the New York Central R. Co., Docket No. 33475. Prior to the Transportation Act of 1940, it was the duty of the Commission under § 5 to prepare "a plan for the consolidation" of the railway systems "into a limited number of systems." The 1940 Act relieved the Commission of that duty. H. R. Rep. No. 1217, 76th Cong., 1st Sess., 6. See *Schwabacher* v. *United States*, 334 U. S. 182, 192; *County of Marin* v. *United States*, 356 U. S. 412, 417. But there is no indication that Congress deprived the Commission of the power to propose one, though its power to enforce one proposed by it in a § 77 reorganization was denied by *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, by a narrow four-to-three vote.

[2] The Railroad Merger Problem, Report of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 88th Cong., 1st Sess., 31 (Comm. Print 1963).

[3] *Id.*, at 31–32.

for the Commission, particularly in the East. The eastern story begins with the Commission's approval of the merger between the Norfolk & Western and the Virginian in 1958, two successful and competitive coal roads. By that merger, the New York Central lost its access to the Pocahontas coal territory and it lost a friendly connection which more or less had always been considered a Central road. Thus the Virginian, apparently not 'attainable' by the Central was now placed in a position to enhance the competitive power of the Pennsylvania (which controlled the Norfolk & Western). This merger, plus the announced intention of the Chesapeake & Ohio to acquire control of the Baltimore & Ohio, sharpened the Central's interest in its competitive survival against the massive Pennsylvania system which was well entrenched in the rich Pocahontas coalfields and in the Tidewater ports. The Central tried to outpoint the C & O in getting control of the B & O, but it lost out, largely because it couldn't convince Swiss bankers of any financial advantage in the merger. Then the Central negotiated with the C & O for a three-way merger between the respective companies, which the Central's president Perlman believed would provide a balanced, competitive system with the Pennsylvania. At the same time, Mr. Perlman was stating that a B & O–C & O union would seriously hurt the Central. In the meantime, the Norfolk & Western had filed for merger with the Nickel Plate, for a leasing of the Wabash, and for the purchase of the Pennsylvania's Sandusky line. This was apparently the last straw for the Central. It had been outmaneuvered, and thus did the only thing left it could do—agree to merge with the Pennsylvania. That merger was 'attainable,' and is now the crucial determinant of most rail reorganizations."

The Commission denied requests to consolidate the eastern consolidation proceedings for decision. See *Chesapeake & Ohio R. Co.—Control—Baltimore & Ohio R. Co.*, 317 I. C. C. 261, 266; *Norfolk & Western R. Co. and New York, Chicago & St. Louis R. Co.—Merger*, 324 I. C. C. 1, 19.

The Commission's piecemeal, hands-off approach to the merger problem is, however, not commanded by the Transportation Act of 1940. There is no evidence that Congress intended to remove entirely the planning and policy function of the Commission with respect to rail consolidations. Indeed, such a position ignores the mandate of the preamble to the Act of 1940, which provides that its provisions shall be administered with a view to "promote . . . adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . . all to the end of developing, coordinating, and preserving a national transportation system." As my Brother BRENNAN notes, the 1940 Act significantly broadened the Commission's responsibility; it would be "incongruous to assert that the change from the 1920 Act approach to that of the 1940 Act signifies a change from planning to strictly *ad hoc* adjudication." *Ante*, p. 427. The Commission has ample authority to insure a co-ordinated approach to railroad consolidations; it is not straitjacketed by a disjointed case-by-case approach. Yet the contrary attitude of the Commission is evident in this case. The Department of Justice argued that the eastern district should be served by four systems: Penn, Central, C & O–B & O, and N & W into which E–L should be merged. If it was shown that the traffic could not support four systems, the Department proposed that Penn should be consolidated with N & W and Central with C & O–B & O. The Commission's answer to this was that it could not compel the alignments suggested by the Department of Justice

and was limited to alignments suggested by the carriers. This suggests, as my Brother BRENNAN indicates, a subservience of the Commission to the railroads' estimates, the railroads' proposals, the railroads' evaluations, the railroads' prophecies of the future.

The C & O–B & O merger was approved, 317 I. C. C. 261, sustained, 221 F. Supp. 19, aff'd *per curiam* 375 U. S. 216. The N & W-Nickel Plate merger was approved, 324 I. C. C. 1; but its legality was not litigated. This is the first time the question of legality has been presented to this Court after full argument.

Now the "panic button" is being pushed here; and we in turn are being asked to act hurriedly and become the final instrument for foisting this new cartel on the country. Some cases generate great pressures on the Court. Mr. Justice Holmes once remarked that those cases make "bad law." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400. "For great cases are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Id.*, at 400–401. We should, I submit, decline the present invitation.

We are here concerned with § 5 (2)(c) of the Act which governs railroad mergers and provides:

> "In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the pro-

posed transaction; and (4) the interest of the carrier employees affected."

The four items listed are not exclusive but only exemplary for they are only "considerations, among others."

The Commission's decision omits findings on many critical questions, all of which are, I think, relevant if the statutory ingredients of the public interest are to be evaluated under § 5 (2)(c).

Mr. Justice Brandeis, writing for the Court in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464, emphasized that basic findings cannot be "left entirely to inference." Mr. Justice Cardozo emphasized the point again in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511, saying, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." More recently we emphasized the necessity of findings to responsible judicial review:

> "Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S.

> 126, 144. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

Many crucial issues, necessary for evaluation by the Commission, are not even exposed in this record, let alone appraised. The absence of these findings makes judicial review impossible.

What is the nature of this cartel? What financial interests control it? Only one of the largest stockholders in the applicants is known. The remaining largest stockholders are brokerage houses and Swiss banks holding nominal title for their customers. The beneficial owners are unknown, and apparently of no concern to the Commission. The Commission was specifically requested to determine who are the beneficial owners of the stock and who would control the merged company. The Commission refused to accede to the request. Nor did the Commission consider it relevant that, through interlocking directorates, the proposed directors of the merged company are directors of and interested in corporations which deal with the railroads or that the control of railroads is steadily being concentrated in the hands of banks, insurance companies, and other large financial interests.

What effect on other roads within the area served by these carriers will result from the merger? What effect on rail competition outside the area will result? What will be the effect on the towns served by the two roads? Will some dry up? Will the community dislocations be offset by tangible gains?

None of these questions is answered by the Commission. Yet § 5 (2)(c) of the Act, which governs railroad

mergers, demands findings on the various ingredients of the public interest.

Concededly, community dislocations are relevant to the public interest. For the Commission considered them crucial in concluding that this merger would not be approved unless the New Haven were included.[4] What is the need of the New Haven? Its need is mirrored in the economic well-being of the New England States. With a rundown carrier, how can they attract new factories? Without new factories how can their employment needs be met?

If these basic community needs are relevant in the case of the New Haven, why are they not relevant when we turn to the needs of the communities served by the other roads which are about to be merged? We are told that the three mergers mentioned, including the present one, will result in many communities being reduced "from main line to secondary line status"—a condition "particularly true with respect to the merger between the Pennsylvania and New York Central when most of the New York to western gateway traffic will be routed over the Central's northern route." [5]

The healthy small towns stretched along these railroads may be more important in terms of the "public interest" than the profit and loss statements of the carriers, or the market prices of their securities, or the power of the small oligarchy that will sit at the head of this behemoth that will be turned loose. Rail mergers are only one form of regional planning. And whatever the attitude of the Commission may have been, it cannot in light of § 5 (2)(c) delegate that duty to the carriers or become

[4] ". . . [W]e find that this merger, without complete inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require all the New Haven railroad to be included in the applicants' transaction." 327 I. C. C. 475, 524.

[5] Report, *supra*, n. 2, at 14, n. 52.

their rubber stamp or fail to relate to the standard of the "public interest" the impact of the merger on the various communities served by these lines.

The Commission in its report gave practically its entire consideration to two aspects of the merger. The first dealt with the financial needs of the two carriers and on this the Commission concluded that the new company would have the financial strength and power and resources to deal with all the difficult contingencies in the years ahead. The second main consideration related to the problem of competition within the region served by the two roads. The Commission indicated that, although there will be less competition, the improved transportation service was a justified price to pay for that loss.[6]

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[6] The reasons usually advanced in support of railroad mergers are: (1) consolidations will improve the ailing financial condition of the constituents; (2) consolidations will result in a reduction of cost of operations; (3) consolidations will improve service capability. The premises underlying these justifications have been seriously questioned. It has been suggested that the financial condition of the industry is not as poor as merger applicants suggest. See, *e. g.*, Keyserling, The Move Toward Railroad Mergers 72–74 (1962); The Railroad Merger Problem, Report of Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 88th Cong., 1st Sess., 49–54 (Comm. Print 1963). Some have maintained that the wave of railroad mergers, and the resulting contraction of physical plant, will impair rather than improve the roads' financial condition and dampen the Nation's economic development. See, *e. g.*, Keyserling, *supra*, at 75–78. Others have noted that the present condition of the industry is due to a multitude of causes, and that solutions must strike at the roots of the problem rather than accept the temporary palliative of merger. See, *e. g.*, Nelson, Railroad Transportation and Public Policy 327–435 (1959); Meyer, Peck, Stenason & Zwick, The Economics of Competition in the Transportation Industries 242–273 (1959); National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess., 67–71 (1961). It has been suggested that massive alignments may result in serious diseconomies, not in the savings predicted by their proponents. See, *e. g.*, Healy,

Yet one who reads the report and reflects on these two considerations and their treatment by the Commission, cannot help but wonder why they would not justify any conceivable merger—all the southern roads and eastern roads—all the eastern roads and the western roads—or the western and southern and southwestern roads so that we would end up with one or two rail transportation systems. I put the matter that way because the arguments of the Commission are so generalized and so obviously mere rationalizations that they could easily apply to any merger; for the theory of all promoters of mergers, as Mr. Justice Brandeis exposed many years ago,[7] is to justify mergers by increased financial power and improved service.

The size and power of the new company will be awesome, and some say excessive. *It has been estimated that the new company will account for 51% of the assets, 50% of the trackage, 52% of the operating revenues, 75% of the revenue passenger miles, and almost 53% of the railroad employees in the eastern area.* The combine will be almost twice as large as the next system and three times as large as the third system. Some experts have concluded that the new company will have a dominant position with respect to the negotiation of rates and its relations with the public and government, to the detriment of other railroads and other modes of competition. It will have a vast amount of power over the decisions of the Association of American Railroads with respect to rail transportation policy. Its power will extend well beyond the eastern district. The Railroad Merger Problem, Report of the Subcommittee on Antitrust and Monopoly of the Senate

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The Effects of Scale in the Railroad Industry (1961). The Commission does not address itself to these problems.

[7] See Brandeis, The Curse of Bigness 185 *et seq.* (1935).

Judiciary Committee, 88th Cong., 1st Sess., 8–9 (Comm. Print 1963).

The routes of the applicants parallel each other through their respective systems and have many common points. They serve many communities and areas in common, and in several one or the other is the sole road; in others the applicants alone compete. The Commission realizes that the merger will eliminate the existing choice for many shippers and communities. It downgrades the severity of the impairment of competition. And the Examiners' Report frankly takes the position that interrailroad competition is not very important because the industry is characterized by oligopoly, rendering price competition nonexistent and service competition unimportant.[8] The Commission thinks that intermodal competition will prevent the new company from misusing its tremendous size and power,[9] even though it recognizes that the rail-

[8] Cf. Conant, Railroad Mergers and Abandonments 25–40 (1964); Conant, Railroad Consolidations and the Antitrust Laws, 14 Stan. L. Rev. 489, 490–495 (1962).

[9] It is argued that intermodal competition is not sufficient to protect the public interest, that intramodal competition is necessary to insure progress, efficiency, and lower prices. Only the firms in the same industry have the same cost structures and products. Thus, no firm has a sheltered market due to inherent advantages over other firms, a condition which obtains when competition is only intermodal. Meyer, Peck, Stenason & Zwick, The Economics of Competition in the Transportation Industries 240–241 (1959). Further, the position that intermodal competition is sufficient to protect the public interest ignores the fact that the number of regulated trucking lines on important routes is rapidly decreasing, due to entry control and mergers in the motor carrier industry. If the present trend continues, we may soon see a very limited number of firms—perhaps one from each mode—serving any given route. If that happens, the possibilities of oligopolistic lessening of competition without explicit rate and market agreements is likely. See Chamberlin, Theory of Monopolistic Competition 46–53 (1956).

roads have an inherent advantage in transportation of bulk and long-haul traffic. The Examiners' Report and the Commission's opinion suggest that competition among railroads, rather than being the norm, is to be avoided because it is "inefficient." Comparing the Commission's handling of the competitive effects of this merger with its treatment of the competitive effects of the proposed Great Northern Railway Company-Northern Pacific Railway merger gives one the impression that the cases were decided by different regulatory bodies rather than the same commission. In the Great Northern case the Commission was sensitive to the anticompetitive effects of the merger and recognized that competition is necessary to protect the public interest. The Commission also noted that intermodal competition is not enough to furnish the impetus for lower prices and increased service, especially with respect to low-rated bulk shipments and long-haul traffic. See *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern R. Co.*, —— I. C. C. ——.

These problems apparently bother the Commission because in spite of its findings concerning the improved financial position of these two carriers and the improved transportation system even with the loss of competition, it nonetheless refused to approve the merger *unless the New Haven road, which is in a notoriously desperate condition, is included.* So what the Commission in effect is saying is that the increased financial prowess of the new company and the improved transportation service are themselves not enough to satisfy § 5 (2)(c) of the Act. What satisfies § 5 (2)(c) of the Act apparently is the opportunity to salvage the New Haven situation. This, I admit, is a relevant consideration if there is to be a merger. But if salvaging the New Haven so as to maintain the economy of New England is rele-

vant,[10] then what about the economy of the cities and counties stretched along the lines of these two roads which will be merged? What degree of obsolescence will they suffer?

Railroads are critical factors in the production and distribution of goods and in the supply of materials. They are still the basic transporters of low-cost, bulk goods and long-haul merchandise. Their rates and efficiency of service affect industrial competition. Adequate railroad transportation, at reasonable costs, is essential to the economic development of any region or area. The

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[10] The facts are detailed in the Examiners' Report. The plight of Rhode Island is typical:

"N. H. is the only Class I railroad serving the State of Rhode Island. Over 50 percent of the population in Rhode Island are employed in the manufacturing industry and such industry is greatly dependent upon rail service provided by N. H., particularly for the inbound movement of raw materials from points outside of New England. In 1962, 35,000 cars were consigned to or shipped by industries located in Rhode Island via N. H. from which the latter derived $5,000,000 in revenue. Three important naval stations in Rhode Island are located at Newport, Quonset Point and Davisville, and in the Narragansett Bay area, the naval installations employ over 10,000 civilians. In addition to freight service, the N. H. provides an important passenger service in the State, and estimates indicate that approximately 1,200,000 passengers utilizing rail service originate or terminate within the confines of this State annually. Providence, a city with a population of 200,000 and Metropolitan Area of 1,000,000, has water facilities to receive shipments of bulk commodities, but since World War II general freight service by water to and from Providence has been discontinued.

"The Governor of Rhode Island evidenced his concern at the hearing that the failure to include the N. H. in the proposed merger may result in a loss of service provided by N. H. in the State. It was his belief that without such service, the State would have little chance of attracting new industry; that existing industries might relocate their plants and that without rail service, the Federal Government may well determine to reduce or terminate existing defense installations. . . ." Report, at 278.

curtailment of rail transportation is bound to have an adverse effect on the areas and communities which rely on railroads to service industry upon which their economic health is dependent. Many communities along the lines are dependent upon the employment furnished by railroads. What will the effect of this merger be on these communities? Will industry locate elsewhere because of inadequate rail transportation? Will the firms located in the region cease to expand or move to other areas? Will decreased employment opportunities mean that the residents of these towns must move elsewhere, thus creating more of the ghost towns which we already see along many of the trunklines? None of these questions is even considered by the Commission. After a very generalized discussion, the Commission concluded that the merger would not seriously impair Pennsylvania's economic health. But this "finding" is foreshadowed by the Commission's expressed view that railroads have little if any responsibility in furthering the economic development of an area and by the Examiners' position that the Commission need not consider the employment, tax, and developmental effects of the merger. And what about the other States and communities so vitally interested in the effects of this combination? The Commission's opinion is totally unenlightening. The Examiners' Report is no better. It contains a long list of interesting statistics, on a state-by-state basis, but makes no attempt to evaluate the effects of the combination.[11] Compare Stan-

[11] The Commission's own Bureau of Transport Economics and Statistics has recognized the importance of community dislocations in evaluating the "public interest" aspects of a proposed merger.

"[T]he Commission should consider the local and regional impact of consolidations, economically and socially, as a separate criterion or sub-criterion in its decisions . . . . Separate consideration of local effects would have the merit of affording opportunity for the Commission to distinguish and determine the relative importance

ford Research Institute, Selected Impacts of Railroad Mergers (1965).

This merger, like the ones preceding it, apparently is a manipulation by financiers and not a part of regional planning which is the ultimate function of the Interstate Commerce Commission. Yet if the imprimatur of the Commission is to be put on the plans of the financiers much more should be known about them. What interests will control the new company? How powerful will those interests be? Are the interests which will control the new company antagonistic to the basic interests of the region being served? Is the Commission putting its imprimatur on a new form of banker-management of rail carriers that was so disastrous to the New Haven and that Mr. Justice Brandeis exposed in Other People's Money 129–136 (1933)?

The New Haven Railroad is indeed an excellent example of manipulation at the hands of financial interests rather than management by railroad operators. Mr. Justice Brandeis said:

> "The rise of the New Haven monopoly presents another striking example of combination as a developer of financial concentration; and it illustrates also the use to which 'large security issues' are put.
>
> "In 1892, when Mr. Morgan entered the New Haven directorate, it was a very prosperous little railroad with capital liabilities of $25,000,000 paying 10 per cent dividends, and operating 508 miles of line. By 1899 the capitalization had grown to $80,477,600, but the aggregate mileage had also grown (mainly through merger or leases of other lines) to 2017. Fourteen years later, in 1913, when Mr. Morgan died

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of such factors." Railroad Consolidations and the Public Interest, Staff Report of Bureau of Transport Economics and Statistics 72 (1962).

and Mr. Mellen resigned, the mileage was 1997, just 20 miles less than in 1899; but the capital liabilities had increased to $425,935,000. . . . [A]dditional issues were needed, also, because the company paid out in dividends more than it earned. . . . [O]f the capital increase, over $200,000,000 was expended in the acquisition of the stock or other securities of some 121 other railroads, steamships, street railway-, electric-light-, gas- and water-companies. It was these outside properties, which made necessary the much discussed $67,000,000, six per cent, bond issue, as well as other large and expensive security issues. For in these fourteen years the improvements on the railroad including new equipment have cost, on the average, only $10,000,000 a year." *Id.*, at 121–122.

"[T]he most grievous fault of this banker-managed railroad has been its financial recklessness—a fault that has already brought heavy losses to many thousands of small investors throughout New England for whom bankers are supposed to be natural guardians. In a community where its railroad stocks have for generations been deemed absolutely safe investments, the passing of the New Haven . . . dividends after an unbroken dividend record of generations comes as a disaster.

"This disaster is due mainly to enterprises outside the legitimate operation of these railroads; for no railroad has equaled the New Haven in the quantity and extravagance of its outside enterprises. . . .

"Close scrutiny of the transactions discloses no justification. On the contrary, scrutiny serves only to make more clear the gravity of the errors committed. Not merely were recklessly extravagant acquisitions made in mad pursuit of monopoly; but the financial judgment, the financiering itself, was conspicuously bad." *Id.*, at 130–131.

The years passed, the New Haven emerged from bankruptcy reorganization, and in 1954 Patrick B. McGinnis won a proxy fight for control of the road and became president. His group owned very little preferred stock; but in order to pay dividends on the common, in which he was heavily interested, he first had to pay cash dividends on the preferred. These cash dividends were paid out in very large amounts, the record showing the following:

1954	$3,440,180
1955	2,457,700

At the same time, maintenance outlays were severely cut. Total outlays for maintenance of ways and structures dropped from $27,641,046 in 1953, to $19,647,313 in 1954, to $18,338,714 in 1955. Total maintenance of equipment decreased from $24,306,984 in 1953, to $22,794,715 in 1954, to $21,933,318 in 1955.

It is estimated that this cabal of financial interests lost $7,000,000 of the railroad's money in 20 months. Cash reserves dwindled, current liabilities mounted, as did long-term debt. "It's a stock speculation venture instead of a railroad business" said one director. Time, January 30, 1956, p. 76.

Is the new Penn-Central Company also to be milked by predatory finance?

Alternatively, if a regime as big and as powerful as this is to be turned loose, should it stay in private hands? How big can an enterprise of this character get without stepping over into the public domain? "How far should the consolidations be allowed to go before they cross the threshold of private enterprise and enter the domain of *private* government?" [12] Is the power and the control so

[12] Report, *supra*, n. 2, at 80.

great that we should think in terms of public ownership [13] rather than private ownership?

These considerations go to the very vitals of § 5 (2)(c) of the Act and none of them is answered. They are emphasized by the apparent worry in the mind of the Commission that in spite of all the arguments for the merger that it could advance, it decided not to approve it unless the New Haven was bailed out. Bailing out the New Haven may be very important in the public interest, as I have said. But in the context of these modern mergers there is the terrible spectre that the Federal Government may be creating new Frankensteins who will be running the country in a way that people can ill afford.

The alarm is increased by the Commission's default as respects the other eastern rail carriers. There are three so-called "protected" roads—Erie-Lackawanna, Delaware & Hudson, and Boston & Maine. The Commission found that this merger would destroy those three as independent railroads and proposed the imposition of protective conditions. What those protective conditions will be we do not know. If they include a capital indemnity, the "protected" lines will in substance disappear from the competitive scheme. Should competition be bought off in that manner?

Should the three "protected" carriers go into this Penn-Central merger and create a monopoly of rail

[13] Some experts have suggested that the trend toward railroad consolidations, which may result in the Nation's dependence upon mammoth combines with excessive power, may be a prelude to nationalization of the industry. See, *e. g.*, Meyer, Peck, Stenason & Zwick, The Economics of Competition in the Transportation Industries 260 (1959); Rail Merger Legislation, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 87th Cong., 2d Sess., 15 (1962) (testimony of Professor Kent T. Healy).

transportation east of Buffalo and north of New York City? The Commission has never made any effort even to consider whether such an inclusion in Penn-Central would be in the public interest.

There are suggestions that perhaps the three "protected" lines belong in the N & W-Nickel Plate system. In that merger it was recognized that E–L was a logical addition but that inclusion on equitable terms was not possible because of E–L's poor financial condition. 324 I. C. C. 1, 22. The Commission therefore reserved jurisdiction to give E–L five years to improve its financial position to become eligible for inclusion in N & W on equitable terms. 324 I. C. C., at 28–29.[14] The Penn-Central merger has frustrated this purpose by threatening the very survival of E–L, D & H and B & M as independent roads. If they are not to become members of the Penn-Central system, their only alternative seems to be inclusion in N & W. The failure of the Commission to consolidate these cases raises the distinct possibility that the three "protected" carriers may not be included in any system, and being unable to withstand the pressure of the Penn-Central, will be destroyed. As my Brother BRENNAN points out, the inclusion of these roads in the N & W system is no less risky than their inclusion in the Penn-Central system.

The question whether the Penn-Central merger is in the "public interest" therefore cannot be resolved until the fate of these three protected roads is determined.

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[14] On December 22, 1966, Commissioner Webb of the ICC recommended that the Commission direct inclusion of the E–L and D & H, and authorize inclusion of the B & M in the N & W. The Commissioner perceptively noted that, "Unfortunately, the Commission's action in deciding the (Penn-Central and N & W-Nickel Plate) cases separately has tended to blur vital issues common to both proceedings." *Norfolk and Western R. Co. and New York, C. & St. L. R. Co., Merger,* Finance Docket No. 21510, p. 23.

They too have stockholders and bondholders. They too service shippers, consumers, and communities. They too are an important part of the competitive system in the East. The truth is that before the Commission can exercise an informed judgment on the Penn-Central merger, it must deal with the serious impact which this merger will have on the three "protected" carriers.

There are also seven unprotected eastern rail carriers whose future is in doubt. Their fate is emphasized anew by a new merger application now pending before the Commission. As I have said, the Commission has promoted three systems in the East—the C & O, the N & W, and Penn-Central. Now the C & O and N & W have applied for approval to merge. This proposal would include the three "protected" roads I have mentioned. It would also include Central of New Jersey and Reading. Hearings on that merger will commence April 17, 1967. If that merger is approved, we will have two huge eastern rail cartels rather than three.

Was the creation of the new Penn-Central behemoth the reason for the desire to create this second one?

What will happen to both the three "protected" lines and the seven unprotected ones under a regime of two eastern cartels? Where will they best fit to maintain as much of a competitive system as possible?

No one at present can say because the entire merger problem of the East is nowhere near solution. Until the total plan is known, an informed decision is impossible. The Commission does not even know what effect the inclusion of NH will have on Central of New Jersey which claims that the inclusion of NH should not be authorized, unless CNJ is at least included in one of the new large systems. Under § 5 (2)(c) the Commission is required to consider "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction." In

McLean Trucking Co. v. *United States,* 321 U. S. 67, 87, we stated that the Commission has the duty "to consider the effect of the merger on competitors and on the general competitive situation in the industry."

Its default in that regard is conspicuous here. Those required findings cannot be made until a master plan or plans for the East are designed and the place of each rail carrier in the new system is finally rationalized and determined.

The Commission has now approved three privately planned mergers embracing over 85% of the railway operating revenues in the entire eastern railroad market. The unresolved but crucial question is whether the remaining roads can survive as presently constituted; or if they cannot, how they can best be restructured to promote competition against one or more of the new merger systems.

The case must be remanded to the Commission so that the competitive regime of the East under two or three or four or five rail cartels can be determined. The impact on the communities of the region must be determined. The competitive balance of the several combines must be appraised. The position of each rail carrier in the new picture must be established. And the financial hierarchy of the new cartels must be exposed so that the centers of control will be known. Only when all these facts are known can the Commission make the required findings under § 5 (2) (c). Only then will judicial review of a responsible kind be possible. It is only when the required findings are made that we will be able to know what the Commission's opinion really means and to determine whether the statutory standards have been met. See *United States* v. *Carolina Carriers Corp.,* 315 U. S., at 480–489.

We should say here what we said in *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 94,

"The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. . . . There is no such finding here."

I would reverse the lower court and remand the cases to the Commission not only to spell out the terms and conditions specified by the Court but also to make the necessary findings on the reach and merits of the merger as required by § 5 (2)(c) of the Act.

MR. JUSTICE FORTAS, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

For more than 45 years it has been the national policy, reflected in congressional legislation, that the railroads of this country should be combined into a limited number of systems. The policy gained acceptance in 1919, when, following World War I, the Government was planning to return the railroads to private ownership and the frail condition of many of the smaller roads became apparent. The Transportation Act of 1920 directed the Commission to formulate a national master plan of consolidation pursuant to which, it was hoped, the railroads would submit voluntary plans for consolidation. The Commission did so, but the opposition to the program was overwhelming and the goal could not be achieved. In 1925 the Commission asked to be relieved of the burden of working out a national plan, but until 1940, its request did not result in congressional action. In that year, Congress enacted the Transportation Act of 1940, which remains in effect and governs the present proceedings. Under that Act, and in all of the years since 1919 or 1920, the national policy of effecting consolidations of the railroads into a limited number of systems has been un-

changed. Because of the failure of the technique authorized by the 1920 Act, Congress in the 1940 law abandoned the idea of a formal national plan, and left the power to initiate mergers and consolidations in the hands of the carriers. The Commission became judge rather than architect. See generally, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 315–321 (Appendix) (1954).

The 1940 Act expressly provided that two or more carriers could merge or otherwise combine management, ownership, and operation if the approval of the ICC were obtained. The key provision, which basically governs the present case, is § 5 (2): "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this [section] and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . ." § 5 (2)(b). Among the considerations to which the Commission is to give weight are: "(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." § 5 (2)(c). Jurisdiction "to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order" of the ICC, is vested in the district courts by 28 U. S. C. § 1336. It is clear, beyond argument—one would confidently assert prior to today's decision—that whether particular railroad mergers serve the public interest, including the antitrust ingredient, is to be judged by the standards of the Transportation

Act of 1940 as applied initially by the ICC, and not by this Court.

Under the 1940 Act, the Commission's judgment is not to be governed by the antitrust laws. As this Court said in *McLean Trucking Co.* v. *United States,* 321 U. S. 67, at 84–85 (1944), there is "little doubt that the Commission is not to measure proposals for all-rail . . . consolidations by the standards of the anti-trust laws." In the last Term of Court, a decision of a three-judge district court setting aside ICC approval of a merger was reversed by this Court in a *per curiam* decision, quoting the above statement from *McLean Trucking,* because the District Court applied antitrust standards to overturn the ICC decision. *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965). In that case, the Court said: "It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.' " 382 U. S., at 156–157.

Until recently, despite the provisions of the 1940 Act, little was accomplished to effectuate the national policy of combining roads into a few major systems. The conflicts and rivalries, the overlaps of conflicting needs and ambitions are so great that the task is formidable and, from time to time, has appeared hopeless. Finally, in 1962, the ICC approved the C & O's acquisition of control of the B & O.[1] In 1964, it approved the combination of the N & W and the Nickel Plate.[2] And, after more than 10 years of elaborate corporate maneuvering and

[1] 317 I. C. C. 261, sustained *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (D. C. E. D. Mich.), aff'd, *per curiam,* 375 U. S. 216 (1963).

[2] 324 I. C. C. 1.

negotiating, in 1962 the Pennsylvania and the New York Central Railroads filed with the ICC their proposal to merge. Lengthy administrative proceedings followed, and it was not until April of 1966 that the ICC rendered its final decision, approving the merger subject to conditions. *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I. C. C. 475. It modified those conditions on September 16, 1966. 328 I. C. C. 304. If the Penn-Central merger becomes effective, the result will be three large systems, each operating in various and sometimes overlapping parts of the Northeast, middle Atlantic and midwestern States. The Commission's opinions in the three cases indicate its view that the consequences, at long last, will be a substantial measure of progress towards the goal successively announced in the transportation laws of 1920 and 1940.

The Penn-Central merger, as approved by the ICC, was attacked by various parties and a temporary injunction was sought in the Southern District of New York. The complainants included a number of railroads, several affected communities and one Milton Shapp. As the matter comes to this Court,[3] the only plaintiffs who complain about the merger itself are Shapp and the City of Scranton, Pennsylvania. Shapp, whose rather shaky standing to participate in these appeals is predicated upon his participation before the Commission and the bare circumstance that he is a shareholder in the Pennsylvania Railroad and a citizen of Pennsylvania, asserts here, as he did in the District Court, that in calculating the necessity for the merger and the benefits to be derived therefrom, the ICC relied upon an unwarrantedly pessimistic forecast as to railroad prospects, and that as a result it

[3] Other communities aligned themselves with the City of Scranton in the District Court, but have either declined to seek review or, as in the case of the Township of Weehawken, have abandoned their appeal.

has approved a transaction which will have serious anti-competitive effects in the East and will inflict economic harm upon the Commonwealth of Pennsylvania. A single community in Pennsylvania, the City of Scranton, concurs with Shapp's analysis and argues in addition that the merger and expected inclusion of the E–L, D & H and CNJ in one or another system will reduce the quantity of rail service now available to Scranton, which is presently served by those three smaller roads. The United States, which questions the correctness of the procedure used by the Commission in protecting the E–L, D & H and B & M, does not challenge the merger itself. Indeed, the Solicitor General has represented to the Court that "the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected." [4]

None of the railroads objects to the merger itself as unlawful or unfair. None of the affected States objects. The Commonwealth of Pennsylvania which had at one point opposed the merger withdrew its opposition, and now urges approval of the ICC order. Vigorous attack, however, was and is launched upon the ICC's order by various of the railroads because of provisions in the order addressed to the complications arising from the situation of three smaller roads, the E–L, the D & H, and the B & M.

The three-judge District Court, in an opinion by Circuit Judge Friendly for himself and District Judge Levet, declined to issue a temporary injunction to enjoin the merger, Judge Weinfeld dissenting. 259 F. Supp. 964. This Court granted a stay and expedited the case for consideration. The Court today sets aside the ICC's order.

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[4] Memorandum for the United States in Nos. 642, 680, 691, p. 21.

It expressly reserves any ruling upon the issue of the merits of the merger. It bases its decision entirely upon the alleged failure of the Commission to make adequate provision for the three smaller roads prior to authorizing consummation. In a separate opinion, MR. JUSTICE DOUGLAS concurs, but concludes that he would also hold the merger itself illegal and the Commission's approval unlawful for this reason. I respectfully dissent. I believe we should affirm the order of the District Court upholding the Commission's action.

Certainly, there is no tolerable basis for our attacking the merger on its merits. To do so would be to substitute our judgment for that of the Commission on grounds which, to say the least, are speculative and based upon the claimed superiority of competing economic considerations. We are not at liberty to do this, and if we were free to do so, it would require a high degree of intrepidity on such a basis to overturn a result which, even if we assume its imperfections, generally incorporates a significant step in a direction which national policy has sought for several generations. This is Congress' responsibility, and the task, not of the courts, but of Congress' designated instrumentality, the ICC. The national need to refurbish and revitalize rail communications is urgent—some say of desperate urgency. The ICC has found that the merger here will result in economies and efficiencies aggregating $80,000,000 annually by the eighth year, which it asserts will enable the roads to effect the badly needed modernization of their facilities. This may be a step in the wrong direction, as my Brother DOUGLAS argues; but we have neither the franchise to say so nor the power to do better.

The problem presented with respect to the three smaller roads assumes a different form. Here, it is urged that the Commission specifically failed to carry out its statutory duty and that the merger should not be con-

summated until its task is complete. The facts are as follows:

1. The three roads, the Commission has found, cannot survive without inclusion in one of the large, integrated systems. The Commission has assumed, as I shall describe, that they will be included in either the N & W or the Penn-Central systems. The three roads filed applications in both the N & W-Nickel Plate and the Penn-Central proceedings, for inclusion in the resulting system. They have indicated their preference for inclusion in the former. The Commission approved the N & W-Nickel Plate merger and its order has become final. It did not, however, pass upon the application of the three roads for inclusion. On the other hand, it made effective assurance for the subsequent determination of the issue and the effectuation of the result. Its order of approval provided that the ICC would retain jurisdiction for five years to require the N & W to include the three roads on terms that the ICC would itself prescribe in the absence of agreement, and it required the irrevocable consent of N & W to such order as a condition of consummating the merger. The N & W gave its consent. On December 22, 1966, pursuant to the reserved jurisdiction, Commissioner Webb of the ICC recommended authorizing inclusion of the three roads in the system.[5] It is anticipated that a Commission order will be entered by July 1 or August 1, 1967. When this order becomes final, if it provides for inclusion of the three roads in the N & W system, that will settle their ultimate fate and will terminate the significance of the conditions to which the Court herein objects and which have resulted in setting aside the ICC's order. It

[5] He recommended that the Commission "authorize and direct" inclusion of the E–L and D & H, and "authorize" inclusion of the B & M. *Norfolk and Western R. Co. and New York, C. & St. L. R. Co., Merger,* Finance Docket No. 21510.

must be remembered, however, that the Commission's order will be subject to judicial review; and if the past is a guide to prediction, the resulting proceedings will be long, complex, and bitter. In short, no one can say whether the three roads will find their ultimate home during this calendar year or the next.[6]

2. In the present proceeding, the ICC denied the request of the three roads for inclusion in the Penn-Central system, but it provided that if they were not included in the N & W system, they might resubmit the matter by supplemental petition. It is essential to note that no attack is made in this proceeding on these provisions relating to the ultimate fate of the three roads.

3. The ICC concluded that the three roads required some interim protection because "when the various consolidations of yards and equipment and the new through routes contemplated by the applicants are effectuated, a substantial amount of traffic could be diverted from E–L, D & H and B & M." Accordingly, it decided to impose certain conditions which I shall describe, and it required of the applicants "their acceptance of and active cooperation in the implementation of conditions" pending ultimate decision as to the inclusion of the three roads in a major system. In this connection, the Commission made the statement that has provided the basis of attack. It said: "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." 327 I. C. C., at 531–532.

4. The conditions consisted of measures for (1) traffic maintenance, by temporary preservation of present prac-

[6] The court below speculated that the ICC should finish its work on the matter during calendar 1967. 259 F. Supp., at 969, n. 4.

tices and patterns; (2) indemnity payments to cover losses due to diversion of traffic, if any; and (3) procedures to determine disputes under these conditions. The Commission specifically provided, however, that notwithstanding the above, the applicants and the three protected carriers could enter into an agreement for alternate protections "which shall supersede the protection provided by such sections" if not otherwise violative of law. 327 I. C. C., at 563, App. G.

5. The three protected carriers complained that the conditions were not adequate for their protection and they specifically demanded, in addition to improvement of the traffic and indemnity provisions, an indemnification against capital impairment. On the other hand, a number of other roads attacked Appendix G on the ground that the indemnity provisions would induce manipulation and diversion of traffic by both Penn-Central and the three roads which would be harmful to them. All of them complained that there had been no hearing, and the nonprotected complainants alleged that the indemnity conditions really amounted to a pooling arrangement which should have been but was not considered under § 5 (1) of the Act.

6. On September 16, after the present suit had been filed, the Commission granted the various petitions to reconsider Appendix G. Pending hearing and decision on reconsideration, it rescinded the indemnity provisions but left in effect the traffic conditions subject to whatever modifications might be made. 328 I. C. C. 304. The Commission said that "Since the applicants have indicated willingness to accept post-merger modification of the protective conditions, they may proceed with consummation of the merger upon our authorization thereof becoming effective. Such consummation will constitute irrevocable assent on the part of the applicants to any modification resulting from the further consideration

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herein described and ordered and which is found to be just and reasonable; as well as irrevocable agreement by the applicants to comply fully with the conditions as modified." On October 31, pursuant to this ruling, hearings were commenced on the interim protective conditions.

It is the ruling that the merger may be consummated in these circumstances that the Court finds objectionable and on the basis of which the Court halts this transaction which is concededly of major importance to the Nation. The Court reasons that the Commission's order as it now stands fails to implement its findings with respect to the three smaller roads, and unless and until it does so the merger may not be consummated.

Fundamentally, I submit, this is based upon a misconception of the ICC's findings. The Commission firmly and clearly held that, as a condition to consummation of the merger, it was necessary to assure that the three roads would be protected pending their inclusion in one of the larger systems. But it is clear that the Commission did not find that it was necessary to fix the terms of such protection prior to consummation of the merger. On the contrary, the Commission prescribed traffic and indemnity provisions in what must, in all fairness, be regarded as a tentative setting.

The prescribed conditions were, as the court below noted, "unprecedented in their severity in the history of railroad mergers." 259 F. Supp., at 969. They had not been focused or defined prior to the Commission's report for the apparent reason, understandable to anyone familiar with the administrative process, that they must have been crystallized in the post-argument deliberations of the Commission and its staff. They had not been included in the Hearing Examiners' report. The conditions are complex. Interim protection of the three roads against possible traffic diversion and resulting financial

loss depends upon future events which are unknown and largely unknowable. A vast realignment of the sort involved here always has elements of the unique, and only a doctrinaire approach, separated by the miles that lie between the quiet of theoretical condemnation in this Court and the pressures of realistic problems in the administrative agency, can explain this Court's readiness to insist that an unknown and unknowable solution be prescribed in advance. Solutions can be found, prescriptions can be written, to implement the Commission's determination that adequate interim protection must be furnished to the three roads. The Commission's insistence upon such protection is beyond dispute. Its deferral, in part, of the prescription of specific measures to effect this is at least understandable in light of the inherent difficulty of the problem. This is clear: (1) Appendix G, as I have noted, in effect invited the parties to work out their own agreement in substitution for the Commission's formula; (2) the Commission further demonstrated its awareness that only time and experience would perfect the interim conditions by its admonition to Penn-Central to comply not merely with the letter but with the spirit of the protective mandate; (3) the Commission, commendably, I suggest, ordered a hearing and reconsideration of the conditions after litigation commenced and the need therefor became apparent. The Commission, as I have noted, left in effect the traffic conditions, subject to modification, and provided that whatever indemnity provisions might be specified would be retroactive to the date of consummation of the merger. With the assurance that Penn-Central would accept whatever might be ordered in these respects,[7] it authorized consummation of the merger.

[7] The Commission did not, however, foreclose the applicants from seeking judicial review of any decision which might be made as to capital indemnification. 328 I. C. C., at 329.

The Court holds that this order approving immediate consummation of the merger is "insupportable," not because the Commission lacked power, but because the Commission deferred full implementation of its own findings that it was indispensable that interim protection be provided the three roads. The Court concedes that the Commission may retain jurisdiction for some purposes.[8] It does not "find it necessary to pass upon the question of naked power in the Commission to do what has been done here." Its drastic action is induced solely because of the Commission's decision to effect interim protection of the three roads—to which it and Penn-Central are fully committed—by prescribing only traffic conditions presently and to proceed with deliberation to work out the controversial and complex indemnification provisions. I agree with the Commission that, in view of the complete consent of the applicants to accept the terms ultimately fixed, there is no reason to defer the consummation of the merger until this is done. In any event, the choice of procedure that the Commission has made is not unreasonable; and this Court should not upset a decision of the magnitude involved in this merger except for significant reasons of substance.[9]

There is no reason of substance for the Court's action; there is no substantive value that is impaired or lost by proceeding as the Commission has ordered.

(1) As the Court found, there has been no objection to the substance of the traffic conditions which will con-

[8] See, *e. g.*, *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951) (to keep motor routes of railroad "auxiliary or supplemental"); *New York Central Unification*, 154 I. C. C. 489 (1929) (inclusion of short lines); *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672 (1946) (employee protective provisions).

[9] "[I]n the absence of a clear legal prescription, a reasonable procedural decision should withstand judicial interference." Jaffe, Judicial Control of Administrative Action 567 (1965).

tinue in effect, except suggestions as to details. Indemnification provisions will be made retroactive to the date of consummation of the merger and will therefore be as fully effective as if originally prescribed.

(2) Effective judicial review of the ultimate conditions will be available. If they fail in any respect fully and lawfully to implement the Commission's finding as to the necessity for interim protection of the three roads, they will presumably be modified. It is, with all respect, nonsense to say that the only remedy would be to "unscramble the consolidation." At issue are the indemnity terms. These are the only ones that have not been prescribed. They involve only the guaranty of payment of money on whatever formula the Commission may prescribe in its own motion or after direction by the courts. An order of the Commission or the courts to make such payment can be fully and easily implemented by conventional processes. The traffic conditions are to be effective immediately. They are not under substantial attack. If they are modified in this hearing, that is nothing more than an exercise of the power to modify its order which the Court concedes to be within the Commission's power under § 5 (9) of the Act. Cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951).

On the other hand, the Court's order, which I submit is insupportable as a matter of law and of sound administration of the principles of judicial review of decisions of administrative agencies, will have unfortunate consequences. I do not know, and I submit the Court cannot know, just how long it will take to satisfy the Court's rigid prescription that the interim protective provisions must be settled. The Court says that it will entail "a very short delay"; that the three roads will be included in the N & W or that the Commission's interim order

will be perfected with expedition. I view this prediction with profound skepticism. Too many interests have too much to gain from obstruction and delay; and the maze of administrative proceeding and judicial review is not inhospitable to ingenious counsel bent on delay. The history of ICC proceedings is a source book for dilatory tactics and a monument to the successful burial of good projects by over-elaborate procedures manipulated by experts in the art. Meanwhile, national policy continues unfulfilled; urgent national needs for improved long-haul and local rail service are impeded; the desperate erosion of the New Haven continues at a rapid pace; and the public and communities urgently in need of improved rail service continue to suffer.

If this result were compelled by law—if the Court's decision rested upon fault of substance—the practical consequence would have to be suffered with grace. But that is not so. The Commission insisted that the three smaller roads had to receive interim protection and required the applicants to agree to this as a condition of consummation of the merger. It has not modified this. It has not failed to implement it. On the contrary, it has—I think, commendably—embarked upon a procedure which, *while assuring that the protections will be forthcoming,* subject to judicial review, makes possible the careful and deliberate working-out of its terms and at the same time avoids disrupting the timetable of the merger. If we were to comment upon it, we should, I think, be compelled to applaud the unusual flexibility of method which it demonstrates and which has not always ornamented Commission practices. But we should not indulge in this kind of second-guessing. The plain conclusion is that the Commission's order does not violate any principle of law. It does not fail to implement the Commission's findings. It merely provides for the

accomplishment in stages of an objective firmly stated to which it and the applicants are fully committed. This is well within its powers, and we should affirm.

Addendum:

MR. JUSTICE BRENNAN'S concurring opinion requires these additional comments. He concedes that "this merger may well be in the public interest," but he concludes that the Commission's order approving and authorizing consummation of the merger must be set aside because the Commission has not completed the job of providing for the future of the three roads: the E–L, D & H and B & M. MR. JUSTICE BRENNAN does not contend that, as an abstract matter, settlement of the ultimate destiny of these roads is a necessary precondition to approval of the Penn-Central merger. He recognizes that such a contention would be contrary to statute, precedent, and practical sense. The Commission clearly has power to reserve for the future some problems incident to a merger. Faced—as this Court is not—with the urgent need of coping with the realities of life, the Commission must frequently content itself with less than perfection. Accordingly, MR. JUSTICE BRENNAN agrees that "the Act vests wide discretion in the agency to allow a merger to go forward while conditions as to inclusion are worked out." He argues, however, that *in this specific situation,* the failure to settle, by definitive order, the ultimate fate of the three roads is error which requires that the order approving the Penn-Central merger be set aside. In my judgment, his analysis lays bare the tortuous speculation upon which the Court's nullification of this merger is based.

MR. JUSTICE BRENNAN'S argument, in net effect, is that when the Commission really comes to grips with the problem of including the roads in one of the great sys-

tems, one thing will lead to another and the eventual result will be that the Penn-Central merger—to which he does not otherwise object—will become contrary to the public interest. When the Commission reaches this point, it will either have to refrain from including the three roads in either the N & W or the Penn-Central systems, which would be contrary to its findings, or it will have to grit its teeth and go ahead even though inclusion of the three roads in one of the systems would make the Penn-Central merger contrary to the public interest. I agree that either of these would be most unfortunate. My difficulty stems from the fact that there is no basis for the forecast of catastrophe. With all respect, my Brother BRENNAN's journey from the present to this horrifying future requires a trip through outer space which I cannot make, and in which I do not believe we should indulge. There should be more than rocketry to justify our nullification of action of this national importance which has been authorized by the agency with the heavy responsibility for repairing our deplorable national railroad network.

MR. JUSTICE BRENNAN says that "[a]llegations are made" by the Department of Justice and numerous other parties that inclusion of the three roads in either of the major systems "might not be possible consistent with the public interest or upon equitable terms." Now the fact that allegations are made is interesting, but less than dispositive; so MR. JUSTICE BRENNAN, after pointing out that there seems to be general agreement that the three roads should be included in the N & W, says that "there is a significant possibility, given the present state of circumstances, that inclusion in N & W might be unattainable or attainable only at the price of rendering the Penn-Central merger against the public interest, and that, even if inclusion could be accomplished consistent

with the public interest, it might be impossible to work out equitable terms."

Now, a "significant possibility" is not, I think, a conventional basis for judicial nullification of an administrative order. See *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U. S. 57, 69 (1966), and cases there cited. It is true, as MR. JUSTICE BRENNAN argues, that there are problems and difficulties about inclusion of the roads in one of the systems, largely stemming from the poor financial condition of two of the three roads. These difficulties themselves argue for prompt inclusion of the roads in one of the great systems, a result which the three roads' fierce struggle for the last ounce of flesh may paradoxically defeat.[10] But judicial pessimism, if it is to lead to administrative nullification, should have a more substantial basis than is present here. There is, in fact, no basis here for assuming that the roads will not be included in the N & W; or that the terms and conditions will not be equitable; or that the result will make the Penn-Central merger contrary to the public interest—or that, if any of these happened at the Commission's hands, corrective measures could not be mandated by the courts.

The N & W, as MR. JUSTICE BRENNAN recognizes, has "irrevocably agreed to include these three petitioners in their system upon terms . . . , if necessary, prescribed by [the Commission], provided such inclusion is found to be consistent with the public interest." 327 I. C. C., at 529. There is no reason for us to doubt that the Commission will in fact complete the task of working out terms and conditions of inclusion. If deemed neces-

[10] Judge Friendly referred to "the jockeying of these roads and of the three plaintiffs in the C & O, B & O, and N & W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about." 259 F. Supp., at 981.

sary, we could order that the District Court retain jurisdiction so that the courts could speedily accomplish the result if the Commission should fail.

But MR. JUSTICE BRENNAN darkly argues that the pressure of the problem of including the three roads will result in creating a "virtual rail monopoly in some southeastern States." He attaches a map to prove it. This will come about, he says, because when the Commission really gets down to the inclusion of these three roads in the N & W, the financial burdens will irresistibly impel the Commission to allow the N & W and C & O to affiliate, with monopolistic effect, in order to bear the weight of the included roads. The net result, therefore, he argues, is "that Penn-Central will increase the likelihood of, and may actually cause, an affiliation of N & W and C & O." He points out that the Commission did not consider this possibility. That's true. But the remoteness of the consequence that MR. JUSTICE BRENNAN divulges is such that neither we nor the Commission can, in all reason, be required to consider it. I respectfully disagree with my Brother BRENNAN that "Only by considering this possibility could the ICC fulfill its obligation to consider all the relevant factors before approving the merger." I do not believe that we can require of the Commission the rich and resourceful imagination to foresee the consequence that the relatively minor problem presented by the three roads will precipitate a vast monopoly, nor, if the Commissioners were so gifted as to envisage such a result, could we expect a response from them as to the problem presented other than a solemn oath that they will not build a city to house a mouse. In any event, if they yielded virtue and judgment in response to the urgencies of these three roads, the courts could always overrule them.[11] That the courts would

[11] I do not intend to indicate any opinion as to the merits of a possible N & W–C & O affiliation.

not be timid, reluctant, or deferential to intervene in the Commission's decision is a proposition which today's decision establishes beyond dispute.

I repeat: Given the point conceded by my Brother BRENNAN that the Commission has power to permit the merger to go forward while the problems incident to inclusion of these three roads in one of the great systems are being worked out, there is no basis for repudiating the exercise of that power in this case.

It is not necessary to analyze MR. JUSTICE BRENNAN'S detailed attack upon the Commission's interim protective conditions for the three roads. These are being reconsidered by the Commission, and are hardly ripe for judicial review. The underlying question is, again, whether the Commission may allow the "merger to go forward while conditions . . . are worked out." MR. JUSTICE BRENNAN contends that "the Act vests wide discretion in the agency" to do this, and I confess bafflement as to why this discretion is not broad enough to require us to tolerate the Commission's action here.

The basic fact of the matter, I submit, is that this is not a case in which the Commission has refused or failed to consider, or to make findings or provide for effective measures with respect to a material aspect of a merger. It gave elaborate, meticulous consideration to the problem presented by the three roads. It made findings with respect to their needs which apparently evoked an enthusiastic response—perhaps excessively enthusiastic—in this Court. It worked out provisions for assuring the interim protection of the roads and their eventual destiny. It made clear, effective provision for accomplishing the result found necessary: that the three roads ultimately be included in one of the major systems and that meanwhile they receive traffic and financial protection and benefits. It did this by requiring advance consent and reserving jurisdiction. The integrity and

adequacy of the process may be subjected to court review.

I cannot escape the conclusion that the dimensions of this merger have induced a major departure from the established and sound principles governing judicial review of administrative judgments in complex economic situations. It is, of course, possible, perhaps probable, that the parties affected by this merger, including the three roads, aided by the shock of the Court's action herein, will find a way to avert the national mischief of aborting the Penn-Central merger and of avoiding the continuation of the deplorable condition of two of the three roads which will persist if the Penn-Central merger is not effectuated. But I think, with all respect, that the Court's decision in this case is wrong in principle and unfortunate in consequence. It is a reversion to the days of judicial negation of governmental action in the economic sphere. We should be conservative and restrained, I think, where all we can say is *no*. The problems of the administrative agency deserve more understanding and its efforts to find solutions are entitled to more respect than the Court has today shown. The courts may be the principal guardians of the liberties of the people. They are not the chief administrators of its economic destiny.

BOSTICK *v.* SOUTH CAROLINA ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 647. Argued March 20, 1967.—Decided March 27, 1967.

247 S. C. 22, 145 S. E. 2d 439, reversed.

Matthew J. Perry argued the cause for petitioner. With him on the brief was *Charles E. Washington, Jr.*

Everett N. Brandon, Assistant Attorney General of South Carolina, argued the cause for respondents. With him on the brief were *Daniel R. McLeod,* Attorney General, and *Randolph Murdaugh.*

PER CURIAM.

The judgment of the Supreme Court of South Carolina is reversed. *Whitus* v. *Georgia,* 385 U. S. 545 (1967).

COLONIAL REFRIGERATED TRANSPORTATION, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 894. Decided March 27, 1967.

255 F. Supp. 999, affirmed.

S. Eason Balch, for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Nahum Litt* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

ROGERS ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 998. Decided March 27, 1967.

— Colo. —, 419 P. 2d 648, appeal dismissed.

Harry L. Arkin for appellants.

Max P. Zall, Charles S. Rhyne, Brice W. Rhyne and *Alfred J. Tighe, Jr.,* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BERMAN *v.* BOARD OF ELECTIONS, CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1019. Decided March 27, 1967.

18 N. Y. 2d 774, 221 N. E. 2d 564, appeal dismissed and certiorari denied.

Appellant *pro se.*

J. Lee Rankin for appellees.

Mason Hampton, Jr., for the National Information Bureau for Jewish Life, Inc., as *amicus curiae,* in support of appellant.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SHANNON *v.* SEQUEECHI, SHERIFF, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1198, Misc. Decided March 27, 1967.

365 F. 2d 827, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CROSS ET AL. *v.* PALO ALTO-MOUNTAIN VIEW MUNICIPAL COURT ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 1246, Misc. Decided March 27, 1967.

Appeal dismissed and certiorari denied.

Appellants *pro se.*

Hugh Stewart Center for appellees Ebnother et al.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

The prayer for other relief is also denied.

MANGUS *v.* A. C. E. FREIGHT, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 1260, Misc. Decided March 27, 1967.

Certiorari granted; vacated and remanded.

Louis A. Dirker for petitioner.

Bruce B. Laybourne for respondent Freight Drivers, Dockworkers & Helpers, Local Union No. 24.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Vaca* v. *Sipes, ante,* p. 171.

CONNOR ET AL. *v.* JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 999. Decided March 27, 1967.

265 F. Supp. 492, affirmed.

Carl Rachlin, Marvin M. Karpatkin, Arthur Kinoy, Melvin L. Wulf, Alvin J. Bronstein and *Robert B. McKay* for appellants.

Joe T. Patterson, Attorney General of Mississippi, and *Martin R. McLendon,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set down for argument.

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HONDA ET AL. *v.* CLARK, ATTORNEY GENERAL.

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

No. 164. Argued February 14, 1967.—Decided April 10, 1967.

This suit was brought by 4,100 citizens or residents of the United States who were depositors, holding "yen certificates," in the Yokohama Specie Bank (YSB). In 1943 the Alien Property Custodian had vested as enemy property the assets of YSB located in the United States. In 1946 Congress provided in § 34 of the Trading with the Enemy Act for the payment from the vested assets to American citizen or resident creditors of persons whose property was vested. After some 7,500 yen certificate holders filed claims for payment, the Attorney General (successor to the Custodian) determined that the debts were payable in yen and that the proper conversion rate was the postwar rate of 361.55 yen to the dollar, rather than the prewar 4.3 rate. In 1958 all YSB claimants were advised of this decision, were told to submit their original certificates within 45 days, were informed that a full schedule of claimants would be made pursuant to § 34 (f) of the Act, after which aggrieved claimants could file suit in the District Court, and that they could at once redeem their certificates at the postwar rate from YSB's successor in Japan. Petitioners took no action and their claims were disallowed as abandoned. In 1961 a final schedule under § 34 (f), which did not include petitioners' claims, was prepared and sent to all claimants, including petitioners, who were advised that under § 34 (f) they could, if aggrieved, file suit in the District Court within 60 days of the mailing of the schedule. Within 60 days a suit (*Abe* v. *Kennedy*) was brought on behalf of those claimants listed on the schedule to challenge the rate of exchange ruling. This suit was held in abeyance pending determination of the same issue in a suit involving yen certificates of another bank. The lower courts upheld the postwar rate in the latter case (*Aratani* v. *Kennedy*) and after this Court granted certiorari the Attorney General entered into a compromise settlement in both cases, in *Abe* at approximately the prewar rate without interest. Upon the final disposition of the *Abe* case, and before the dismissal of certiorari in *Aratani,* petitioners filed this suit, asking for similar treatment. The Attorney General denied their claims because they were not included in the class represented in the *Abe* suit and they had not brought suit within the 60-day

period. *Held:* Since the statutory scheme of § 34, which was modeled on the Bankruptcy Act, was intended to provide a fair and equitable distribution of vested enemy assets to American residents or citizens, the limitations period was tolled during the pendency of the *Abe* litigation and petitioners' right to bring their suit was not foreclosed. Pp. 494–502.

(a) The Bankruptcy Act presents a compelling analogy in § 57n which provides that "claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend, and, if duly proved, shall be allowed against any surplus remaining in such case." See also *Nassau Works* v. *Brightwood Co.*, 265 U. S. 269. Pp. 496–498.

(b) The 60-day limitation serves only as a means of expediting the distribution of vested assets to creditors, and here there are no other creditors, a surplus remains in the fund, and the Attorney General is a mere stakeholder. P. 498.

(c) Since petitioners filed their suit immediately upon settlement of the *Abe* case, they did not interfere with the speed or manner in which this litigation was conducted. Pp. 499–500.

(d) In this case, where the public treasury is not directly affected, it is consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the facts of this case and nowhere eschewed by Congress, to preserve petitioners' cause of action. Pp. 500–502.

123 U. S. App. D. C. 12, 356 F. 2d 351, reversed and remanded.

Joseph L. Rauh, Jr., argued the cause for petitioners. With him on the briefs were *John Silard, A. L. Wirin, Fred Okrand* and *Benjamin V. Cohen.*

Richard A. Posner argued the cause for respondent. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Sanders, David L. Rose* and *Richard S. Salzman.*

Thomas C. Lynch, Attorney General, *Charles A. O'Brien,* Chief Deputy Attorney General, and *Charles W. Rumph,* Deputy Attorney General, filed a brief for the State of California, as *amicus curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners are 4,100 United States citizens or residents of Japanese descent seeking to recover funds vested under

the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1 *et seq.* The District Court dismissed their suit against the Attorney General [1] as barred by limitations, and the Court of Appeals affirmed by a divided vote. 123 U. S. App. D. C. 12, 356 F. 2d 351. We granted certiorari because of the importance and unusual character of the questions involved, affecting the proper application of this wartime statute. 385 U. S. 917.

Both as the case was treated by the lower courts and as it was largely argued here, the limitations issue has been thought to turn on whether the Government is estopped from asserting the 60-day time bar provided for actions of this kind by § 34 (f) of the Trading with the Enemy Act. We conclude, however, that "estoppel" is not the controlling issue, but that for reasons discussed in this opinion the period of limitations was tolled, requiring reversal of the judgment below.

I.

Upon the outbreak of hostilities with Japan, the United States, on December 7, 1941, acting under the Trading with the Enemy Act, seized the American assets of businesses owned by Japanese nationals, among such property being the assets of the Yokohama Specie Bank, Ltd. The assets of the bank were liquidated, and in 1943 were vested in the Alien Property Custodian; see *Paramount Pictures, Inc.* v. *Sparling,* 93 Cal. App. 2d 768, 770–771, 209 P. 2d 968, 969–970. Petitioners were among the approximately 7,500 depositors of the bank

[1] This suit was originally filed against Robert F. Kennedy, then Attorney General. Nicholas deB. Katzenbach was substituted as statutory defendant in the District Court, and Ramsey Clark, the present Attorney General, succeeded him as respondent here by operation of law. Sup. Ct. Rule 48 (3).

holding "yen certificates," [2] who submitted timely claims, many being filed as early as 1946, under § 34 of the Act seeking recovery of their deposits.

Section 34 of the Act was enacted in 1946 as a legislative response to this Court's decision in *Markham* v. *Cabell,* 326 U. S. 404, which allowed nonenemy creditors of former owners of vested property to bring suit under a World War I statute,[3] and recover directly out of vested assets. The Alien Property Custodian feared that allowance of such suits might lead to inequitable results, in that creditors who brought suit immediately might exhaust the assets at the expense of other, equally valid, claims. The Custodian urged, and the Congress agreed, that an approach on the lines of the Bankruptcy Act was a fairer method of distributing such assets.[4] See H. R. Rep. No. 2398, 79th Cong., 2d Sess., 10, 14 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 4, 8 (1946). As in bankruptcy law, the new Act required the filing of a

[2] The certificates expressed their value in terms of yen, and bore the following statement, in both Japanese and English:

"This is to certify that the sum of yen ——— has been submitted to our Head Office, Yokohama, to be placed in Fixed Deposit there in your name at — percent. per annum for — months, maturing ———, subject to the conditions on the back hereof.

"Both principal and interest are payable, when due, at our aforesaid Head Office, Yokohama, upon surrender of this Certificate, properly endorsed and/or sealed."

[3] Section 9 (a) of the Trading with the Enemy Act, 50 U. S. C. App. § 9 (a).

[4] Section 34 (a) limits allowable debt claims only to "those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act; and those acquired by the Custodian."

debt claim with the Custodian within a specified period, § 34 (b).

Approximately 7,500 yen certificate holders, including petitioners, immediately complied with this provision and submitted photostatic copies of their respective certificates. In the course of processing the claims pursuant to § 34 (f) a question arose as to the redemption value of the certificates both for depositors of the Yokohama Specie Bank and for those of another bank, the Sumitomo Bank, holding similar certificates. An administrative determination was sought in a proceeding brought in the name of one of the Yokohama Bank depositors, Kunio Abe, Claim No. 55507. Abe, acting for all yen certificate holders, took the view that since these deposits had been made in American dollars, and the certificates were allegedly redeemable in dollars at any time upon demand at American branches of the bank, they should be treated as dollar debts at the amount of their value when seized in 1941, at a rate of about 4.3 yen to the dollar. The Attorney General,[5] however, characterized the debts as yen debts, and following the rule of *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, and *Zimmermann* v. *Sutherland*, 274 U. S. 253, held that the proper measure of recovery would be at the postwar conversion rate of 361.55 yen to the dollar, or less than 2% of the prewar rate. It is noteworthy that throughout this period the Yokohama Bank's successor in Japan, the Bank of Tokyo, Ltd., was willing to redeem these certificates at the postwar rate. Petitioners, at any time, could therefore have received from the Japanese bank the amount the Government asserted would eventually be obtained from the vested assets.

At the conclusion of the administrative process, in 1958–1959, the Chief of the Claims Section wrote to each

[5] The Attorney General assumed the duties of the Custodian in 1946 by Executive Order No. 9788, 11 Fed. Reg. 11981.

of the depositors who had filed a claim, including petitioners, advising that "The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et al.,* Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd. . . . are obligations payable in yen in Japan . . . ," and therefore that the postwar rate of 361.55 yen to the dollar would be used in redeeming certificates from the vested assets. Claimants were told to submit their original certificates within 45 days. However, the letter continued, "Payment of your claim . . . will not be made immediately." The letter informed the claimant that a full schedule of claimants would be made, § 34 (f), and that after its issuance aggrieved certificate holders might file suit in the United States District Court for the District of Columbia for judicial review. "Under the circumstances," the letter continued, "you may wish to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card."

Petitioners characterize this letter as "confusing" and "insulting." We think the opprobrium which is sought to be fastened on the letter is undeserved and consider it more accurate and fairer to say that although its instructions were complex, the letter was written in a manner designed reasonably to apprise a layman of the choices before him. However, on the particular facts of this case and given the empirical evidence available, it is quite understandable that of the 7,500 initial claimants, only 1,817 responded affirmatively by sending in their certificates, and less than 1,600 canceled their claims and sought immediate recovery in Japan. The remainder, a majority of all who had claims, petitioners in this case, did nothing.

The reasons for their inaction are quite apparent, and, it can reasonably be argued, should have been so to the Government: the letter indicated that despite as long as 12 years of waiting after the original submission of their claims, supported by copies of their certificates, they could expect to receive less than 2% of their basic deposits measured in prewar dollar terms, and that even this amount would not be forthcoming immediately, but only after issuance of a schedule (an additional interval, it turned out, of three years) plus possible judicial review. Claimants would clearly be better off getting repayment immediately from the Japanese bank itself. This recourse, suggested by the letter itself, was at the same time understandably advantageous to the Government as well: American citizens or residents would obtain relief, but from a foreign source, thus freeing more of the vested assets for distribution to remaining claimants. It is thus understandable that the Government did nothing to ascertain why a majority of the 7,500 claimants had responded in no way to its letter.

In affidavits submitted to the District Court, and not contradicted on the motion to dismiss the complaint, various other reasons were asserted for the failure of these petitioners to respond. Petitioner Jiro Kai asserted:

> "I did receive a letter from the Office of Alien Property offering me about 30¢ for my claim. I think I recall being asked to send in my original certificate by registered mail to receive this amount. For me to have done this would have cost more than I was being offered.[6] I had heard from others

[6] Counsel for petitioners have supplied us with the following information as to the range in amounts of the claims involved in this litigation: "Of the 1,120 *Honda* claimants who have . . . retained [our associated California counsel] . . . to the present date, the highest is for 120,000 yen—about $30,000 at the *Abe* ratio [or about $332 at the Government's original rate]—and the lowest claim is

> that many more persons had claims similar to mine and I understood that they were all being processed together. I saw in the Japanese newspaper that a court suit was or would be filed seeking to obtain for the yen claimants the proper amount for their claims. I believed, therefore, I would be protected."

Other affidavits gave similar reasons. These are summarized best in an affidavit of Mr. Katsuma Mukaeda, president of the Japanese Chamber of Commerce of Southern California:

> "Many of the Yokohama Specie Bank yen deposit certificate holders were old people who could not read English and could not understand the communications they received from the Office of Alien Property; many of them had to rely upon other persons who themselves were not able to understand the letters; most of the claimants had never talked to a lawyer about their cases and there was a general feeling in the community that all of the claims were going to be treated alike, both the Sumitomo Bank claimants and the Yokohama Specie Bank claimants; there was knowledge in the community that a law suit had been filed in Washington and it was understood and believed that the outcome of that law suit would determine how much money the claimants received and that it would apply to all claim-

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for 50 yen, or about $12 [about 14¢ at the lower rate]. Among all 4,100 petitioners the largest debt claimant of which we are aware chose other counsel, and his claim was for 246,000 yen (about $60,000) [about $680 at the lower rate] . . . .

"The average claim among the 1,120 *retainer* claimants in *Honda* is for about $2,000 [at the *Abe* rate], and the mean considerably lower; the average among all 4,100 petitioners is necessarily more modest still, because it includes the 2,980 claimants who have not even sought representation by counsel in this suit, presumably because of the very small amounts of their claims . . . ."

ants not just some; most of the claimants had had experience with or had heard about the Japanese Evacuation Claims program (50 U. S. C. Appx. 1981–1987)[7] and many of them knew generally that under that program, deadlines had been extended and even that the law itself had been changed to include persons who originally were not eligible, to be eligible for repayment of some of their losses due to the Japanese evacuation program, and that persons who previously had been denied payment, later were paid; . . . since the original certificates of deposit were the claimants' only direct evidence of their claim, many of the claimants were reluctant to part with this evidence, especially at a time when the Government was recognizing their claims at less than 2% of their face value, to say nothing of accumulated interest over the years; moreover, many of them felt that to send in their certificates at that time would be taken as agreeing to accept this very small sum in full settlement and they did not want to do that; there were others whose claims were so small that to send in the originals at the figure the Government was offering would net them no return or a very small amount; as individuals, even those claimants who did not have very small claims could not afford to hire an individual lawyer in Washington or to file their own suit but had to rely on what was

[7] This legislation, enacted in 1948, authorizes the Attorney General to make awards in amounts not to exceed $100,000 "on any claim by a person of Japanese ancestry against the United States arising on or after December 7, 1941, . . . that is . . . a reasonable and natural consequence of the evacuation or exclusion of such person by the appropriate military commander from a military area in Arizona, California, Oregon, or Washington; or from the Territory of Alaska, or the Territory of Hawaii, under authority of Executive Order . . . ." 70 Stat. 513, 50 U. S. C. App. § 1981.

being done generally and many of them believed that in the end their Government would not try to keep their money but would return it."

The claims of these 4,100 claimants were dismissed when they did not respond within the 45-day administrative limit, pursuant to 8 CFR § 502.25 (g), 21 Fed. Reg. 1582.[8] Petitioners were notified that their claims were disallowed as abandoned, and told that further proceedings were governed by § 34 (f), the provision requiring a final schedule of claimants and providing for judicial review. In May 1961 a final schedule was prepared and sent to all claimants, including petitioners. Petitioners' claims were not included in the schedule, but they were informed that "Pursuant to Section 34 (f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule . . . ."

Such a suit was brought to challenge the proper rate of exchange. It was brought by Mr. Kunio Abe, the same person who had challenged the administrative ruling and whose case was cited by the Government in its letters to petitioners as dispositive of their cases. *Abe* v. *Kennedy,* C. A. No. 2529–61, D. D. C., was held in abeyance

[8] The regulation provides: "A claim shall be deemed abandoned when after request to do so the claimant has not furnished relevant information in support of his claim, or where by virtue of his failure to respond to inquiries regarding the claim it appears that he does not wish to pursue it further." Neither in his motion to dismiss the complaint in the District Court, nor on review in the Court of Appeals and in this Court, has the Attorney General advanced the argument that failure to comply with this administrative regulation is by itself an independent reason for dismissing this suit. It suffices to say here that such an argument would be open to attack on lines similar to those we hold require tolling the statute of limitations.

in the District Court pending a determination of the identical issue raised in relation to yen certificates issued by the Sumitomo Bank. The District Court upheld the Attorney General's determination, and the Court of Appeals affirmed, *Aratani* v. *Kennedy,* 115 U. S. App. D. C. 97, 317 F. 2d 161, 323 F. 2d 427. After this Court granted certiorari in *Aratani,* 375 U. S. 877, the Attorney General entered into a compromise settlement with the plaintiffs in *Aratani* and *Abe,* in the latter case approximately at the prewar rate without interest.[9] Petitioners here were not included in the class represented by *Abe,* for his complaint was framed to represent only the class of those claimants listed in the schedule rather than all outstanding claimants. Petitioners therefore filed this suit upon final disposition of the *Abe* litigation, and long before the dismissal of certiorari in *Aratani,* asking for similar treatment.[10] The Attorney General denied their claims because petitioners were not included in the class represented in the *Abe* suit, and because they had not filed their suit within 60 days after mailing of the schedule as required by § 34 (f).

II.

Quite apart from any question of governmental estoppel respecting assertion of the statute of limitations, a contention that is sought to be predicated on the foregoing train of events and circumstances, we consider that the limitations period was in any event tolled during the

[9] The claimants in *Aratani* recovered considerably less than those in *Abe* because the amounts of their claims exceeded the vested assets of the Sumitomo Bank. 228 F. Supp. 706, 708.

[10] The District Court approved the settlements in both *Aratani* and *Abe* on March 18, 1964, 228 F. Supp. 706, and entered its final order on May 18, 1964. The present suit was filed May 19, 1964. The writ of certiorari in *Aratani* was dismissed on March 9, 1965, 380 U. S. 938, upon stipulation of counsel that the case had been settled.

pendency of the *Abe* litigation, and that petitioners' right to bring their suit was not foreclosed. An analysis of the statutory scheme as devised by Congress persuades us, in the context of this factual setting, that this is the result most consistent with the legislative purpose of this Act.

The statutory system embodied in § 34 was intended to provide a method for the fair and equitable distribution of vested enemy assets to American residents. The basic model for the statute was the Federal Bankruptcy Act, a concept revealed in the legislative record by expressions of the Custodian and of those members of Congress principally responsible for the legislation.[11] The 60-day limi-

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[11] At the committee hearings on this section, the following dialogue occurred between the Chairman, Congressman Celler of New York, and the Custodian, Mr. Markham:

"Mr. MARKHAM. . . . We propose that the law be changed so that the man could file his claim, but he would be paid on a ratable basis, if there is not enough money for everybody, and that we should have a marshaling of assets and a marshaling of debts, so that everybody would be treated alike and would not depend upon the time when they brought the suit or the order in which the suits were brought.

. . . . . .

"Mr. CELLER. But you want to be sure that you don't get into a situation where one creditor can fritter away all the assets of an enterprise, and you want to apply them under the principle now applied in the Bankruptcy Act, give each creditor an equitable share in the assets?

"Mr. MARKHAM. That is the way I want it to be done. That is what I want to do." Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 5089, 79th Cong., 2d Sess., 17 (1946). See also, *id.*, at 7, 11–13, 113–114.

Congressman Celler used the same reference when he introduced the bill to the House: "The bill before us provides that the Alien Property Custodian takes the property and sells it and divides the proceeds equitably among all creditors as pari passu, in bankruptcy." 92 Cong. Rec. 10217 (1946). And see H. R. Rep. No. 2398, 79th Cong., 2d Sess., 10, 14 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 4, 8 (1946).

tation on suits was designed to further this end—to aid claimants by expediting a final distribution—and not primarily as a shield for the Government.

The Bankruptcy Act, the pattern for this legislation, presents a compelling analogy, pointing the way to the decision which we make in this case. Section 57n, 11 U. S. C. § 93 (n), requires notification of claims within six months after the first date set for the first meeting of creditors. Those who fail to file timely claims do not, however, lose all their rights; rather after all duly allowed and properly filed claims have been paid in full, "claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case."

It is true that this equitable principle of the Bankruptcy Act was specifically authorized by a 1938 amendment which was "designed to remedy the inequity of returning property to the bankrupt as long as there are creditors, however tardy, whose claims have not been satisfied even in part." 3 Collier, Bankruptcy ¶ 57.33, at 398. But it is noteworthy that bankruptcy courts in the exercise of their general equity power had already reached this result long before the principle was enacted into law. As one *nisi prius* bankruptcy court stated in *In re Lenox,* 2 F. 2d 92, in 1924, "This [the statute of limitations] is a provision for the benefit of creditors, not for the benefit of the bankrupt. . . . In the present case, the provisions of the Bankruptcy Act have been complied with, and those who complied with all its provisions have been paid in full. But the fact remains that the petitioner who had reduced his claim to judgment, the existence and validity of which the bankrupt recognized in his schedules and does not now deny, has received nothing. A fund remains in the hands of the trustee." *Id.,* at 93. The equitable solution, the court held, was to allow the

claim, even though untimely. In *Williams* v. *Rice,* 30 F. 2d 814, an estate, presumably without assets, was reopened when new assets were discovered. The question was again whether creditors who had not filed timely claims should be allowed to prove their claims. Noting that the time limitation "is intended primarily to require creditors to prove their claims promptly, in order that the estate may be closed without undue delay," *id.,* at 815, the Court of Appeals for the Fifth Circuit held that in the absence of negligent failure to file, claimants in such a case could file after the time limitation. See also *In re Pierson,* 174 F. 160, where the court allowed the reopening of the estate and the filing of claims past the statutory period when new assets were discovered. But see *In re Silk,* 55 F. 2d 917, reaching the opposite result.

Another, though less precise, analogy in the bankruptcy area can be drawn from *Nassau Works* v. *Brightwood Co.,* 265 U. S. 269. The issue there was whether a creditor whose claim was not proved within the statutory period established for creditors in bankruptcy could nevertheless participate in a composition in bankruptcy. Mr. Justice Brandeis, writing for a unanimous Court, analyzed the statute in terms of its purpose and the various interests involved. From the viewpoint of the other creditors, he found, "neither the amount which a creditor receives, nor the time when he receives it, can be affected by the amount of others' claims, or by the time of proof, or by their failure to prove. . . . Nor can the time of proof of claims, as distinguished from their allowance, be of legitimate interest to the bankrupt. . . . No reason is suggested why Congress should have wished to bar creditors from participation in the benefits of a composition merely because their claims were not proved within a year of the adjudication. Failure to prove within the year does not harm the bankrupt. Why should he gain thereby? And why should

the creditor be penalized by a total loss of his claim?" 265 U. S., at 272–273.

These factors can be applied to the present case with equal force. What purpose does the strict 60-day limitation serve, except as a method of expediting the distribution of vested assets to creditors? But no other creditors are here objecting, for none exist: they have all compromised their claims and yet a surplus remains in the account. The Government itself has no real interest in this fund, for it neither comes out of the common weal nor will any surplus inure to the Treasury. The Attorney General is a mere stakeholder, a custodian in the true sense of the word.[12] The only persons who might eventually benefit from the surplus are those general beneficiaries of the War Claims Fund into which any surplus is deposited. But the 60-day rule can hardly be deemed a device for augmenting this general fund at the expense of recognized creditors, especially in the face of repeated and uncontested expressions of congressional intent to facilitate and expand the rights of American creditors having an interest in these assets.[13]

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[12] Under the War Claims Act of 1948, undistributed assets of enemy property are transferred to a War Claims Fund for distribution to United States citizens who suffered losses caused by enemy military operations during World War II. 62 Stat. 1246–1247, as amended, 50 U. S. C. App. §§ 39, 2012. That Act also declares that no vested property be returned to the former German or Japanese owners as had been the case with some assets after World War I. § 39 (a). See H. R. Rep. No. 976, 80th Cong., 1st Sess., 2–3 (1947); H. R. Rep. No. 2439, 80th Cong., 2d Sess. (1948); S. Rep. No. 1742, 80th Cong., 2d Sess. (1948).

[13] See references cited in n. 11, *supra*. There is nothing in the legislative history of the 1946 Act indicating that Congress had the interests of those who were in effect "remainder beneficiaries" in mind when imposing the procedures of § 34. It is further noteworthy that in 1953 the Congress refused to enact legislation, supported by the Government, that would have had the effect of wiping out entirely

III.

The foregoing considerations are especially persuasive here when the reason for petitioners' delay in bringing suit is recalled. It was generally known in the Japanese community that a class suit, the *Abe* case, had been filed in the United States District Court for the District of Columbia. The complaint in that suit outlined the history of the controversy over the proper rate of exchange and it specifically noted that this question was "[t]he sole issue on this complaint for review . . . ." An examination of the complaint, on file at the District Court but presumably not readily available to petitioners who lived on the West Coast, reveals that the plaintiffs included in the class action were defined as those listed on the final schedule rather than all those who filed valid claims. But from a practical standpoint, this definition, which legally excluded these petitioners, made no differentiation between the total group of certificate holders in any material respect. The legal issue raised in the complaint dealt only with the exchange rate; the administrative record filed with the District Court was that of the Abe claim which did apply—at the administrative level—to petitioners; the named plaintiff was also Kunio Abe whose case was cited by the Government as dispositive of petitioners' claims; no action was in any event taken on the complaint which was held in suspense pending determination of the same legal issue in the *Aratani* case and then dismissed upon settlement with the *Abe* suit claimants. Since petitioners filed their claim immediately upon settlement of the *Abe* case, there can be no claim that the course of action they took in any

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debt claims payable in foreign currency, the Yokohama Bank certificates being the largest group of such debts. See S. Rep. No. 616, 83d Cong., 1st Sess. (1953); 99 Cong. Rec. 7408–7409 (1953).

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way interfered with the speed or manner in which this litigation was conducted.

The only arguable difference it might have made had petitioners filed their action immediately upon publication of the schedule is that the Government's willingness to settle the case might have been dampened because the larger number of plaintiffs would have made settlement more costly to the total fund. Upon examination, however, even this possibility should be discounted when it is recalled that these are not in any real sense government funds, but rather vested assets of an enemy debtor which will be distributed to another class of war victims if petitioners' claims are barred. The Government has no interest in the fund except to enforce the primary congressional mandate that bona fide creditors recover their due. Since the amount in the fund adequately covers a full settlement with all these claimants at the *Abe* rate, exhausting the surplus should not have played a part in the Government's decision to settle with the *Abe* claimants.

For these reasons we think the statutory purpose is best served by invoking the equitable doctrine of tolling to preserve petitioners' action in which they seek payment on the same basis as that accorded the claimants in *Abe*.

IV.

In light of these circumstances we find the Attorney General's arguments unpersuasive. He argues primarily that the doctrine of estoppel does not apply in this case to prevent assertion of the statute of limitations. We do not reach the estoppel issue, because we hold that the statutory scheme itself requires tolling the limitation period during the pendency of the *Abe* litigation. In this respect, the Government contends that because this suit is, at least formally, one against the sovereign, see

Banco Mexicano v. *Deutsche Bank,* 263 U. S. 591, the statute of limitations may not be tolled without express congressional consent. It is well settled, of course, that the Government is ordinarily immune from suit, and that it may define the conditions under which it will permit such actions. *E. g., Kendall* v. *United States,* 107 U. S. 123; *United States* v. *Sherwood,* 312 U. S. 584. It is also true that in many cases this Court has read procedural rules embodied in statutes waiving immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity. *E. g., Kendall* v. *United States, supra; United States* v. *Sherwood, supra; Soriano* v. *United States,* 352 U. S. 270; compare *Crown Coat Front Co.* v. *United States, post,* p. 503.

This case is, however, wholly different from those cases on which the Government primarily relies, where the public treasury was directly affected. Here Congress established a method for returning seized enemy assets to United States creditors, assets that were never contemplated as finding their way permanently into the public fisc. As the House and Senate Reports on this statute declare, "The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concur in the view that there exists a strong moral obligation to satisfy them inasmuch as, but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors." H. R. Rep. No. 2398, 79th Cong., 2d Sess., 10 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 3–4 (1946). We consider it much more consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress, to preserve petitioners' cause of action. *Burnett* v. *New York Central R. Co.,* 380 U. S. 424; cf. *Midstate*

Horticultural Co. v. *Pennsylvania R. Co.*, 320 U. S. 356, 360.

The judgment of the Court of Appeals upholding the dismissal of this action is therefore reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK took no part in the decision of this case.

Syllabus.

CROWN COAT FRONT CO., INC. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 371. Argued February 13–14, 1967.—Decided April 10, 1967.

Petitioner in May 1956 agreed to furnish canteen covers to the United States under a contract containing a standard "disputes" clause requiring the contracting officer to decide "any dispute concerning a question of fact arising under [the] contract," and providing for appeal to the department head or his representative, whose decision was to be final unless judicially determined to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith. The Government later tested material samples and rejected them as not meeting contract specifications. Petitioner agreed to a price reduction and completed the contract in December 1956. In March 1959 petitioner allegedly first learned the nature of the Government's tests and in October 1961 demanded an equitable adjustment in the contract price, asserting in the claim filed with the contracting officer that the tests constituted a change in contract specifications. In February 1963 the board of contract appeals affirmed the contracting officer's rejection of the claim. About five months later petitioner sued in the District Court on its claim, alleging that the board's decision was capricious, arbitrary and not supported by substantial evidence. The District Court, without deciding whether the claim arose under the contract within the meaning of the disputes clause, upheld the Government's contention that the cause of action accrued when performance of the contract was completed and was thus foreclosed by 28 U. S. C. § 2401 (a), which bars a civil action against the United States unless the complaint is filed within six years "after the right of action first accrues." The Court of Appeals affirmed. *Held:*

1. When administrative proceedings with respect to a contractor's claim subject to the disputes clause in a government contract extend beyond the completion of the contract, his right of action "first accrues" within the meaning of 28 U. S. C. § 2401 (a) when the administrative action is final, and not before. *Nager Electric Co., Inc.* v. *United States,* 177 Ct. Cl. 234, 368 F. 2d 847, followed. Pp. 510–522.

(a) The "civil action" referred to in § 2401 (a) is a civil action in a court of competent jurisdiction. P. 510.

(b) With respect to claims arising under the disputes clause of a government contract, the contractor has in effect agreed to convert what might otherwise be claims for breach of contract into claims for equitable adjustment. P. 511.

(c) Adjustment of such claims, as provided in the contract, must be made by the contracting officer subject to appeal to the department head or his representative, here the board of contract appeals, and not until that board has acted is the contractor's claim subject to court adjudication. P. 511.

(d) The contractor must seek the relief provided for under the contract or be barred from any relief in the courts. P. 512.

(e) The court review, which is not *de novo,* is focused upon the validity of the administrative decision, pending the making of which the contractor cannot know what his justiciable claim is. Pp. 512–514.

(f) To hold that the six-year limitation period runs from the contract completion date, as the Government urges, would deprive the contractor of judicial review where administrative proceedings extend more than six years beyond that date, a result which would conflict with the policy underlying the Wunderlich Act. P. 514.

(g) Determination of when a "cause of action" first "accrues" must be made with regard to the practical ends to be served by statutes of limitations. *McMahon* v. *United States,* 342 U. S. 25, and other cases not involving the Tucker Act, distinguished. Pp. 516–519.

(h) In enacting a general statute limiting suits by the Government to those which are brought within "six years after the right of action accrues or within one year after final decisions . . . in applicable administrative proceedings required by contract or by law" (28 U. S. C. § 2415) Congress manifested no intention to construe § 2401, which governs a private litigant's right to sue the Government. Pp. 519–522.

2. The determination of whether petitioner's claim arose under the contract or involved a breach of contract claim, which accrued no later than the contract completion date, will be open on remand to the District Court. P. 522.

363 F. 2d 407, reversed and remanded.

Edwin J. McDermott argued the cause and filed a brief for petitioner.

David L. Rose argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Sanders* and *Richard A. Posner.*

Thomas Kiernan filed a brief, as *amicus curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The standard disputes clause in government contracts requires that "any dispute concerning a question of fact arising under this contract," not disposed of by agreement, shall be decided by the contracting officer, with the right of appeal within 30 days to the department head or his representative (normally a board of contract appeals) whose decision shall be final "unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." [1] The "arising under" claims

[1] The disputes clause contained in the contract between petitioner and the Government provides:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an oppor-

subject to final administrative determination are those claims asserted under other clauses of the contract calling for equitable adjustment of the purchase price or extensions of time upon the occurrence of certain events.[2] One of these clauses is the so-called "changes" clause which permits the contracting officer to make changes within the scope of the contract, provides that if any change causes an increase or decrease in the cost of, or the time required for the performance of, the work, "an equitable adjustment shall be made in the contract price or delivery schedule," and states that failure to agree upon an adjustment shall be a question of fact within the meaning of the disputes clause.[3]

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tunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

For the disputes clause presently in use, see 32 CFR § 597.103–12.

[2] Claims not arising under those other clauses of the contract calling for equitable adjustment and therefore not within the disputes clause will sometimes be referred to herein as "breach" claims. See *United States* v. *Utah Construction Co.*, 384 U. S. 394, 403–418.

[3] The record in this case contains only excerpts from the changes clause of the contract at issue here. The standardized version of the changes clause for fixed-price supply contracts provides, in its entirety, that:

"The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from

This case involves a claim for an equitable adjustment, asserted under the changes clause and rejected by the contracting officer and the Armed Services Board of Contract Appeals. The contractor brought suit in the District Court under 28 U. S. C. § 1346 [4] alleging that the decision of the Board was arbitrary, capricious and not supported by substantial evidence. The District Court dismissed the case as barred by 28 U. S. C. § 2401 (a) which provides that "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues . . . ." The principal question here is whether the "right of action" with respect to a claim within the disputes clause first accrues at the time of the final administrative action or at an earlier date.

The facts are quite simple. On May 14, 1956, petitioner contracted with the United States to furnish a specified number of canteen covers which were to be

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the date of receipt by the Contractor of the notification of change, provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed." 32 CFR § 7.103–2.

The excerpted version of the changes clause in this case appears in the unreported opinion of the District Court, and it seems substantially identical to the full clause quoted above.

[4] Section 1346 in relevant part provides that the district courts shall have original jurisdiction, concurrent with the Court of Claims, of ". . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States . . . ."

lined with mildew-resistant felt of certain specifications. The Government, which was authorized to inspect materials to be used under the contract, tested and rejected certain samples of felt purchased by petitioner because they allegedly did not contain the contract quantities of mildew inhibitors. Petitioner agreed to a price reduction, however, and was permitted to complete the contract. Final delivery, originally scheduled for October 11, 1956, was made on December 14, 1956. Allegedly, in March 1959, petitioner first discovered the nature of the tests which the United States had performed on the felt. Claiming that the use of such tests was not within the contemplation of the contract and constituted a change in contract specifications, petitioner filed a claim with the contracting officer in October 1961, demanding an equitable adjustment in the contract price in the form of a refund of the price reduction and compensation for increased costs occasioned by substantial delay resulting from the Government's rejection of the felt samples. The contracting officer denied the claim. On February 28, 1963, the Board of Contract Appeals affirmed the contracting officer's decision. On July 31, 1963, more than six years after petitioner had completed performance of the contract, petitioner brought suit in the District Court alleging that the Board's decision was capricious, arbitrary and not supported by substantial evidence and that it was entitled to an equitable adjustment as provided in the contract. The United States, among other things, denied that the claim was within the disputes clause and asserted that the suit was time-barred by § 2401 (a). Without deciding whether the claim arose under the contract within the meaning of the disputes clause, the District Court dismissed the suit as barred by the statute of limitations. The Court of Appeals, sitting *en banc,* affirmed in a five-to-four decision. 363 F. 2d 407. Relying on *McMahon* v. *United States,* 342 U. S. 25, and its own

decision in *States Marine Corp. of Delaware* v. *United States,* 283 F. 2d 776, which arose under the Suits in Admiralty Act, the majority below concluded that the right of action first accrued no later than December 14, 1956, the date of the final delivery of the disputed canteen covers, and was therefore time-barred by § 2401 (a). The court disagreed with the decision of the Court of Appeals for the Third Circuit in *Northern Metal Co.* v. *United States,* 350 F. 2d 833, which, like *States Marine, supra,* involved the Suits in Admiralty Act. 41 Stat. 525, as amended. The Court of Appeals for the Third Circuit had agreed with *States Marine* as to when the time bar begins to run but had held that the statute was tolled during the pendency of the administrative proceedings. Because of this apparent conflict, we granted certiorari, 385 U. S. 811. We reverse.

Since the decision below, the Court of Claims has decided *Nager Electric Co., Inc.* v. *United States,* 177 Ct. Cl. 234, 368 F. 2d 847, a unanimous decision by that court supported by an exhaustive opinion by Judge Davis dealing with the application of the "first accrual" language of 28 U. S. C. § 2501 [5] to both breach and disputes clause claims under the typical government contract. The conclusion of the Court of Claims was that it would adhere to what it considered to be its long-standing rule: (1) when administrative proceedings with respect to a contractor's claim subject to the disputes clause extend beyond the completion of the contract, his right of action first accrues when the administrative action is final,[6] and not before,

[5] Section 2501 provides as follows: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

[6] Where the administrative proceedings have not extended beyond the date of completion of the contract, the Court of Claims' rule has been that "the claim accrues, and the statutory period com-

and (2) when the contractor has breach claims as well as disputes clause claims the statute begins to run on breach claims as well only at the conclusion of administrative action on the claims arising under the contract.[7] As will be evident below, we do not reach the question of breach claims in this case. But with respect to claims arising under the contract, such as one asserted under the changes clause, we agree with the Court of Claims and essentially for the reasons which that court articulated.

1. We start with the obvious: Section 2401 (a) provides a time limit upon bringing civil actions against the United States. The "civil action" referred to is a civil action in a court of competent jurisdiction. Cf. *Unexcelled Chemical Corp.* v. *United States,* 345 U. S. 59. Such a civil suit is seemingly barred if the right to bring it first accrued more than six years prior to the date of filing the suit. Our initial inquiry is, therefore, when the right of the contractor in this case to bring suit in the District Court

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mences, at the time of completion or acceptance (if the latter is contemplated)." 177 Ct. Cl. 234, 242, 368 F. 2d 847, 853.

[7] The Court of Claims summarized its prior rulings with respect to co-existing breach and disputes clause claims as follows:

"Reading them all together, these opinions show, we think, that where a contractor has both 'disputes-clause' items and 'breach-type' claims under a single contract, the following standards have controlled in this court: (i) there should be only one suit to enforce the various claim-items; (ii) the contractor *can* bring suit on the ripened 'breach-type' items before completion of the administrative process on the 'disputes-clause' items, but if he does so he may well lose the latter claims unless he includes them (by proper amendment, if necessary, as they mature) in his court action; *but* (iii) the contractor need not file suit on the 'breach-type' items until after the end of the administrative process, when all the items have ripened and can be included in the one petition. In sum, our rule has been that the time-bar will not fall until six years after the administrative determination, but suit can be filed earlier, with the plaintiff taking the risk that he may thereby split his cause of action." 177 Ct. Cl., at 248–249, 368 F. 2d, at 857.

first accrued. In our opinion, if its claim arose under the contract, it first accrued at the time of the final decision of the Armed Services Board of Contract Appeals, that is, upon the completion of the administrative proceedings contemplated and required by the provisions of the contract.

With respect to claims arising under the typical government contract, the contractor has agreed in effect to convert what otherwise might be claims for breach of contract into claims for equitable adjustment. The changes clause, for example, permits the Government to make changes in contract specifications. Such changes are not breaches of contract. They do give rise to claims for equitable adjustments which the Government agrees to make, if the cost of performance is increased or the time for performance changed. But whether and to what extent an adjustment is required are questions to be answered by the methods provided in the contract itself. The contractor must present his claim to the contracting officer, whose decision is final unless appealed for final action by the department head or his representative, here the Armed Services Board of Contract Appeals. Until that Board has acted, the contractor's claim is not subject to adjudication in the courts.[8] Until then, he has only the right to have the existence and extent of his claimed adjustment determined by the administrative process agreed upon. But, as we have said, the "right of action" of which § 2401 (a) speaks is not the right to administrative action but the right to file a civil action in the courts against the United States. Under the contract we have here, the contractor's claim was subject only to administrative, not judicial, determina-

[8] We do not have a situation here where the United States refuses to process the claim in accordance with its agreement or otherwise departs from the agreed-upon scheme for settling disputed issues within the disputes clause.

tion in the first instance, with the right to resort to the courts only upon the making of that administrative determination.

It is now crystal clear that the contractor must seek the relief provided for under the contract or be barred from any relief in the courts. In *United States* v. *Holpuch Co.,* 328 U. S. 234, the question was whether a contractor's failure to exhaust the administrative appeal provisions of a government construction contract bars him from bringing suit in the Court of Claims to recover damages. The Court held that it did. According to the Court, the disputes clause

> "is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in disregarding its letter or spirit. . . . It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Blair,* 321 U. S. 730, 735. This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract. . . . And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court." 328 U. S. 234, 239–240.

See also *United States* v. *Blair,* 321 U. S. 730, and *United States* v. *Callahan Walker Co.,* 317 U. S. 56, 61, where the disputes clause procedures are described as the "only avenue for relief."

2. Even when the contractual scheme has run its course and the contractor is free to file his suit in court, he is not entitled to demand a *de novo* determination of

his claim for an equitable adjustment. The evidence in support of his case must have been presented administratively and the record there made will be the record before the reviewing court. *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709; *United States* v. *Utah Construction Co.*, 384 U. S. 394. The court performs principally a reviewing function. Only if it is alleged and proved that the administrative determination was arbitrary, capricious, or not supported by substantial evidence may the court refuse to honor it. This much is clear not only from the disputes clause itself but from the Wunderlich Act.[9] In that statute, entitled "An Act to permit review . . . ," 68 Stat. 81, Congress widened the scope of judicial review but at the same time recognized the finality of the administrative decision absent the specified grounds for setting it aside. The focus of the court action is the validity of the administrative decision. Until that decision is made, the contractor cannot know what claim he has or on what grounds administrative

[9] 41 U. S. C. §§ 321 and 322 provide as follows:

"§ 321. Limitation on pleading contract-provisions relating to finality; standards of review.

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"§ 322. Contract-provisions making decisions final on questions of law.

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

action may be vulnerable. It is only then that his claim or right to bring a civil action against the United States matures and, as the Court of Claims said, that he has "the right to demand payment . . . the hallmark of accrual of a claim in this court." 177 Ct. Cl., at 252, 368 F. 2d, at 859.

3. To hold that the six-year time period runs from the completion of the contract, as the Government insists, would have unfortunate impact. The contractor is compelled to resort to administrative proceedings which may be protracted and which may last not only beyond the completion of the contract but continue for more than six years thereafter. If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This would be true whether he wins or loses before the board of appeals. Even if he prevailed there and was granted the equitable adjustment he sought, the Government would be immune from suit to enforce the award if more than six years had passed since the completion of the contract. This is not an appealing result, nor, in our view, one that Congress intended. The Wunderlich Act evidences a congressional purpose to insure adequate judicial review of administrative decisions on claims arising under government contracts; it is very doubtful that it anticipated no review at all if administrative proceedings, compulsory on the contractor, continued for more than six years beyond the contract's completion date.[10]

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[10] The Committee Report on the Wunderlich Act disaffirms any intention to confer any new rights on the contractor other than the widened scope of review and refers specifically to the six-year statute of limitations barring stale suits against the Government. But the report does not suggest when the limitations period begins to run or purport to alter or to disagree with the then-extant judicial constructions of either § 2401 or § 2501 by the Court of Claims or by any other court. See H. R. Rep. No. 1380, 83d Cong., 2d Sess.

The Government suggests that the contractor may easily avoid such untoward results by the timely filing of a protective suit which could remain inactive pending the conclusion of administrative proceedings. But the contractor is not legally entitled to ask the courts to adjudicate his claim as an original matter. Nor can he sensibly ask the courts to review a decision which has not yet been made. He cannot, with honesty, make the necessary allegations to support an action for review until the administrative process is completed and the agency decision known. Since it would remain quiescent until the administrative decision is rendered, the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts. Certainly it would be no help to those contractors for whom it is already too late to file such a suit, which is true of the petitioner in this case.[11]

4. The Government challenges what the Court of Claims in *Nager Electric* considered to be the long-standing rule found in its own past cases. It asserts that many of the cases from which the purported rule was sifted do not involve the standard disputes clause and those that do state the rule by way of dictum only. But we think the Court of Claims fairly reflected the thrust and tenor

[11] We should in this respect heed the words of the Court of Claims: "The United States has known for decades that contract suits will be timely in this court if they are filed within six years after the administrative determination, and has probably acted on that assumption in keeping records and retaining evidence. On the other hand, to say abruptly at this moment that limitation runs from the contract's completion, regardless of subsequent mandatory administrative proceedings, would undoubtedly cut off scores of contractors who, relying on our past decisions, have waited to bring suit until the ending of the administrative process. There is no adequate reason to disrupt these justified expectations." 177 Ct. Cl., at 253–254, 368 F. 2d, at 860.

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of its prior opinions.[12] At least, based on those cases, the ordinary contractor would have been wholly justified in concluding that he had six years from the conclusion of administrative proceedings to file his suit. Nor, aside from the decision in this case, have we been cited to any court of appeals decisions in Tucker Act (24 Stat. 505) cases, which are contrary to the rule followed by the Court of Claims.

5. This brings us to the cases in this Court upon which the Government and the Court of Appeals have relied: *McMahon* v. *United States,* 342 U. S. 25; *Soriano* v. *United States,* 352 U. S. 270; and *Unexcelled Chemical Corp.* v. *United States,* 345 U. S. 59. None of them was a Tucker Act suit involving a disputes clause claim. *McMahon* was an action brought by an injured seaman against the United States for negligence and unseaworthiness. The Suits in Admiralty Act requires actions to be brought within two years after "the cause of action arises." The Clarification Act, 57 Stat. 45, 50 U. S. C.

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[12] The cases cited by the Court of Claims are the following:

Electric Boat Co. v. *United States,* 81 Ct. Cl. 361, 367–368, cert. denied, 297 U. S. 710; *Austin Eng'r Co.* v. *United States,* 88 Ct. Cl. 559, 562–564; *Holton, Seelye & Co.* v. *United States,* 106 Ct. Cl. 477, 501, 65 F. Supp. 903, 907; *Griffin* v. *United States,* 110 Ct. Cl. 330, 372–373, 77 F. Supp. 197, 206, rev'd on other grounds, *sub nom. United States* v. *Jones,* 336 U. S. 641; *Art Center School* v. *United States,* 136 Ct. Cl. 218, 226, 142 F. Supp. 916, 921; *Empire Institute of Tailoring, Inc.* v. *United States,* 142 Ct. Cl. 165, 168, 161 F. Supp. 409, 411; *International Potato Corp.* v. *United States,* 142 Ct. Cl. 604, 606–607, 161 F. Supp. 602, 604–605; *Clifton Products, Inc.* v. *United States,* 144 Ct. Cl. 806, 809, 169 F. Supp. 511, 512–513; *Cosmopolitan Mfg. Co.* v. *United States,* 156 Ct. Cl. 142, 144, 297 F. 2d 546, 547, cert. denied *sub nom. Arlene Coats* v. *United States,* 371 U. S. 818; *Steel Improvement & Forge Co.* v. *United States,* 174 Ct. Cl. 24, 29–30, 355 F. 2d 627, 631.

The Court of Claims also dealt with *Aktiebolaget Bofors* v. *United States,* 139 Ct. Cl. 642, 644, 153 F. Supp. 397, 399, a case containing statements seemingly contrary to those found in the above cases.

App. § 1291 (a), which brought such a seaman's suit within the ambit of the Suits in Admiralty Act, permits court action only if the claim has been administratively disallowed, but sets no time within which a claim must be presented to the administrative body. The Court held that the limitations period ran from the time of the injury, not from the date of the disallowance of the claim. The Court saw no indications that Congress in passing the Clarification Act intended to postpone the usual time of accrual of the cause of action until the date of disallowance, since this would permit the claimant to postpone indefinitely the commencement of the running of the statutory period.

The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a "cause of action" first "accrues." Such words are to be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading Co.* v. *Koons,* 271 U. S. 58, 62; see also *United States* v. *Dickinson,* 331 U. S. 745, 748. Cases under the Suits in Admiralty Act do not necessarily rule Tucker Act claims. The purpose of the Clarification Act was to prevent unnecessary litigation by providing for notice of injury to the United States and for the opportunity to settle claims administratively. But while suit was permitted only if a claim had been "disallowed," the applicable regulations provided that if a claim was not rejected within 60 days after filing, it would be deemed to have been administratively disallowed and the claimant would be free to enforce his claim. There was no chance for administrative action to consume the entire limitations period and therefore bar all resort to the courts.

In disputes clause cases, however, final administrative action, which the claimant must await, may occur more

than six years after the completion of the contract. When it does, the claimant would be time-barred if the six-year period is measured from the date of final performance. Nor does the claimant in cases like the one before us have unlimited discretion as to when to file his claim. The standard changes clause [13] requires him to present his claim within 30 days and most other clauses in government contracts calling for an equitable adjust-

[13] The Court of Claims dealt with the matter as follows:

"Similarly, the contractor in the cases before us (and the mass of such cases) is not left at large to present his claim administratively whenever he likes. The Disputes clause does not itself fix a time within which a disputed issue of fact must be presented to the contracting officer, but that is not ordinarily true of the various substantive contractual clauses which lead to equitable adjustments or comparable relief under the contract. Those specific clauses usually have built-in time limits, and where no specific period is established in the contract the contractor cannot delay unreasonably. Cf. Dawnic Steamship Corp. v. United States, 90 Ct. Cl. 537, 579 (1940). Neither this court nor the administrative tribunals have had any great difficulty in handling belated claims by contractors under the various contract-adjustment articles. Contractors have not been able to extend the limitations period unduly by unilaterally postponing the commencement of the administrative process." 177 Ct. Cl., at 259–260, 368 F. 2d, at 864.

The court also noted that:

"The standard Changes clause in construction contracts provides that claims for adjustment must be asserted within 10 days; the Changed Conditions clause calls for an immediate notification to the contracting officer; the Delays-Damages clause contemplates a notice within 10 days of excusable delays; the Price Adjustment for Suspension, Delays, or Interruption of Work clause sets 20 days as the normal period. See United States v. Utah Constr. & Mining Co., 384 U. S. 394, 397–399 n. 1, 416 n. 14, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)." *Id.*, at 259, n. 29, 368 F. 2d, at 864, n. 29.

The 30-day period within which a fixed-price supply contractor must assert his claim for equitable adjustment arising from changes, see text above and *supra,* n. 3, may be shortened in accordance with Department procedure, 32 CFR § 7.103–2, or with negotiations, 32 CFR § 597.103–2.

ment also contain their own time limitations. Where this is not true, the contractor cannot delay unreasonably in presenting his claim. This is the rule the Court of Claims follows. See *Nager Electric, supra,* 177 Ct. Cl., at 259, 368 F. 2d, at 864.

Nor do *Soriano* or *Unexcelled* control this case. In *Soriano* the six-year time bar was held to run from the date of the requisitioning of foodstuffs and equipment by Philippine guerrilla forces and not from the date of the disallowance of a claim filed with the Army Claims Service. The majority in that case expressly held that the administrative action was not a prerequisite to suit in the Court of Claims. Likewise, in *Unexcelled,* where the statutory period was held to run from the date of the breach of statutory duty under the Walsh-Healey Act (49 Stat. 2036), rather than from the date of the administrative determination of the liquidated damages due the Government, it seems apparent that the United States, to which damages were payable, could have brought suit without first resorting to administrative remedies.

6. Finally, the Government relies on Public Law 89–505, 80 Stat. 304, 28 U. S. C. § 2415 (1964 ed., Supp. II), enacted on July 18, 1966, which for the first time established a general statute of limitations on government tort claims and on suits by the Government for money damages founded on any contract, express or implied. Such suits must now be brought within "six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law." As an example of such administrative proceedings, the relevant committee reports and hearings mentioned the administrative proceedings required under the standard disputes clause contained in government contracts. H. R. Rep. No. 1534, 89th Cong., 2d Sess., at 4; S. Rep. No. 1328, 89th Cong., 2d Sess., at 3; Hearing on H. R. 13652 before Sub-

committee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess., 7 (1966). Based on this new provision, the Government argues that Congress necessarily assumed that the right of action of the United States in disputes clause situations first accrues and the limitations period begins to run prior to the completion of administrative proceedings. Otherwise there would have been no need for the one-year period following final administrative decision in order to save actions which might otherwise be barred by the six-year limitation. What this amounts to, the Government says, is a congressional construction of the similar "first accrual" language of the older limitations on private actions contained in § 2401 (a) and § 2501. Likewise, it argues, this construction precludes holdings such as that of the Third Circuit in *Northern Metal Co.* v. *United States,* 350 F. 2d 833, to the effect that the statute is tolled during the pendency of administrative proceedings.

This argument is not without force. There is no question of the power of Congress to define the limits of its waiver of sovereign immunity. But we are not convinced that Congress intended to issue any determinative construction of § 2401 in formulating and passing § 2415. Neither in the hearing on H. R. 13652 nor in the committee reports did Congress focus on the first accrual language of § 2401, on the existing construction of that language by the Court of Claims or any other court or on the situation of the government contractor desiring to sue the United States during or after the conclusion of administrative proceedings under the disputes clause. The bill was recommended to the Congress by the Department of Justice at the time the Department was litigating *Nager Electric* in the Court of Claims in which the Department ultimately took the position that the private contractor's right of action first accrues no later than the completion of the contract.

This position was rejected by the Court of Claims, in favor of what is considered to be its existing rule—that the private contractor's right to sue on a disputes clause claim first accrues with the termination of administrative proceedings. Given the Wunderlich Act, and the prior litigative history of disputes clause issues in this Court and in the Court of Claims, we are doubtful that Congress intended to bar a private contractor's suit on a disputes clause claim where administrative proceedings continue for more than six years after the completion of the contract. Congress understood what the impact of such a rule would be if applied to the Government and made due allowance for it by allowing the Government the one-year grace period. We see no indications that it had in mind the private litigant whose right to sue the United States is governed by § 2401. We are hesitant to believe that in passing a statute aimed at equalizing the litigative opportunities between the Government and private parties [14] Congress consciously extended

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[14] The congressional intent to "put the Government on a parity with those private litigants who may sue" and "to equalize the position of litigants" is sufficiently evident. See Hearing on H. R. 13652 before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess., 9, 11 (1966); H. R. Rep. No. 1534, 89th Cong., 2d Sess., at 4; S. Rep. No. 1328, 89th Cong., 2d Sess., at 2. Whether Congress succeeded in establishing exact equality between contractors and the Government is of course another question. In this regard, it is interesting to note that in addition to the one year following the termination of administrative proceedings in which the Government can institute a suit under § 2415, subsection (e) of that provision provides that:

"In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action." 28 U. S. C. § 2415 (e) (1964 ed., Supp. II).

a one-year saving period to the Government to overcome the effects of protracted administrative proceedings and refused similar relief to the contractor. At least we are sufficiently doubtful that we prefer to await a somewhat clearer signal from the Congress.

We therefore conclude that if the claim filed by the contractor in this case was a claim "arising under" the contract and was therefore subject to administrative determination, (1) its right to bring a civil action first accrued when the Armed Services Board of Contract Appeals finally ruled on its claim and (2) its suit in the District Court was timely filed. The Government in its answer to the complaint, however, denied that the claim arose under the contract, characterized it instead as a pure breach of contract claim which accrued no later than the date of the completion of the contract. The District Court did not decide this issue; nor do we. This matter will be open on remand to the District Court. If the claim is not within the disputes clause, the court may then determine whether it is time-barred.

Reversed and remanded.

STATE FARM FIRE & CASUALTY CO. ET AL. *v.* TASHIRE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 391. Argued February 14–15, 1967.—Decided April 10, 1967.

A bus and a truck collided in California resulting in a large number of casualties, including many Canadians and citizens of five States. Four victims brought suits in California state courts for damages exceeding $1,000,000 against the bus and truck drivers and the truck owner (all Oregon citizens), and the bus company, a California corporation. Before these cases were tried or other suits brought, petitioner insurance company, an Illinois corporation, brought this action in the nature of interpleader in the Federal District Court in Oregon against the drivers, the bus company, truck owner, and each prospective claimant, asserting that it had insured the truck driver against bodily injury liability to the extent of $10,000 per person, and $20,000 per occurrence. It paid the latter sum into court, and asked that all claims against it and the insured be established only in this single proceeding and that it be discharged from all further obligations under its policy, including its duty to defend the truck driver in lawsuits arising from the accident. Alternatively, it asked to be relieved of all liability on the policy, claiming that the policy excluded from coverage accidents such as the one involved here resulting from the insured's operation of a truck owned by and being used in the business of another. Jurisdiction was based on general diversity of citizenship and 28 U. S. C. § 1335, which, *inter alia,* vests the district courts with jurisdiction in an interpleader action where a corporation has issued an insurance policy if two or more "adverse claimants, of diverse citizenship" claim "or may claim" to be entitled to money or the benefits arising under a policy and if the plaintiff has paid the amount due into the court's registry. An injunction was issued providing that all suits against the insurance company and its insured and (on the bus company's motion) the bus company and its driver be prosecuted in the interpleader proceeding. On interlocutory appeal, the Court of Appeals reversed, holding that in States like Oregon which do not permit

"direct action" suits against an insurance company, federal interpleader may not be invoked until the claims against the insured have been reduced to judgment, since persons with unliquidated tort claims are not "claimants" within the meaning of § 1335. *Held:*

1. The diversity requirement of 28 U. S. C. § 1335 is satisfied here and the federal courts have jurisdiction since that provision requires only "minimal diversity," *i. e.*, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens, and "minimal diversity" is permissible under Article III of the Constitution. Pp. 530–531.

2. Section 1335 authorizes interpleader where adverse claimants "may claim" benefits, and petitioner insurance company need not wait until claimants against the insured have reduced their claims to judgment before seeking to invoke the benefits of the interpleader statute. Pp. 531–533.

3. An injunction barring the prosecution of suits against the insurance company and the alleged tortfeasors outside the confines of the interpleader proceeding was not authorized by 28 U. S. C. § 2361, the scope of the litigation being vastly more extensive than the deposited proceeds of the insurance policy which constituted the "fund." Pp. 533–537.

(a) This is not a case where the effect of the interpleader is to confine the litigation to a single forum and proceeding as where rival claims are limited to the fund itself. P. 534.

(b) The fortuitous circumstance that one of the prospective defendants happens to be insured should not limit the other plaintiffs to the forum selected by the insurance company. Pp. 534–535.

(c) The insurance company's interest, which is confined to its $20,000 fund, is fully vindicated when the court restrains claimants from seeking to enforce against the insurance company any judgment obtained against the insured except in the interpleader proceeding itself. The District Court had no power in that proceeding to control claimants' lawsuits against the insured or other alleged tortfeasors. P. 535.

(d) Interpleader was never intended to serve as a "bill of peace" and solve all the problems of multiparty litigation arising out of a mass tort. Pp. 535–536.

363 F. 2d 7, reversed and remanded.

Otto R. Skopil, Jr., and *John Gordon Gearin* argued the cause and filed briefs for petitioners.

Nick Chaivoe and *James B. Griswold* argued the cause and filed a brief for respondents.

Mark C. McClanahan filed a brief for Anderson & Geary et al., as *amici curiae.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Early one September morning in 1964, a Greyhound bus proceeding northward through Shasta County, California, collided with a southbound pickup truck. Two of the passengers aboard the bus were killed. Thirty-three others were injured, as were the bus driver, the driver of the truck and its lone passenger. One of the dead and 10 of the injured passengers were Canadians; the rest of the individuals involved were citizens of five American States. The ensuing litigation led to the present case, which raises important questions concerning administration of the interpleader remedy in the federal courts.

The litigation began when four of the injured passengers filed suit in California state courts, seeking damages in excess of $1,000,000. Named as defendants were Greyhound Lines, Inc., a California corporation; Theron Nauta, the bus driver; Ellis Clark, who drove the truck; and Kenneth Glasgow, the passenger in the truck who was apparently its owner as well. Each of the individual defendants was a citizen and resident of Oregon. Before these cases could come to trial and before other suits were filed in California or elsewhere, petitioner State Farm Fire & Casualty Company, an Illinois corporation, brought this action in the nature of interpleader in the United States District Court for the District of Oregon.

In its complaint State Farm asserted that at the time of the Shasta County collision it had in force an insurance policy with respect to Ellis Clark, driver of the truck, providing for bodily injury liability up to $10,000 per person and $20,000 per occurrence and for legal representation of Clark in actions covered by the policy. It asserted that actions already filed in California and others which it anticipated would be filed far exceeded in aggregate damages sought the amount of its maximum liability under the policy. Accordingly, it paid into court the sum of $20,000 and asked the court (1) to require all claimants to establish their claims against Clark and his insurer in this single proceeding and in no other, and (2) to discharge State Farm from all further obligations under its policy—including its duty to defend Clark in lawsuits arising from the accident. Alternatively, State Farm expressed its conviction that the policy issued to Clark excluded from coverage accidents resulting from his operation of a truck which belonged to another and was being used in the business of another. The complaint, therefore, requested that the court decree that the insurer owed no duty to Clark and was not liable on the policy, and it asked the court to refund the $20,000 deposit.

Joined as defendants were Clark, Glasgow, Nauta, Greyhound Lines, and each of the prospective claimants. Jurisdiction was predicated upon 28 U. S. C. § 1335, the federal interpleader statute,[1] and upon general diversity

[1] 28 U. S. C. § 1335 (a) provides: "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a . . . policy of insurance . . . of value or amount of $500 or more . . . if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to

of citizenship, there being diversity between two or more of the claimants to the fund and between State Farm and all of the named defendants.

An order issued, requiring the defendants to show cause why they should not be restrained from filing or prosecuting "any proceeding in any state or United States Court affecting the property or obligation involved in this interpleader action, and specifically against the plaintiff and the defendant Ellis D. Clark." Personal service was effected on each of the American defendants, and registered mail was employed to reach the 11 Canadian claimants. Defendants Nauta, Greyhound, and several of the injured passengers responded, contending that the policy did cover this accident and advancing various arguments for the position that interpleader was either impermissible or inappropriate in the present circumstances. Greyhound, however, soon switched sides and moved that the court broaden any injunction to include Nauta and Greyhound among those who could not be sued except within the confines of the interpleader proceeding.

When a temporary injunction along the lines sought by State Farm was issued by the United States District Court for the District of Oregon, the present respondents moved to dismiss the action and, in the alternative, for a change of venue—to the Northern District of California, in which district the collision had occurred. After a hearing, the court declined to dissolve the temporary injunction, but continued the motion for a change of venue. The injunction was later broadened to include the protection sought by Greyhound, but modified to

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be entitled to such money or property, or to any one or more of the benefits arising by virtue of any . . . policy . . . ; and if (2) the plaintiff has . . . paid . . . the amount due under such obligation into the registry of the court, there to abide the judgment of the court . . . ."

permit the filing—although not the prosecution—of suits. The injunction, therefore, provided that all suits against Clark, State Farm, Greyhound, and Nauta be prosecuted in the interpleader proceeding.

On interlocutory appeal,[2] the Court of Appeals for the Ninth Circuit reversed. 363 F. 2d 7. The court found it unnecessary to reach respondents' contentions relating to service of process and the scope of the injunction, for it concluded that interpleader was not available in the circumstances of this case. It held that in States like Oregon which do not permit "direct action" suits against insurance companies until judgments are obtained against the insured, the insurance companies may not invoke federal interpleader until the claims against the insured, the alleged tortfeasor, have been reduced to judgment. Until that is done, said the court, claimants with unliquidated tort claims are not "claimants" within the meaning of § 1335, nor are they "persons having claims against the plaintiff" within the meaning of Rule 22 of the Federal Rules of Civil Procedure.[3] *Id.*,

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[2] 28 U. S. C. § 1292 (a)(1).

[3] We need not pass upon the Court of Appeals' conclusions with respect to the interpretation of interpleader under Rule 22, which provides that "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . ." First, as we indicate today, this action was properly brought under § 1335. Second, State Farm did not purport to invoke Rule 22. Third, State Farm could not have invoked it in light of venue and service of process limitations. Whereas statutory interpleader may be brought in the district where any claimant resides (28 U. S. C. § 1397), Rule interpleader based upon diversity of citizenship may be brought only in the district where all plaintiffs or all defendants reside (28 U. S. C. § 1391 (a)). And whereas statutory interpleader enables a plaintiff to employ nationwide service of process (28 U. S. C. § 2361), service of process under Rule 22 is confined

at 10. In accord with that view, it directed dissolution of the temporary injunction and dismissal of the action. Because the Court of Appeals' decision on this point conflicts with those of other federal courts,[4] and concerns a matter of significance to the administration of federal interpleader, we granted certiorari. 385 U. S. 811 (1966). Although we reverse the decision of the Court of Appeals upon the jurisdictional question, we direct a substantial modification of the District Court's injunction for reasons which will appear.

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to that provided in Rule 4. See generally 3 Moore, Federal Practice ¶ 22.04.

With respect to the Court of Appeals' views on Rule 22, which seem to be shared by our Brother DOUGLAS, compare *Underwriters at Lloyd's* v. *Nichols,* 363 F. 2d 357 (C. A. 8th Cir. 1966), and *A/S Kredüt Pank* v. *Chase Manhattan Bank,* 155 F. Supp. 30 (D. C. S. D. N. Y. 1957), aff'd, 303 F. 2d 648 (C. A. 2d Cir. 1962), with *National Casualty Co.* v. *Insurance Co. of North America,* 230 F. Supp. 617 (D. C. N. D. Ohio 1964), and *American Indemnity Co.* v. *Hale,* 71 F. Supp. 529 (D. C. W. D. Mo. 1947). See also 3 Moore, Federal Practice ¶ 22.04, at 3008 and n. 4.

[4] See, *e. g., Travelers Indemnity Co.* v. *Greyhound Lines, Inc.,* 260 F. Supp. 530 (D. C. W. D. La. 1966); *Commercial Union Insurance Co. of New York* v. *Adams,* 231 F. Supp. 860 (D. C. S. D. Ind. 1964); *Pan American Fire & Casualty Co.* v. *Revere,* 188 F. Supp. 474 (D. C. E. D. La. 1960); *Onyx Refining Co.* v. *Evans Production Corp.,* 182 F. Supp. 253 (D. C. N. D. Tex. 1959). Although *Travelers* and *Revere* were brought in Louisiana, a State which authorizes "direct action" suits against insurance companies, the statute was not relied upon in *Travelers* (see 260 F. Supp., at 533, n. 3), and furnished only an alternative ground in *Revere* (see 188 F. Supp., at 482–483).

The only post-1948 case relied upon by the Court of Appeals and respondents, *National Casualty Co.* v. *Insurance Co. of North America,* 230 F. Supp. 617 (D. C. N. D. Ohio 1964), turns out to be of little assistance with respect to statutory interpleader since that court denied statutory interpleader solely on the ground that all claimants were citizens of Ohio and hence lacked the required diversity of citizenship. *Id.,* at 619.

I.

Before considering the issues presented by the petition for certiorari, we find it necessary to dispose of a question neither raised by the parties nor passed upon by the courts below. Since the matter concerns our jurisdiction, we raise it on our own motion. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 70 (1939). The interpleader statute, 28 U. S. C. § 1335, applies where there are "Two or more adverse claimants, of diverse citizenship . . . ." This provision has been uniformly construed to require only "minimal diversity," that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens.[5] The language of the statute, the legislative purpose broadly to remedy the problems posed by multiple claimants to a single fund, and the consistent judicial interpretation tacitly accepted by Congress, persuade us that the statute requires no more. There remains, however, the question whether such a statutory construction is consistent with Article III of our Constitution, which extends the federal judicial power to "Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." In *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), this Court held that the diversity of citizenship statute required "complete diversity": where co-citizens appeared on both sides of a dispute,

[5] See, *e. g.*, *Haynes* v. *Felder*, 239 F. 2d 868, 872–875 (C. A. 5th Cir. 1957); *Holcomb* v. *Aetna Life Insurance Co.*, 255 F. 2d 577, 582 (C. A. 10th Cir.), cert. denied *sub nom. Fleming* v. *Aetna Life Insurance Co.*, 358 U. S. 879 (1958); *Cramer* v. *Phoenix Mut. Life Ins. Co.*, 91 F. 2d 141, 146–147 (C. A. 8th Cir.), cert. denied, 302 U. S. 739 (1937); *Commercial Union Insurance Co. of New York* v. *Adams*, 231 F. Supp. 860, 863 (D. C. S. D. Ind. 1964); 3 Moore, Federal Practice ¶ 22.09, at 3033.

jurisdiction was lost. But Chief Justice Marshall there purported to construe only "The words of the act of congress," not the Constitution itself.[6] And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.[7] Accordingly, we conclude that the present case is properly in the federal courts.

II.

We do not agree with the Court of Appeals that, in the absence of a state law or contractual provision for

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[6] Subsequent decisions of this Court indicate that *Strawbridge* is not to be given an expansive reading. See, *e. g., Louisville Railroad Co.* v. *Letson,* 2 How. 497, 554–556 (1844), expressing the view that in 1839 Congress had in fact acted to "rid the courts of the decision in the case of Strawbridge and Curtis." *Id.,* at 556.

[7] See, *e. g., American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6, 10, n. 3 (1951), and *Barney* v. *Latham,* 103 U. S. 205, 213 (1881), construing the removal statute, now 28 U. S. C. § 1441 (c); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356 (1921), concerning class actions; *Wichita R. R. & Light Co.* v. *Public Util. Comm.,* 260 U. S. 48 (1922), dealing with intervention by co-citizens. Full-dress arguments for the constitutionality of "minimal diversity" in situations like interpleader, which arguments need not be rehearsed here, are set out in Judge Tuttle's opinion in *Haynes* v. *Felder,* 239 F. 2d, at 875–876; in Judge Weinfeld's opinion in *Twentieth Century-Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913, 918–921 (D. C. S. D. N. Y. 1965); and in ALI, Study of the Division of Jurisdiction Between State and Federal Courts 180–190 (Official Draft, Pt. 1, 1965); 3 Moore, Federal Practice ¶ 22.09, at 3033–3037; Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L. J. 377, 393–406 (1940); Chafee, Interpleader in the United States Courts, 41 Yale L. J. 1134, 1165–1169 (1932). We note that the American Law Institute's proposals for revision of the Judicial Code to deal with the problem of multiparty, multijurisdiction litigation are predicated upon the permissibility of "minimal diversity" as a jurisdictional basis.

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"direct action" suits against the insurance company, the company must wait until persons asserting claims against its insured have reduced those claims to judgment before seeking to invoke the benefits of federal interpleader. That may have been a tenable position under the 1926 [8] and 1936 interpleader statutes.[9] These statutes did not carry forward the language in the 1917 Act authorizing interpleader where adverse claimants "may claim" benefits as well as where they "are claiming" them.[10] In 1948, however, in the revision of the Judicial Code, the "may claim" language was restored.[11] Until the decision below, every court confronted by the question has concluded that the 1948 revision removed whatever requirement there might previously have been that the insurance com-

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[8] 44 Stat. 416 (1926), which added casualty companies to the enumerated categories of plaintiffs able to bring interpleader, and provided for the enjoining of proceedings in other courts.

[9] 49 Stat. 1096 (1936), which authorized "bills in the nature of interpleader," meaning those in which the plaintiff is not wholly disinterested with respect to the fund he has deposited in court. See Chafee, The Federal Interpleader Act of 1936: I, 45 Yale L. J. 963 (1936).

[10] 39 Stat. 929 (1917). See *Klaber* v. *Maryland Casualty Co.*, 69 F. 2d 934, 938–939 (C. A. 8th Cir. 1934), which held that the omission in the 1926 Act of the earlier statute's "may claim" language required the denial of interpleader in the face of unliquidated claims (alternative holding).

[11] Although the Reviser's Note did not refer to the statutory change or its purpose, we have it on good authority that it was the omission in the Note rather than the statutory change which was inadvertent. See 3 Moore, Federal Practice ¶ 22.08, at 3025–3026, n. 13. And it was widely assumed that restoration of the "may claim" language would have the effect of overruling the holding in *Klaber, supra*, that one may not invoke interpleader to protect against unliquidated claims. See, *e. g.*, Chafee, 45 Yale L. J., at 1163–1167; Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L. J. 377, 418–420 (1940). In circumstances like these, the 1948 revision of the Judicial Code worked substantive changes. *Ex parte Collett*, 337 U. S. 55 (1949).

pany wait until at least two claimants reduced their claims to judgments.[12] The commentators are in accord.[13]

Considerations of judicial administration demonstrate the soundness of this view which, in any event, seems compelled by the language of the present statute, which is remedial and to be liberally construed. Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims. The difficulties such a race to judgment pose for the insurer,[14] and the unfairness which may result to some claimants, were among the principal evils the interpleader device was intended to remedy.[15]

III.

The fact that State Farm had properly invoked the interpleader jurisdiction under § 1335 did not, however, entitle it to an order both enjoining prosecution of suits against it outside the confines of the interpleader proceeding and also extending such protection to its insured, the alleged tortfeasor. Still less was Greyhound Lines entitled to have that order expanded so as to protect itself and its driver, also alleged to be tortfeasors, from suits brought by its passengers in various state or federal courts. Here, the scope of the litigation, in terms of

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[12] See cases listed in n. 4.

[13] 3 Moore, Federal Practice ¶ 22.08, at 3024–3025; Keeton, Preferential Settlement of Liability-Insurance Claims, 70 Harv. L. Rev. 27, 41–42 (1956).

[14] See Keeton, *op. cit. supra,* n. 13.

[15] The insurance problem envisioned at the time was that of an insurer faced with conflicting but mutually exclusive claims to a policy, rather than an insurer confronted with the problem of allocating a fund among various claimants whose independent claims may exceed the amount of the fund. S. Rep. No. 558, 74th Cong., 1st Sess., 2–3, 7, 8 (1935); Chafee, Modernizing Interpleader, 30 Yale L. J. 814, 818–819 (1921).

parties and claims, was vastly more extensive than the confines of the "fund," the deposited proceeds of the insurance policy. In these circumstances, the mere existence of such a fund cannot, by use of interpleader, be employed to accomplish purposes that exceed the needs of orderly contest with respect to the fund.

There are situations, of a type not present here, where the effect of interpleader is to confine the total litigation to a single forum and proceeding. One such case is where a stakeholder, faced with rival claims to the fund itself, acknowledges—or denies—his liability to one or the other of the claimants.[16] In this situation, the fund itself is the target of the claimants. It marks the outer limits of the controversy. It is, therefore, reasonable and sensible that interpleader, in discharge of its office to protect the fund, should also protect the stakeholder from vexatious and multiple litigation. In this context, the suits sought to be enjoined are squarely within the language of 28 U. S. C. § 2361, which provides in part:

> "In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting *any proceeding* in any State or United States court *affecting the property, instrument or obligation involved in the interpleader action . . . .*" (Emphasis added.)

But the present case is another matter. Here, an accident has happened. Thirty-five passengers or their representatives have claims which they wish to press against a variety of defendants: the bus company, its driver, the owner of the truck, and the truck driver. The circumstance that one of the prospective defendants hap-

[16] This was the classic situation envisioned by the sponsors of interpleader. See n. 15, *supra*.

pens to have an insurance policy is a fortuitous event which should not of itself shape the nature of the ensuing litigation. For example, a resident of California, injured in California aboard a bus owned by a California corporation should not be forced to sue that corporation anywhere but in California simply because another prospective defendant carried an insurance policy. And an insurance company whose maximum interest in the case cannot exceed $20,000 and who in fact asserts that it has no interest at all, should not be allowed to determine that dozens of tort plaintiffs must be compelled to press their claims—even those claims which are not against the insured and which in no event could be satisfied out of the meager insurance fund—in a single forum of the insurance company's choosing. There is nothing in the statutory scheme, and very little in the judicial and academic commentary upon that scheme, which requires that the tail be allowed to wag the dog in this fashion.

State Farm's interest in this case, which is the fulcrum of the interpleader procedure, is confined to its $20,000 fund. That interest receives full vindication when the court restrains claimants from seeking to enforce against the insurance company any judgment obtained against its insured, except in the interpleader proceeding itself. To the extent that the District Court sought to control claimants' lawsuits against the insured and other alleged tortfeasors, it exceeded the powers granted to it by the statutory scheme.

We recognize, of course, that our view of interpleader means that it cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort. But interpleader was never intended to perform such a function, to be an all-purpose "bill of peace." [17] Had

[17] There is not a word in the legislative history suggesting such a purpose. See S. Rep. No. 558, 74th Cong., 1st Sess. (1935). And Professor Chafee, upon whose work the Congress heavily

it been so intended, careful provision would necessarily have been made to insure that a party with little or no interest in the outcome of a complex controversy should not strip truly interested parties of substantial rights—such as the right to choose the forum in which to establish their claims, subject to generally applicable rules of jurisdiction, venue, service of process, removal, and change of venue. None of the legislative and academic sponsors of a modern federal interpleader device viewed their accomplishment as a "bill of peace," capable of sweeping dozens of lawsuits out of the various state and federal courts in which they were brought and into a single interpleader proceeding. And only in two reported instances has a federal interpleader court sought to control the underlying litigation against alleged tortfeasors as opposed to the allocation of a fund among successful tort plaintiffs. See *Commercial Union Insurance Co. of New York* v. *Adams,* 231 F. Supp. 860 (D. C. S. D. Ind. 1964) (where there was virtually no objection and where all of the basic tort suits would in any event have been prosecuted in the forum state), and *Pan American Fire & Casualty Co.* v. *Revere,* 188 F. Supp. 474 (D. C. E. D. La. 1960). Another district court, on the other hand, has recently held that it lacked statutory authority to

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depended, has written that little thought was given to the scope of the "second stage" of interpleader, to just what would be adjudicated by the interpleader court. See Chafee, Broadening the Second Stage of Federal Interpleader, 56 Harv. L. Rev. 929, 944–945 (1943). We note that in Professor Chafee's own study of the bill of peace as a device for dealing with the problem of multiparty litigation, he fails even to mention interpleader. See Chafee, Some Problems of Equity 149–198 (1950). In his writing on interpleader, Chafee assumed that the interpleader court would allocate the fund "among all the claimants who get judgment within a reasonable time . . . ." Chafee, The Federal Interpleader Act of 1936: II, 45 Yale L. J. 1161, 1165 (1936). See also Chafee, 49 Yale L. J., at 420–421.

enjoin suits against the alleged tortfeasor as opposed to proceedings against the fund itself. *Travelers Indemnity Co.* v. *Greyhound Lines, Inc.*, 260 F. Supp. 530 (D. C. W. D. La. 1966).

In light of the evidence that federal interpleader was not intended to serve the function of a "bill of peace" in the context of multiparty litigation arising out of a mass tort, of the anomalous power which such a construction of the statute would give the stakeholder, and of the thrust of the statute and the purpose it was intended to serve, we hold that the interpleader statute did not authorize the injunction entered in the present case. Upon remand, the injunction is to be modified consistently with this opinion.[18]

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[18] We find it unnecessary to pass upon respondents' contention, raised in the courts below but not passed upon by the Court of Appeals, that interpleader should have been dismissed on the ground that the 11 Canadian claimants are "indispensable parties" who have not been properly served. The argument is that 28 U. S. C. § 2361 provides the exclusive mode of effecting service of process in statutory interpleader, and that § 2361—which authorizes a district court to "issue its process for all claimants" but subsequently refers to service of "such process" by marshals "for the respective districts where the claimants reside or may be found"—does not permit service of process beyond the Nation's borders. Since our decision will require basic reconsideration of the litigation by the parties as well as the lower courts, there appears neither need nor necessity to determine this question at this time. We intimate no view as to the exclusivity of § 2361, whether it authorizes service of process in foreign lands, whether in light of the limitations we have imposed on the interpleader court's injunctive powers the Canadian claimants are in fact "indispensable parties" to the interpleader proceeding itself, or whether they render themselves amenable to service of process under § 2361 when they come into an American jurisdiction to establish their rights with respect either to the alleged tortfeasors or to the insurance fund. See 2 Moore, Federal Practice ¶ 4.20, at 1091–1105.

IV.

The judgment of the Court of Appeals is reversed, and the case is remanded to the United States District Court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree with the Court's view as to "minimal diversity" and that the injunction, if granted, should run only against prosecution of suits against the insurer, I feel that the use which we today allow to be made of the federal interpleader statute,[1] 28 U. S. C. § 1335, is, with all deference, unwarranted. How these litigants are "claimants" to this fund in the statutory sense is indeed a mystery. If they are not "claimants" of the fund,[2] neither are they in the category of those who "are claiming" or who "may claim" to be entitled to it.

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[1] "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more . . . if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property . . . into the registry of the court, there to abide the judgment of the court . . . ."

[2] Under the policy issued by State Farm, it promises "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons . . . caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned automobile . . . ." The insured will "become legally

This insurance company's policy provides that it will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay." To date the insured has not become "legally obligated" to pay any sum to any litigant. Since nothing is owed under the policy, I fail to see how any litigant can be a "claimant" as against the insurance company. If that is doubtful the doubt is resolved by two other conditions:

(1) The policy states "[n]o action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

(2) Under California law where the accident happened and under Oregon law where the insurance contract was made, a direct action against the insurer is not allowable until after a litigant receives a final judgment against the insured.[3]

Thus under this insurance policy as enforced in California and in Oregon a "claimant" against the insured can become a "claimant" against the insurer only after final judgment against the insured or after a consensual written agreement of the insurer, a litigant, and the insured. Neither of those two events has so far happened.[4]

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obligated to pay" only if he has been found to be at fault for the accident, or if the victim's claim has been settled in accord with the policy terms. The claim against the insurance company is thus contingent on a finding that the insured was at fault or a settlement. This is unlike the situation where the insurance company has issued a policy such as a workmen's compensation policy which insures the insured for liability imposed in the absence of fault.

[3] See Calif. Ins. Code § 11580 (b)(2); Ore. Rev. Stat. § 23.230.

[4] In those States having a direct-action statute, allowing an action against the insurer prior to judgment against the insured, interpleader jurisdiction can be sustained absent a judgment against the insured. The direct-action statute gives the injured party the status of a "claimant" against the insurer. See, *e. g.*, *Pan American Fire & Casualty Co.* v. *Revere*, 188 F. Supp. 474, 482–483.

This construction of the word "claimant" against the fund is borne out, as the Court of Appeals noted, by Rule 22 (1) of the Federal Rules of Civil Procedure.[5] That Rule, also based on diversity of citizenship, differs only in the district where the suit may be brought and in the reach of service of process, as the Court points out.[6] But it illuminates the nature of federal interpleader for it provides that only "persons having claims against the plaintiff [insurer] may be joined as defendants and required to interplead."

Can it be that we have two kinds of interpleader statutes as between which an insurance company can choose: one that permits "claimants" against the insurer ("persons having claims against the plaintiff") to be joined and the other that permits "claimants" against the insured to be joined for the benefit of the insurer even though they may never be "claimants" against the insurer? I cannot believe that Congress launched such an irrational scheme.

The Court rests heavily on the fact that the 1948 Act contains the phrase "may claim," while the 1926 and 1936 interpleader statutes contained the phrase "are claiming." From this change in language the Court infers that Congress intended to allow an insurance company to interplead even though a judgment has not been entered against the insured and there is no direct-action statute. This inference is drawn despite the fact that the Reviser's Note contains no reference to the change in wording or its purpose; the omission is dismissed as "inadvertent." But it strains credulity to suggest

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[5] Rule 22 (1) provides in part:

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."

[6] See n. 3 of the Court's opinion.

that mention would not have been made of such a drastic change, if in fact Congress intended to make it. And, despite the change in wording, under the 1948 Act there must be "adverse claimants . . . [who] are claiming or may claim to be entitled to such money . . . , or to any one or more of the benefits arising by virtue of any . . . policy . . . ." Absent a direct-action statute, the victims are not "claimants" against the insurer until their claims against the insured have been reduced to judgment. Understandably, the insurance company wants the best of two worlds. It does not want an action against it until judgment against its insured. But, at the same time, it wants the benefits of an interpleader statute. Congress could of course confer such a benefit. But it is not for this Court to grant dispensations from the effects of the statutory scheme which Congress has erected.

I would construe its words in the normal sense and affirm the Court of Appeals.

NOWAKOWSKI *v.* MARONEY, CORRECTIONAL SUPERINTENDENT.

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

No. 222. Argued March 13, 1967.—Decided April 10, 1967.

When a federal district judge grants a certificate of probable cause necessary to allow a state prisoner to appeal a denial of a writ of habeas corpus, the court of appeals must allow an indigent petitioner to appeal *in forma pauperis* and dispose of the case in accordance with its ordinary procedure.

Vacated and remanded.

Daniel J. O'Hern, by appointment of the Court, 385 U. S. 804, argued the cause and filed a brief for petitioner.

William E. Pfadt argued the cause and filed a brief for respondent.

PER CURIAM.

The petitioner, a prisoner in the Pennsylvania penal system, sought a writ of habeas corpus from the United States District Court for the Western District of Pennsylvania. He alleged, among other things, that his appointed counsel in the state trial which resulted in his conviction had been ineffective, and that he had therefore been denied the aid and assistance of counsel guaranteed by the Constitution. *Gideon* v. *Wainwright,* 372 U. S. 335. The District Court granted Nowakowski a hearing and appointed a lawyer to assist him. Following the hearing and "[v]iewing the record of the trial and the habeas corpus hearing as a whole" the court concluded that Pennsylvania "cannot be convicted of denying effective aid and assistance of counsel to the relator . . . ." However, the District Judge issued the certificate of probable cause necessary to allow a person in state custody to appeal a denial of federal habeas corpus. 28 U. S. C. § 2253.

The lawyers who assisted the petitioner at the habeas hearing were then allowed to withdraw by the District Court. Nowakowski subsequently petitioned the Court of Appeals for the Third Circuit to allow him to appeal *in forma pauperis* from the District Court's denial of relief. He also asked to be allowed to proceed in the Court of Appeals on written briefs and sought the appointment of counsel. That court denied the petition in the following order:

> "Upon consideration of appellant's petition for leave to proceed in forma pauperis and to file handwritten briefs; and for appointment of counsel in the above-entitled case;
>
> "It is ORDERED that the petition be and it hereby is denied."

Following the Third Circuit's denial of Nowakowski's petition for rehearing, he sought a writ of certiorari from this Court. It was granted, as was his motion to proceed *in forma pauperis.* 384 U. S. 984.

We hold that the Court of Appeals erred in denying the petitioner the right to appeal after the District Judge had issued a § 2253 certificate of probable cause. It is established law that a circuit judge or justice entertaining an application for a certificate should give "weighty consideration" to its prior denial by a district judge. *Sullivan* v. *Heinze,* 250 F. 2d 427, 429; Sokol, Federal Habeas Corpus § 17, at 94 (1965). Cf. *In re Woods,* 249 F. 2d 614, 616. But when a district judge grants such a certificate, the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed to a disposition of the appeal in accord with its ordinary procedure.

The order of the Court of Appeals for the Third Circuit is therefore vacated and the case is remanded for further proceedings consistent with this opinion.

D'AMICO *v.* BALTIMORE & OHIO RAILROAD CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 1028. Decided April 10, 1967.

Appeal dismissed.

Appellant *pro se.*

Sydney R. Prince, Jr., for appellee.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The motion to dismiss is also granted and the appeal is dismissed for want of jurisdiction.

FLORIDA EAST COAST RAILWAY CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 638. Decided April 10, 1967.*

259 F. Supp. 993, affirmed in Nos. 638, 639 and 641, dismissed as moot in No. 640.

A. Alvis Layne for appellant in No. 638; *Wm. Reece Smith, Jr.,* for appellant in No. 639; *Edward J. Hickey, Jr., James L. Highsaw, Jr., William G. Mahoney* and

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*Together with No. 639, *City of Tampa* v. *United States et al.;* No. 640, *Railway Labor Executives' Association et al.* v. *United States et al.;* and No. 641, *Southern Railway System* v. *United States,* also on appeal from the same court.

William J. Hickey for appellants in No. 640; *W. Graham Claytor, Jr.*, and *John K. Mallory, Jr.*, for appellant in No. 641.

Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner, Edwin M. Zimmerman and *Lionel Kestenbaum* for the United States in Nos. 638, 639 and 641; *Robert W. Ginnane, Fritz R. Kahn* and *Betty Jo Christian* for the Interstate Commerce Commission in Nos. 638, 639 and 641; *Paul A. Porter* and *Dennis G. Lyons* for Seaboard Air Line Railroad Co. et al., appellees.

James M. Weaver filed a brief for the Tampa Port Authority, as *amicus curiae*, urging reversal. *Lewis W. Petteway* and *B. Kenneth Gatlin* filed a brief for the Florida Public Service Commission, as *amicus curiae*, in opposition to the motions to affirm.

PER CURIAM.

The motions to affirm in Nos. 638, 639, and 641 are granted and the judgment is affirmed.

The motion to dismiss in No. 640 is granted and the appeal is dismissed as moot.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted in Nos. 638, 639, and 641.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

CROSS *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO.

No. 1295, Misc. Decided April 10, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The motion to use the record in No. 1161, Misc., October Term, 1965, is granted.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

YOUNG *v.* DIRECTOR, U. S. BUREAU OF PRISONS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 1317, Misc. Decided April 10, 1967.

263 F. Supp. 263, appeal dismissed.

Appellant *pro se.*

Solicitor General Marshall for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

Syllabus.

PIERSON ET AL. *v.* RAY ET AL.

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

No. 79. Argued January 11, 1967.—Decided April 11, 1967.*

Petitioners,† members of a group of white and Negro clergymen on a "prayer pilgrimage" to promote racial integration, attempted to use a segregated interstate bus terminal waiting room in Jackson, Mississippi, in 1961. They were arrested by respondent policemen and charged with conduct breaching the peace in violation of § 2087.5 of the Mississippi Code which this Court, in 1965, held unconstitutional in *Thomas* v. *Mississippi,* 380 U. S. 524, as applied to similar facts. Petitioners waived a jury trial and were convicted by respondent municipal police justice. On appeal one petitioner was accorded a trial *de novo* and, following a directed verdict in his favor, the cases against the other petitioners were dropped. Petitioners then brought this action in the District Court for damages (1) under 42 U. S. C. § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights, and (2) at common law for false arrest and imprisonment. The evidence showed that the ministers expected to be arrested on entering a segregated area. Though the witnesses agreed that petitioners entered the waiting room peacefully, petitioners testified that there was no crowd at the terminal, whereas the police testified that a threatening crowd followed petitioners. The jury found for respondents. On appeal the Court of Appeals held that (1) respondent police justice had immunity for his judicial acts under both § 1983 and the state common law and (2) the policemen had immunity under the state common law of false arrest if they had probable cause to believe § 2087.5 valid since they were not required to predict what laws are constitutional, but that, by virtue of *Monroe* v. *Pape,* 365 U. S. 167, they had no such immunity under § 1983 where the state statute was subsequently declared invalid. The court remanded the case against the officers for a new trial under § 1983 because of prejudicial cross-examination of petitioners, but ruled that they

*Together with No. 94, *Ray et al.* v. *Pierson et al.,* also on certiorari to the same court.

†See n. 3, *infra.*

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could not recover if it were shown at the new trial that they had gone to Mississippi in anticipation that they would be illegally arrested. *Held:*

1. The settled common-law principle that a judge is immune from liability for damages for his judicial acts was not abolished by § 1983. Cf. *Tenney* v. *Brandhove,* 341 U. S. 367. Pp. 553–555.

2. The defense of good faith and probable cause which is available to police officers in a common-law action for false arrest and imprisonment is also available in an action under § 1983. *Monroe* v. *Pape, supra,* distinguished. Pp. 555–557.

3. Though the officers were not required to predict this Court's ruling in *Thomas* v. *Mississippi, supra,* that § 2087.5 was unconstitutional as applied, and the defense of good faith and probable cause is available in an action under § 1983, it does not follow that the count based thereon should be dismissed since the evidence was conflicting as to whether the police had acted in good faith and with probable cause in arresting the petitioners. Pp. 557–558.

4. Petitioners did not consent to their arrest by deliberately exercising their right to use the waiting room in a peaceful manner with the expectation that they would be illegally arrested. P. 558.

352 F. 2d 213, affirmed in part, reversed in part, and remanded.

Carl Rachlin argued the cause for petitioners in No. 79 and for respondents in No. 94. With him on the briefs was *Melvin L. Wulf.*

Elizabeth Watkins Hulen Grayson argued the cause for respondents in No. 79 and for petitioners in No. 94. With her on the brief was *Thomas H. Watkins.*

MR. CHIEF JUSTICE WARREN delivered the opinion of Court.

These cases present issues involving the liability of local police officers and judges under § 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U. S. C. § 1983.[1] Peti-

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

tioners in No. 79 were members of a group of 15 white and Negro Episcopal clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961. They were arrested by respondents Ray, Griffith, and Nichols, policemen of the City of Jackson, and charged with violating § 2087.5 of the Mississippi Code, which makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer.[2] Petitioners [3] waived a jury trial and were convicted of the offense by respondent Spencer, a municipal police justice. They were each given the maximum sentence of four months in jail and

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rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

[2] "1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

"(1) crowds or congregates with others in . . . any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, . . . or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, . . . shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment . . . ."

[3] The ministers involved in No. 79 will be designated as "petitioners" throughout this opinion, although they are the respondents in No. 94.

a fine of $200. On appeal petitioner Jones was accorded a trial *de novo* in the County Court, and after the city produced its evidence the court granted his motion for a directed verdict. The cases against the other petitioners were then dropped.

Having been vindicated in the County Court, petitioners brought this action for damages in the United States District Court for the Southern District of Mississippi, Jackson Division, alleging that respondents had violated § 1983, *supra,* and that respondents were liable at common law for false arrest and imprisonment. A jury returned verdicts for respondents on both counts. On appeal, the Court of Appeals for the Fifth Circuit held that respondent Spencer was immune from liability under both § 1983 and the common law of Mississippi for acts committed within his judicial jurisdiction. 352 F. 2d 213. As to the police officers, the court noted that § 2087.5 of the Mississippi Code was held unconstitutional as applied to similar facts in *Thomas* v. *Mississippi,* 380 U. S. 524 (1965).[4] Although *Thomas* was decided years after the arrest involved in this trial, the court held that the policemen would be liable in a suit under § 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid. The court believed that this stern result was required by *Monroe* v. *Pape,*

[4] In *Thomas* various "Freedom Riders" were arrested and convicted under circumstances substantially similar to the facts of these cases. The police testified that they ordered the "Freedom Riders" to leave because they feared that onlookers might breach the peace. We reversed without argument or opinion, citing *Boynton* v. *Virginia,* 364 U. S. 454 (1960). *Boynton* held that racial discrimination in a bus terminal restaurant utilized as an integral part of the transportation of interstate passengers violates § 216 (d) of the Interstate Commerce Act. State enforcement of such discrimination is barred by the Supremacy Clause.

365 U. S. 167 (1961). Under the count based on the common law of Mississippi, however, it held that the policemen would not be liable if they had probable cause to believe that the statute had been violated, because Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not. Apparently dismissing the common-law claim,[5] the Court of Appeals reversed and remanded for a new trial on the § 1983 claim against the police officers because defense counsel had been allowed to cross-examine the ministers on various irrelevant and prejudicial matters, particularly including an alleged convergence of their views on racial justice with those of the Communist Party. At the new trial, however, the court held that the ministers could not recover if it were proved that they went to Mississippi anticipating that they would be illegally arrested because such action would constitute consent to the arrest under the principle of *volenti non fit injuria,* he who consents to a wrong cannot be injured.

We granted certiorari in No. 79 to consider whether a local judge is liable for damages under § 1983 for an unconstitutional conviction and whether the ministers should be denied recovery against the police officers if they acted with the anticipation that they would be illegally arrested. We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of

[5] Respondents read the court's opinion as remanding for a new trial on this claim. The court stated, however, that the officers "are immune from liability for false imprisonment at common law but not from liability for violations of the Federal statutes on civil rights. It therefore follows that there should be a new trial of the civil rights claim against the appellee police officers so that there may be a determination of the fact issue as to whether the appellants invited or consented to the arrest and imprisonment." 352 F. 2d, at 221.

good faith and probable cause to an action under § 1983 for unconstitutional arrest.[6]

The evidence at the federal trial showed that petitioners and other Negro and white Episcopal clergymen undertook a "prayer pilgrimage" in 1961 from New Orleans to Detroit. The purpose of the pilgrimage was to visit church institutions and other places in the North and South to promote racial equality and integration, and, finally, to report to a church convention in Detroit. Letters from the leader of the group to its members indicate that the clergymen intended from the beginning to go to Jackson and attempt to use segregated facilities at the bus terminal there, and that they fully expected to be arrested for doing so. The group made plans based on the assumption that they would be arrested if they attempted peacefully to exercise their right as interstate travelers to use the waiting rooms and other facilities at the bus terminal, and the letters discussed arrangements for bail and other matters relevant to arrests.

The ministers stayed one night in Jackson, and went to the bus terminal the next morning to depart for Chattanooga, Tennessee. They entered the waiting room, disobeying a sign at the entrance that announced "White Waiting Room Only—By Order of the Police Department." They then turned to enter the small terminal restaurant but were stopped by two Jackson police officers, respondents Griffith and Nichols, who had been awaiting their arrival and who ordered them to "move on." The ministers replied that they wanted to eat,

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[6] Respondents did not challenge in their petition in No. 94 the holding of the Court of Appeals that a new trial is necessary because of the prejudicial cross-examination. Belatedly, they devoted a section of their brief to the contention that the cross-examination was proper. This argument is no more meritorious than it is timely. The views of the Communist Party on racial equality were not an issue in these cases.

and refused to move on. Respondent Ray, then a police captain and now the deputy chief of police, arrived a few minutes later. The ministers were placed under arrest and taken to the jail.

All witnesses including the police officers agreed that the ministers entered the waiting room peacefully and engaged in no boisterous or objectionable conduct while in the "White Only" area. There was conflicting testimony on the number of bystanders present and their behavior. Petitioners testified that there was no crowd at the station, that no one followed them into the waiting room, and that no one uttered threatening words or made threatening gestures. The police testified that some 25 to 30 persons followed the ministers into the terminal, that persons in the crowd were in a very dissatisfied and ugly mood, and that they were mumbling and making unspecified threatening gestures. The police did not describe any specific threatening incidents, and testified that they took no action against any persons in the crowd who were threatening violence because they "had determined that the ministers was the cause of the violence if any might occur," [7] although the ministers were concededly orderly and polite and the police did not claim that it was beyond their power to control the allegedly disorderly crowd. The arrests and convictions were followed by this lawsuit.

We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court.[8] Few doctrines were more solidly

[7] Transcript of Record, at 347. (Testimony of Officer Griffith.)

[8] Petitioners attempted to suggest a "conspiracy" between Judge Spencer and the police officers by questioning him about his reasons

established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher,* 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott* v. *Stansfield,* L. R. 3 Ex. 220, 223 (1868), quoted in *Bradley* v. *Fisher, supra,* 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and

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for finding petitioners guilty in these cases and by showing that he had found other "Freedom Riders" guilty under similar circumstances in previous cases. The proof of conspiracy never went beyond this suggestion that inferences could be drawn from Judge Spencer's judicial decisions. See Transcript of Record, at 352–371.

we presume that Congress would have specifically so provided had it wished to abolish the doctrine.[9]

The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts § 121 (1965); 1 Harper & James, The Law of Torts § 3.18, at 277–278 (1956); *Ward* v. *Fidelity & Deposit Co. of Maryland,* 179 F. 2d 327 (C. A. 8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt,[10] the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.

The Court of Appeals held that the officers had such a limited privilege under the common law of Mississippi,[11] and indicated that it would have recognized a similar privilege under § 1983 except that it felt compelled to hold otherwise by our decision in *Monroe* v. *Pape,* 365 U. S.

[9] Since our decision in *Tenney* v. *Brandhove, supra,* the courts of appeals have consistently held that judicial immunity is a defense to an action under § 1983. See *Bauers* v. *Heisel,* 361 F. 2d 581 (C. A. 3d Cir. 1966), and cases cited therein.

[10] See Caveat, Restatement, Second, Torts § 121, at 207–208 (1965); *Miller* v. *Stinnett,* 257 F. 2d 910 (C. A. 10th Cir. 1958).

[11] See *Golden* v. *Thompson,* 194 Miss. 241, 11 So. 2d 906 (1943).

167 (1961). *Monroe* v. *Pape* presented no question of immunity, however, and none was decided. The complaint in that case alleged that "13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further allege[d] that Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him." 365 U. S., at 169. The police officers did not choose to go to trial and defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family in this manner. Instead, they sought dismissal of the complaint, contending principally that their activities were so plainly illegal under state law that they did not act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" as required by § 1983. In rejecting this argument we in no way intimated that the defense of good faith and probable cause was foreclosed by the statute. We also held that the complaint should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U. S., at 187. Part of the background of tort liability, in the

case of police officers making an arrest, is the defense of good faith and probable cause.

We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983. This holding does not, however, mean that the count based thereon should be dismissed. The Court of Appeals ordered dismissal of the common-law count on the theory that the police officers were not required to predict our decision in *Thomas* v. *Mississippi,* 380 U. S. 524. We agree that a police officer is not charged with predicting the future course of constitutional law. But the petitioners in this case did not simply argue that they were arrested under a statute later held unconstitutional. They claimed and attempted to prove that the police officers arrested them solely for attempting to use the "White Only" waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a disturbance. The officers did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. Rather, they claimed and attempted to prove that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional. The jury did resolve the factual issues in favor of the officers but, for reasons previously stated,

its verdict was influenced by irrelevant and prejudicial evidence. Accordingly, the case must be remanded to the trial court for a new trial.

It is necessary to decide what importance should be given at the new trial to the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested. We do not agree with the Court of Appeals that they somehow consented to the arrest because of their anticipation that they would be illegally arrested, even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations. The case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them. The petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983.[12]

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I do not think that all judges, under all circumstances, no matter how outrageous their conduct are immune

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[12] The petition for certiorari in No. 79 also presented the question whether the Court of Appeals correctly dismissed the count based on the common law of Mississippi. We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case. The state common-law claim in this case is merely cumulative, and petitioners' right to recover for an invasion of their civil rights, subject to the defense of good faith and probable cause, is adequately secured by § 1983.

from suit under 17 Stat. 13, 42 U. S. C. § 1983. The Court's ruling is not justified by the admitted need for a vigorous and independent judiciary, is not commanded by the common-law doctrine of judicial immunity, and does not follow inexorably from our prior decisions.

The statute, which came on the books as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, provides that "every person" who under color of state law or custom "subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." To most, "every person" would mean *every person,* not every person *except* judges. Despite the plain import of those words, the Court decided in *Tenney* v. *Brandhove,* 341 U. S. 367, that state legislators are immune from suit as long as the deprivation of civil rights which they caused a person occurred while the legislators "were acting in a field where legislators traditionally have power to act." *Id.,* at 379. I dissented from the creation of that judicial exception as I do from the creation of the present one.

The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that "[i]mmunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong., 1st Sess., 374. Mr. Rainey of South Carolina noted that "[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." *Id.,* at 394.

Congressman Beatty of Ohio claimed that it was the duty of Congress to listen to the appeals of those who "by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, [cannot] obtain the rights and privileges due an American citizen . . . ." *Id.*, at 429. The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied. It was against this background that the section was passed, and it is against this background that it should be interpreted.

It is said that, at the time of the statute's enactment, the doctrine of judicial immunity was well settled and that Congress cannot be presumed to have intended to abrogate the doctrine since it did not clearly evince such a purpose. This view is beset by many difficulties. It assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.

> "Underlying [this] view is an atomistic conception of intention, coupled with what may be called a pointer theory of meaning. This view conceives the mind to be directed toward individual things, rather than toward general ideas, toward distinct situations of fact rather than toward some significance in human affairs that these situations may share. If this view were taken seriously, then we would have to regard the intention of the draftsman of a statute directed against 'dangerous weapons' as being directed toward an endless series of individual objects: re-

> volvers, automatic pistols, daggers, Bowie knives, etc. If a court applies the statute to a weapon its draftsman had not thought of, then it would be 'legislating,' not 'interpreting,' as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed." Fuller, The Morality of Law 84 (1964).

Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the "common law before the making of the Act." *Heydon's Case,* 3 Co. Rep. 7 a, 76 Eng. Rep. 637 (Ex. 1584). But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law.[1] It cannot be presumed that the common law is the perfection of reason, is superior to statutory law (Sedgwick, Construction of Statutes 270 (1st ed. 1857); Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 404–406 (1908)), and that the legislature always changes law for the worse. Nor should the canon of construction "statutes in derogation of the common law are to be strictly construed" be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the pre-existing law.

The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable. Many members of Congress objected to the statute because it im-

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[1] "Remedial statutes are to be liberally construed." See generally, Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395 (1950); Llewellyn, The Common Law Tradition, Appendix C (1960).

posed liability on members of the judiciary. Mr. Arthur of Kentucky opposed the measure because:

> "Hitherto . . . no judge or court has been held liable, civilly or criminally, for judicial acts . . . . Under the provisions of [section 1] every judge in the State court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him . . . ." Cong. Globe, 42d Cong., 1st Sess., 365–366.

And Senator Thurman noted that:

> "There have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense . . . of honestly and conscientiously deciding the law to be as they understood it to be. . . .
>
> "Is [section 1] intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment, which never lies in the absence of corrupt motive? Is that to be extended, so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill." Cong. Globe, 42d Cong., 1st Sess., Appendix 217.

Mr. Lewis of Kentucky expressed the fear that:

> "By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor. . . ." Cong. Globe, 42d Cong., 1st Sess., 385.

Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to "any person." [2] There was no exception for members of the judiciary. In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result.

The section's purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied. The parade of cases coming to this Court shows that a similar condition now obtains in some of the States. Some state courts have been instruments of suppression of civil rights. The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists.

Today's decision is not dictated by our prior decisions. In *Ex parte Virginia,* 100 U. S. 339, the Court held that a judge who excluded Negroes from juries could be held liable under the Act of March 1, 1875 (18 Stat. 335), one of the Civil Rights Acts. The Court assumed that the judge was merely performing a ministerial function. But it went on to state that the judge would be liable under the statute even if his actions were judicial.[3] It is one thing to say that the common-law doctrine of

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[2] As altered by the reviser who prepared the Revised Statutes of 1878, and as printed in 42 U. S. C. § 1983, the statute refers to "every person" rather than to "any person."

[3] The opinion in *Ex parte Virginia, supra,* did not mention *Bradley* v. *Fisher,* 13 Wall. 335, which held that a judge could not be held liable for causing the name of an attorney to be struck from the court rolls. But in *Bradley,* the action was not brought under any of the Civil Rights Acts.

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judicial immunity is a defense to a common-law cause of action. But it is quite another to say that the common-law immunity rule is a defense to liability which Congress has imposed upon "any officer or other person," as in *Ex parte Virginia,* or upon "every person" as in these cases.

The immunity which the Court today grants the judiciary is not necessary to preserve an independent judiciary. If the threat of civil action lies in the background of litigation, so the argument goes, judges will be reluctant to exercise the discretion and judgment inherent in their position and vital to the effective operation of the judiciary. We should, of course, not protect a member of the judiciary "who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581. To deny recovery to a person injured by the ruling of a judge acting for personal gain or out of personal motives would be "monstrous." *Ibid.* But, it is argued that absolute immunity is necessary to prevent the chilling effects of a judicial inquiry, or the threat of such inquiry, into whether, in fact, a judge has been unfaithful to his oath of office. Thus, it is necessary to protect the guilty as well as the innocent.[4]

The doctrine of separation of powers is, of course, applicable only to the relations of coordinate branches of the same government, not to the relations between the

[4] Other justifications for the doctrine of absolute immunity have been advanced: (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers. See generally Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 271–272 (1937).

branches of the Federal Government and those of the States. See *Baker* v. *Carr,* 369 U. S. 186, 210. Any argument that Congress could not impose liability on state judges for the deprivation of civil rights would thus have to be based upon the claim that doing so would violate the theory of division of powers between the Federal and State Governments. This claim has been foreclosed by the cases recognizing "that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . . ." *Monroe* v. *Pape,* 365 U. S. 167, 171–172. In terms of the power of Congress, I can see no difference between imposing liability on a state police officer (*Monroe* v. *Pape, supra*) and on a state judge. The question presented is not of constitutional dimension; it is solely a question of statutory interpretation.

The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work, is but a more sophisticated manner of saying "The King can do no wrong." [5] Chief Justice Cockburn long ago disposed of the argument that liability would deter judges:

> "I cannot believe that judges . . . would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences . . . from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of.

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[5] Historically judicial immunity was a corollary to that theory. Since the King could do no wrong, the judges, his delegates for dispensing justice, "ought not to be drawn into question for any supposed corruption [for this tends] to the slander of the justice of the King." *Floyd & Barker,* 12 Co. Rep. 23, 25, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607). Because the judges were the personal delegates of the King they should be answerable to him alone. *Randall* v. *Brigham,* 7 Wall. 523, 539.

> While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged." *Dawkins* v. *Lord Paulet,* L. R. 5 Q. B. 94, 110 (C. J. Cockburn, dissenting).

This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistaken, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions. Thus, a judge who sustains a conviction on what he forthrightly considers adequate evidence should not be subjected to liability when an appellate court decides that the evidence was not adequate. Nor should a judge who allows a conviction under what is later held an unconstitutional statute.

But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights. What about the judge who conspires with local law enforcement officers to "railroad" a dissenter? What about the judge who knowingly turns a trial into a "kangaroo" court? Or one who intentionally flouts the

Constitution in order to obtain a conviction? Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.[6]

The plight of the oppressed is indeed serious. Under *City of Greenwood* v. *Peacock,* 384 U. S. 808, the defendant cannot remove to a federal court to prevent a state court from depriving him of his civil rights. And under the rule announced today, the person cannot recover damages for the deprivation.

[6] A judge is liable for injury caused by a ministerial act; to have immunity the judge must be performing a judicial function. See, *e. g., Ex parte Virginia,* 100 U. S. 339; 2 Harper & James, The Law of Torts 1642–1643 (1956). The presence of malice and the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices.

FEDERAL TRADE COMMISSION *v.* PROCTER & GAMBLE CO.

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

No. 342. Argued February 13, 1967.—Decided April 11, 1967.

Procter & Gamble (Procter), a large, diversified manufacturer of household products, acquired in 1957 the assets of Clorox Chemical Co., the leading manufacturer of household liquid bleach, and the only one selling on a national basis. Clorox had 48.8% of the national market, with higher percentages in some regional areas. Clorox and one other firm accounted for 65% of liquid bleach sales, and with four other firms for almost 80%, with the rest divided among more than 200 small producers. Procter is a dominant factor in the area of soaps, detergents and cleaners, with total sales in 1957 in excess of a billion dollars, and an advertising budget of more than $80,000,000, due to which volume Procter receives substantial discounts from the media. The FTC challenged the acquisition, and after hearings found that the substitution of Procter for Clorox would dissuade new entrants in the liquid bleach field, discourage active competition from firms already in the industry due to fear of retaliation from Procter, and diminish potential competition by eliminating Procter, the most likely prospect, as a potential entrant. The FTC, which placed no reliance on post-acquisition evidence, held the acquisition violative of § 7 of the Clayton Act and ordered the divestiture of Clorox. The relevant line of commerce was found to be household liquid bleach and the relevant geographical market was held to be the Nation and a series of regional markets. The Court of Appeals reversed, stating that the FTC's finding of illegality was based on "treacherous conjecture," mere possibility and suspicion. The court found nothing unhealthy about the market conditions in the industry, found "it difficult to base a finding of illegality on discounts in advertising," found no evidence to show that Procter ever intended to enter the bleach field, and relied heavily on post-acquisition evidence to the effect that other producers "were selling more bleach for more money than ever before." *Held:*

1. Any merger, whether it is horizontal, vertical, conglomerate, or, as in this case, a "product-extension merger," must be tested

by the standard of § 7 of the Clayton Act, that is, whether it may substantially lessen competition, which requires a prediction of the merger's impact on present and future competition. P. 577.

2. This merger may have anticompetitive effects. Pp. 578–581.

(a) In this oligopolistic industry the substitution of the powerful acquiring firm for the smaller but dominant firm may substantially reduce the competitive structure of the industry by dissuading the smaller firms from competing aggressively, resulting in a more rigid oligopoly with Procter the price leader. P. 578.

(b) The acquisition may also tend to raise the barriers to new entrants who would be reluctant to face the huge Procter, with its large advertising budget. P. 579.

(c) Potential economies cannot be used as a defense to illegality, as Congress struck the balance in favor of protecting competition. P. 580.

(d) The FTC's finding that the acquisition eliminated Procter, the most likely entrant into the liquid bleach field, as a potential competitor, was amply supported by the evidence. Pp. 580–581.

358 F. 2d 74, reversed and remanded.

Solicitor General Marshall argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Turner, Richard A. Posner* and *James McI. Henderson.*

Frederick W. R. Pride and *Kenneth C. Royall* argued the cause for respondent. With them on the brief was *Robert D. Larsen.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a proceeding initiated by the Federal Trade Commission charging that respondent, Procter & Gamble Co., had acquired the assets of Clorox Chemical Co. in violation of § 7 of the Clayton Act, 38 Stat. 731, as amended by the Celler-Kefauver Act, 64 Stat. 1125,

15 U. S. C. § 18.[1] The charge was that Procter's acquisition of Clorox might substantially lessen competition or tend to create a monopoly in the production and sale of household liquid bleaches.

Following evidentiary hearings, the hearing examiner rendered his decision in which he concluded that the acquisition was unlawful and ordered divestiture. On appeal, the Commission reversed, holding that the record as then constituted was inadequate, and remanded to the examiner for additional evidentiary hearings. 58 F. T. C. 1203. After the additional hearings, the examiner again held the acquisition unlawful and ordered divestiture. The Commission affirmed the examiner and ordered divestiture. 63 F. T. C. —. The Court of Appeals for the Sixth Circuit reversed and directed that the Commission's complaint be dismissed. 358 F. 2d 74. We find that the Commission's findings were amply supported by the evidence, and that the Court of Appeals erred.

As indicated by the Commission in its painstaking and illuminating report, it does not particularly aid analysis to talk of this merger in conventional terms, namely, horizontal or vertical or conglomerate. This merger may most appropriately be described as a "product-extension merger," as the Commission stated. The facts are not disputed, and a summary will demonstrate the correctness of the Commission's decision.

At the time of the merger, in 1957, Clorox was the leading manufacturer in the heavily concentrated house-

[1] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

hold liquid bleach industry. It is agreed that household liquid bleach is the relevant line of commerce. The product is used in the home as a germicide and disinfectant, and, more importantly, as a whitening agent in washing clothes and fabrics. It is a distinctive product with no close substitutes. Liquid bleach is a low-price, high-turnover consumer product sold mainly through grocery stores and supermarkets. The relevant geographical market is the Nation and a series of regional markets. Because of high shipping costs and low sales price, it is not feasible to ship the product more than 300 miles from its point of manufacture. Most manufacturers are limited to competition within a single region since they have but one plant. Clorox is the only firm selling nationally; it has 13 plants distributed throughout the Nation. Purex, Clorox's closest competitor in size, does not distribute its bleach in the northeast or mid-Atlantic States; in 1957, Purex's bleach was available in less than 50% of the national market.

At the time of the acquisition, Clorox was the leading manufacturer of household liquid bleach, with 48.8% of the national sales—annual sales of slightly less than $40,000,000. Its market share had been steadily increasing for the five years prior to the merger. Its nearest rival was Purex, which manufactures a number of products other than household liquid bleaches, including abrasive cleaners, toilet soap, and detergents. Purex accounted for 15.7% of the household liquid bleach market. The industry is highly concentrated; in 1957, Clorox and Purex accounted for almost 65% of the Nation's household liquid bleach sales, and, together with four other firms, for almost 80%. The remaining 20% was divided among over 200 small producers. Clorox had total assets of $12,000,000; only eight producers had assets in excess of $1,000,000 and very few had assets of more than $75,000.

In light of the territorial limitations on distribution, national figures do not give an accurate picture of Clorox's dominance in the various regions. Thus, Clorox's seven principal competitors did no business in New England, the mid-Atlantic States, or metropolitan New York. Clorox's share of the sales in those areas was 56%, 72%, and 64% respectively. Even in regions where its principal competitors were active, Clorox maintained a dominant position. Except in metropolitan Chicago and the west-central States Clorox accounted for at least 39%, and often a much higher percentage, of liquid bleach sales.

Since all liquid bleach is chemically identical, advertising and sales promotion are vital. In 1957 Clorox spent almost $3,700,000 on advertising, imprinting the value of its bleach in the mind of the consumer. In addition, it spent $1,700,000 for other promotional activities. The Commission found that these heavy expenditures went far to explain why Clorox maintained so high a market share despite the fact that its brand, though chemically indistinguishable from rival brands, retailed for a price equal to or, in many instances, higher than its competitors.

Procter is a large, diversified manufacturer of low-price, high-turnover household products sold through grocery, drug, and department stores. Prior to its acquisition of Clorox, it did not produce household liquid bleach. Its 1957 sales were in excess of $1,100,000,000 from which it realized profits of more than $67,000,000; its assets were over $500,000,000. Procter has been marked by rapid growth and diversification. It has successfully developed and introduced a number of new products. Its primary activity is in the general area of soaps, detergents, and cleansers; in 1957, of total domestic sales, more than one-half (over $500,000,000) were in this field. Procter was the dominant factor in this area.

It accounted for 54.4% of all packaged detergent sales. The industry is heavily concentrated—Procter and its nearest competitors, Colgate-Palmolive and Lever Brothers, account for 80% of the market.

In the marketing of soaps, detergents, and cleansers, as in the marketing of household liquid bleach, advertising and sales promotion are vital. In 1957, Procter was the Nation's largest advertiser, spending more than $80,000,000 on advertising and an additional $47,000,000 on sales promotion. Due to its tremendous volume, Procter receives substantial discounts from the media. As a multiproduct producer Procter enjoys substantial advantages in advertising and sales promotion. Thus, it can and does feature several products in its promotions, reducing the printing, mailing, and other costs for each product. It also purchases network programs on behalf of several products, enabling it to give each product network exposure at a fraction of the cost per product that a firm with only one product to advertise would incur.

Prior to the acquisition, Procter was in the course of diversifying into product lines related to its basic detergent-soap-cleanser business. Liquid bleach was a distinct possibility since packaged detergents—Procter's primary product line—and liquid bleach are used complementarily in washing clothes and fabrics, and in general household cleaning. As noted by the Commission:

> "Packaged detergents—Procter's most important product category—and household liquid bleach are used complementarily, not only in the washing of clothes and fabrics, but also in general household cleaning, since liquid bleach is a germicide and disinfectant as well as a whitener. From the consumer's viewpoint, then, packaged detergents and liquid bleach are closely related products. But the area of relatedness between products of Procter and of Clorox is wider. Household cleansing agents in

> general, like household liquid bleach, are low-cost, high-turnover household consumer goods marketed chiefly through grocery stores and pre-sold to the consumer by the manufacturer through mass advertising and sales promotions. Since products of both parties to the merger are sold to the same customers, at the same stores, and by the same merchandising methods, the possibility arises of significant integration at both the marketing and distribution levels." 63 F. T. C. —, —.

The decision to acquire Clorox was the result of a study conducted by Procter's promotion department designed to determine the advisability of entering the liquid bleach industry. The initial report noted the ascendancy of liquid bleach in the large and expanding household bleach market, and recommended that Procter purchase Clorox rather than enter independently. Since a large investment would be needed to obtain a satisfactory market share, acquisition of the industry's leading firm was attractive. "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly, which would pay out reasonably well." 63 F. T. C., at —. The initial report predicted that Procter's "sales, distribution and manufacturing setup" could increase Clorox's share of the markets in areas where it was low. The final report confirmed the conclusions of the initial report and emphasized that Procter could make more effective use of Clorox's advertising budget and that the merger would facilitate advertising economies. A few months later, Procter acquired the assets of Clorox in the name of a wholly owned subsidiary, the Clorox Company, in exchange for Procter stock.

The Commission found that the acquisition might substantially lessen competition. The findings and reasoning

of the Commission need be only briefly summarized. The Commission found that the substitution of Procter with its huge assets and advertising advantages for the already dominant Clorox would dissuade new entrants and discourage active competition from the firms already in the industry due to fear of retaliation by Procter. The Commission thought it relevant that retailers might be induced to give Clorox preferred shelf space since it would be manufactured by Procter, which also produced a number of other products marketed by the retailers. There was also the danger that Procter might underprice Clorox in order to drive out competition, and subsidize the underpricing with revenue from other products. The Commission carefully reviewed the effect of the acquisition on the structure of the industry, noting that "[t]he practical tendency of the . . . merger . . . is to transform the liquid bleach industry into an arena of big business competition only, with the few small firms that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals." 63 F. T. C., at —. Further, the merger would seriously diminish potential competition by eliminating Procter as a potential entrant into the industry. Prior to the merger, the Commission found, Procter was the most likely prospective entrant, and absent the merger would have remained on the periphery, restraining Clorox from exercising its market power. If Procter had actually entered, Clorox's dominant position would have been eroded and the concentration of the industry reduced. The Commission stated that it had not placed reliance on post-acquisition evidence in holding the merger unlawful.

The Court of Appeals said that the Commission's finding of illegality had been based on "treacherous conjecture," mere possibility and suspicion. 358 F. 2d 74, 83. It dismissed the fact that Clorox controlled almost

50% of the industry, that two firms controlled 65%, and that six firms controlled 80% with the observation that "[t]he fact that in addition to the six . . . producers sharing eighty per cent of the market, there were two hundred smaller producers . . . would not seem to indicate anything unhealthy about the market conditions." *Id.*, at 80. It dismissed the finding that Procter, with its huge resources and prowess, would have more leverage than Clorox with the statement that it was Clorox which had the "knowhow" in the industry, and that Clorox's finances were adequate for its purposes. *Ibid.* As for the possibility that Procter would use its tremendous advertising budget and volume discounts to push Clorox, the court found "it difficult to base a finding of illegality on discounts in advertising." 358 F. 2d, at 81. It rejected the Commission's finding that the merger eliminated the potential competition of Procter because "[t]here was no reasonable probability that Procter would have entered the household liquid bleach market but for the merger." 358 F. 2d, at 83. "There was no evidence tending to prove that Procter ever intended to enter this field on its own." 358 F. 2d, at 82. Finally, "[t]here was no evidence that Procter at any time in the past engaged in predatory practices, or that it intended to do so in the future." *Ibid.*

The Court of Appeals also heavily relied on post-acquisition "evidence . . . to the effect that the other producers subsequent to the merger were selling more bleach for more money than ever before" (358 F. 2d, at 80), and that "[t]here [had] been no significant change in Clorox's market share in the four years subsequent to the merger" (*ibid.*), and concluded that "[t]his evidence certainly does not prove anti-competitive effects of the merger." *Id.*, at 82. The Court of Appeals, in our view, misapprehended the standards for its review and the standards applicable in a § 7 proceeding.

Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294; *United States* v. *Philadelphia National Bank,* 374 U. S. 321. The section can deal only with probabilities, not with certainties. *Brown Shoe Co.* v. *United States, supra,* at 323; *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158. And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated.

All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate [2] or other. As noted by the Commission, this merger is neither horizontal, vertical, nor conglomerate. Since the products of the acquired company are complementary to those of the acquiring company and may be produced with similar facilities, marketed through the same channels and in the same manner, and advertised by the same media, the Commission aptly called this acquisition a "product-extension merger":

> "By this acquisition . . . Procter has not diversified its interests in the sense of expanding into a substantially different, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established, and which is virtually indistinguishable from

[2] A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm.

> them insofar as the problems and techniques of marketing the product to the ultimate consumer are concerned. As a high official of Procter put it, commenting on the acquisition of Clorox, 'While this is a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, we are thoroughly at home in the field of manufacturing and marketing low priced, rapid turn-over consumer products.' " 63 F. T. C. —, —.

The anticompetitive effects with which this product-extension merger is fraught can easily be seen: (1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm.

The liquid bleach industry was already oligopolistic before the acquisition, and price competition was certainly not as vigorous as it would have been if the industry were competitive. Clorox enjoyed a dominant position nationally, and its position approached monopoly proportions in certain areas. The existence of some 200 fringe firms certainly does not belie that fact. Nor does the fact, relied upon by the court below, that, after the merger, producers other than Clorox "were selling more bleach for more money than ever before." 358 F. 2d, at 80. In the same period, Clorox increased its share from 48.8% to 52%. The interjection of Procter into the market considerably changed the situation. There is every reason to assume that the smaller firms would become more cautious in competing due to their fear of retaliation by Procter. It is probable that Procter would become the price leader and that oligopoly would become more rigid.

The acquisition may also have the tendency of raising the barriers to new entry. The major competitive weapon in the successful marketing of bleach is advertising. Clorox was limited in this area by its relatively small budget and its inability to obtain substantial discounts. By contrast, Procter's budget was much larger; and, although it would not devote its entire budget to advertising Clorox, it could divert a large portion to meet the short-term threat of a new entrant. Procter would be able to use its volume discounts to advantage in advertising Clorox. Thus, a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox.[3]

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[3] The barriers to entry have been raised both for entry by new firms and for entry into new geographical markets by established firms. The latter aspect is demonstrated by Purex's lesson in Erie, Pennsylvania. In October 1957, Purex selected Erie, Pennsylvania—where it had not sold previously—as an area in which to test the salability, under competitive conditions, of a new bleach. The leading brands in Erie were Clorox, with 52%, and the "101" brand, sold by Gardner Manufacturing Company, with 29% of the market. Purex launched an advertising and promotional campaign to obtain a broad distribution in a short time, and in five months captured 33% of the Erie market. Clorox's share dropped to 35% and 101's to 17%. Clorox responded by offering its bleach at reduced prices, and then added an offer of a $1-value ironing board cover for 50¢ with each purchase of Clorox at the reduced price. It also increased its advertising with television spots. The result was to restore Clorox's lost market share and, indeed, to increase it slightly. Purex's share fell to 7%.

Since the merger Purex has acquired the fourth largest producer of bleach, John Puhl Products Company, which owned and marketed "Fleecy White" brand in geographic markets which Purex was anxious to enter. One of the reasons for this acquisition, according to Purex's president, was that:

"Purex had been unsuccessful in expanding its market position geographically on Purex liquid bleach. The economics of the bleach business, and the strong competitive factors as illustrated by our experience in Erie, Pennsylvania, make it impossible, in our judgment, for us to expand our market on liquid bleach."

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Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition. See *Brown Shoe Co.* v. *United States, supra,* at 344.

The Commission also found that the acquisition of Clorox by Procter eliminated Procter as a potential competitor. The Court of Appeals declared that this finding was not supported by evidence because there was no evidence that Procter's management had ever intended to enter the industry independently and that Procter had never attempted to enter. The evidence, however, clearly shows that Procter was the most likely entrant. Procter had recently launched a new abrasive cleaner in an industry similar to the liquid bleach industry, and had wrested leadership from a brand that had enjoyed even a larger market share than had Clorox. Procter was engaged in a vigorous program of diversifying into product lines closely related to its basic products. Liquid bleach was a natural avenue of diversification since it is complementary to Procter's products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner. Procter had substantial advantages in advertising and sales promotion, which, as we have seen, are vital to the success of liquid bleach. No manufacturer had a patent on the product or its manufacture, necessary information relating to manufacturing methods and processes was readily available, there was no shortage of raw material, and the machinery and equipment required for a plant of efficient capacity were available at reasonable cost. Procter's management was experienced in producing and marketing goods similar to liquid bleach. Procter had considered the possibility of independently entering but decided against it because the acquisition of Clorox would en-

able Procter to capture a more commanding share of the market.

It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market. First, the market behavior of the liquid bleach industry was influenced by each firm's predictions of the market behavior of its competitors, actual and potential. Second, the barriers to entry by a firm of Procter's size and with its advantages were not significant. There is no indication that the barriers were so high that the price Procter would have to charge would be above the price that would maximize the profits of the existing firms. Third, the number of potential entrants was not so large that the elimination of one would be insignificant. Few firms would have the temerity to challenge a firm as solidly entrenched as Clorox. Fourth, Procter was found by the Commission to be the most likely entrant. These findings of the Commission were amply supported by the evidence.

The judgment of the Court of Appeals is reversed and remanded with instructions to affirm and enforce the Commission's order.

It is so ordered.

MR. JUSTICE STEWART and MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

I agree that the Commission's order should be sustained, but I do not share the majority opinion's view that a mere "summary will demonstrate the correctness of the Commission's decision" nor that "[t]he anticompetitive effects with which this product-extension merger is fraught can easily be seen." I consider the case difficult within its own four corners, and beyond that, its portents

for future administrative and judicial application of § 7 of the Clayton Act to this kind of merger important and far-reaching. From both standpoints more refined analysis is required before putting the stamp of approval on what the Commission has done in this case. It is regrettable to see this Court as it enters this comparatively new field of economic adjudication starting off with what has almost become a kind of *res ipsa loquitur* approach to antitrust cases.

The type of merger represented by the transaction before us is becoming increasingly important as large corporations seek to diversify their operations, see Blair, The Conglomerate Merger in Economics and Law, 46 Geo. L. J. 672, and "[c]ompanies looking for new lines of business tend to buy into those fields with which they have at least some degree of familiarity, and where economies and efficiencies from assimilation are at least possible." Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1315. Application of § 7 to such mergers has been troubling to the Commission and the lower courts. The author of the Commission's exhaustive opinion in this case later explained that "[t]he elaborateness of the opinion . . . reflected the Commission's awareness that it was entering relatively uncharted territory." *General Foods Corp.*, 3 Trade Reg. Rep. ¶ 17,465 (Commissioner Elman, dissenting, at 22,745). The Sixth Circuit was equally troubled in this case by the lack of standards in the area and had difficulty in perceiving any effect on competition from the merger since "Procter merely stepped into the shoes of Clorox." 358 F. 2d 74, 82. And in the somewhat similar situation presented to the Seventh Circuit in *Ekco Products Co.* v. *F. T. C.*, 347 F. 2d 745, the need for comprehensive consideration of the problem by this Court was laid bare. The lower court there attempted to review the Commission action before it as

narrowly as possible and refused to formulate principles which might control other cases. It said:

> "If we are to have a different standard or set of rules, aside from those applying to vertical and horizontal combinations, to test the illegality of conglomerate mergers and product-extension acquisitions in cases brought under Section 7 of the Clayton Act, we feel compelled to look to the Supreme Court for guidance." 347 F. 2d, at 751.

I thus believe that it is incumbent upon us to make a careful study of the facts and opinions below in this case, and at least to embark upon the formulation of standards for the application of § 7 to mergers which are neither horizontal nor vertical and which previously have not been considered in depth by this Court.[1] I consider this especially important in light of the divisions which have arisen in the Commission itself in similar cases decided subsequent to this one. See *General Foods Corp., supra; National Tea Co.*, 3 Trade Reg. Rep. ¶ 17,463. My prime difficulty with the Court's opinion is that it makes no effort in this direction at all, and leaves the Commission, lawyers, and businessmen at large as to what is to be expected of them in future cases of this kind.

I.

The Court's opinion rests on three separate findings of anticompetitive effect. The Court first declares that the market here was "oligopolistic" and that interjection of

[1] It has been argued that the mergers before this Court in *United States* v. *Aluminum Co. of America*, 377 U. S. 271, and *United States* v. *Continental Can Co.*, 378 U. S. 441, were essentially conglomerate. But the majority in both cases chose to treat them as horizontal and thus did not reach the problem of standards for judging conglomerate mergers. See Brodley, Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy, 19 Stan. L. Rev. 285, 303–308.

Procter would make the oligopoly "more rigid" because "[t]here is every reason to assume that the smaller firms would become more cautious in competing due to their fear of retaliation by Procter." The Court, however, does not indicate exactly what reasons lie behind this assumption or by what standard such an effect is deemed "reasonably probable." It could equally be assumed that smaller firms would become more aggressive in competing due to their fear that otherwise Procter might ultimately absorb their markets and that Procter, as a new entrant in the bleach field, was vulnerable to attack.

But assumption is no substitute for reasonable probability as a measure of illegality under § 7, see *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 323, and Congress has not mandated the Commission or the courts "to campaign against 'superconcentration' in the absence of any evidence of harm to competition." Turner, *supra*, at 1395. Moreover, even if an effect of this kind were reasonably predictable, the Court does not explain why the effect on competition should be expected to be the substantial one that § 7 demands. The need for substantiality cannot be ignored, for as a leading economist has warned:

> "If a society were to intervene in every activity which might possibly lead to a reduction of competition, regulation would be ubiquitous and the whole purpose of a public policy of competition would be frustrated." Stigler, Mergers and Preventive Antitrust Policy, 104 U. Pa. L. Rev. 176, 177.

The Court next stresses the increase in barriers to new entry into the liquid bleach field caused primarily, it is thought, by the substitution of the larger advertising capabilities of Procter for those of Clorox. Economic theory would certainly indicate that a heightening of such

barriers has taken place. But the Court does not explain why it considers this change to have significance under § 7, nor does it indicate when or how entry barriers affect competition in a relevant market. In this case, for example, the difficulties of introducing a new nationally advertised bleach were already so great that even a great company like Procter, which the Court finds the most likely entrant, believed that entry would not "pay out." [2] Why then does the Court find that a further increase of incalculable proportions in such barriers substantially lessens competition? Such a conclusion at least needs the support of reasoned analysis.[3]

Finally, the Court places much emphasis on the loss to the market of the most likely potential entrant, Procter. Two entirely separate anticompetitive effects might be traced to this loss, and the Court fails to distinguish between them. The first is simply that loss of the most likely entrant increases the operative barriers to entry by decreasing the likelihood that any firm will attempt to

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[2] Thus the Procter memorandum which considered the question of entry into the liquid bleach market stated: "We would not recommend that the Company consider trying to enter this market by introducing a new brand or by trying to expand a sectional brand. This is because we feel it would require a very heavy investment to achieve a major volume in the field, and with the low 'available,' [a reference to profit margin] the payout period would be very unattractive."

[3] The need for analysis is even clearer in light of the fact that entry into the market by producers of nonadvertised, locally distributed bleaches was found to be easy. There were no technological barriers to entry, and the capital requirements for entry, with the exception of advertising costs, were small. The Court must at least explain why the threat of such entry and the presence of small competitors in existing regional markets cannot be considered the predominant, and unaffected, form of competition. To establish its point, the Court must either minimize the importance of such competition or show why it would be substantially lessened by the merger.

surmount them.[4] But this effect merely reinforces the Court's previous entry-barrier argument, which I do not find convincing as presented. The second possible effect is that a reasonably probable entrant has been excluded from the market and a measure of horizontal competition has been lost. Certainly the exclusion of what would promise to be an important independent competitor from the market may be sufficient, in itself, to support a finding of illegality under § 7, *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, when the market has few competitors. The Commission, however, expressly refused to find a reasonable probability that Procter would have entered this market on its own, and the Sixth Circuit was in emphatic agreement. The Court certainly cannot mean to set its judgment on the facts against the concurrent findings below, and thus it seems clear to me that no consequence can be attached to the possibility of loss of Procter as an actual competitor.[5] Cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 175.

Thus I believe, with all respect, that the Court has failed to make a convincing analysis of the difficult problem presented, and were no more to be said in favor of the Commission's order I would vote to set it aside.

II.

The Court, following the Commission, points out that this merger is not a pure "conglomerate" merger but may more aptly be labelled a "product-extension" merger.

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[4] Bain's pioneering study of barriers to entry, Barriers to New Competition, recognized that such barriers could be surmounted at different price levels by different potential entrants. Thus even without change in the nature of the barriers themselves, the market could become more insulated through loss of the most likely entrant simply because the prevailing market price would have to rise to a higher level than before to induce entry.

[5] For a discussion of the difficulty of determining whether entry by a particular company is probable see Brodley, *supra*, n. 1, at 332.

No explanation, however, is offered as to why this distinction has any significance and the Court in fact declares that all mergers, whatever their nature, "must be tested by the same standard." But no matter what label is attached to this transaction, it certainly must be recognized that the problem we face is vastly different from those which concerned the Court in *Brown Shoe, supra,* and *United States* v. *Philadelphia National Bank,* 374 U. S. 321. And though it is entirely proper to assert that the words of § 7 are the only standard we have with which to work, it is equally important to recognize that different sets of circumstances may call for fundamentally different tests of substantial anticompetitive effect. Compare *United States* v. *Philadelphia National Bank, supra,* with *FTC* v. *Consolidated Foods Corp.,* 380 U. S. 592.

At the outset, it seems to me that there is a serious question whether the state of our economic knowledge is sufficiently advanced to enable a sure-footed administrative or judicial determination to be made *a priori* of substantial anticompetitive effect in mergers of this kind. It is clear enough that Congress desired that conglomerate and product-extension mergers be brought under § 7 scrutiny, but well versed economists have argued that such scrutiny can never lead to a valid finding of illegality.

> "Where a business concern buys out a firm producing . . . [a product] which is neither competing, nor a raw material for its own product . . . there is no competition between them to be extinguished, nor the possibility of fewer alternatives for any customer or supplier anywhere. . . . Perhaps Congress intended to stop conglomerate mergers but their act does not." Adelman, quoted in Blair, *supra,* at 674.

See also Bowman, Contrasts in Antitrust Theory: II, 65 Col. L. Rev. 417, 421.

Lending strength to this position is the fact that such mergers do provide significant economic benefits which argue against excessive controls being imposed on them. The ability to merge brings large firms into the market for capital assets and encourages economic development by holding out the incentive of easy and profitable liquidation to others. Here, for example, the owners of Clorox who had built the business, were able to liquefy their capital on profitable terms without dismantling the enterprise they had created. Also merger allows an active management to move rapidly into new markets bringing with its intervention competitive stimulation and innovation. It permits a large corporation to protect its shareholders from business fluctuation through diversification, and may facilitate the introduction of capital resources, allowing significant economies of scale, into a stagnating market. See Turner, *supra,* at 1317.

At the other end of the spectrum, it has been argued that the entry of a large conglomerate enterprise may have a destructive effect on competition in any market. Edwards, Conglomerate Bigness as a Source of Power, in Business Concentration and Price Policy, Report of National Bureau of Economic Research, p. 331. The big company is said to be able to "outbid, outspend, or outlose the small one . . . ." *Id.,* at 335. Thus it is contended that a large conglomerate may underprice in one market, adversely affecting competition, and subsidize the operation by benefits accruing elsewhere.[6] It is also argued that the large company generates psychological pressure which may force smaller ones to follow its pricing policies, and that its very presence in the

[6] But see Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1340. "[T]he belief that predatory pricing is a likely consequence of conglomerate size, and hence of conglomerate merger, is wholly unverified by any careful studies . . . ."

market may discourage entrants or make lending institutions unwilling to finance them. Edwards, *supra,* at 348; see Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 275.[7] While "business behavior is too complex and varied to permit of a single generalized explanation," Stocking, Comment, Business Concentration and Price Policy, *supra,* at 352, these observations do indicate that significant dangers to competition *may* be presented by some conglomerate and product-extension mergers. Further, congressional concern in enacting § 7 extended not only to anticompetitive behavior in particular markets, but also to the possible economic dominance of large companies which had grown through merger. Thus, while fully agreeing that mergers of this kind are not to be regarded as something entirely set apart from scrutiny under § 7, I am of the view that when this Court does undertake to establish the standards for judging their legality, it should proceed with utmost circumspection. Meanwhile, with this case before us, I cannot escape the necessity of venturing my own views as to some of the governing standards.

III.

In adjudicating horizontal and vertical combinations under § 7 where the effects on competition are reasonably obvious and substantiality is the key issue, the respon-

[7] But see Cook, Merger Law and Big Business: A Look Ahead, 40 N. Y. U. L. Rev. 710, 713. "Of course, the conglomerate cases are the best examples of the exotic restraints. Here mere speculation on what either common sense or judiciously selected economists might lead one to infer is apparently enough to prevent a merger. One reads these opinions with growing incredulity. They imply that big businesses have so much strength and such deep pockets that they simply could not lose out in competition with smaller companies . . . . One does not need a statistical survey to know that this is simply not the way the world is."

sible agencies have moved away from an initial emphasis on comprehensive scrutiny and opted for more precise rules of thumb which provide advantages of administrative convenience and predictability for the business world. See Brodley, Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy, 19 Stan. L. Rev. 285.[8] A conglomerate case, however, is not only too new to our experience to allow the formulation of simple rules but also involves "concepts of economic power and competitive effect that are still largely unformulated." This makes clear the need for "full investigation and analysis, whatever the cost in delay or immediate ineffectiveness." Edwards, Tests of Probable Effect Under the Clayton Act, 9 Antitrust Bull. 369, 377. But cf. Blair, *supra,* at 700. Certainly full scale investigation is supported by the considerations adverted to in Part II of this opinion and the basic fact that "the statute does not leave us free to strike down mergers on the basis of sheer speculation or a general fear of bigness." *General Foods Corp., supra,* at 22,749 (Commissioner Elman, dissenting).

Procter, contending that the broadest possible investigation is required here, and noting "the relative poverty of [economic] information about industrial institutions and the relations among different company complexes, as well as the sketchiness of our understanding of methods of competition in specific industries and markets,"

[8] In so doing the Court has moved away from the original recommendations in the Report of the Attorney General's National Committee to Study the Antitrust Laws, which concluded that "it will always be necessary to analyze the effect of the merger on relevant markets in sufficient detail, given the circumstances of each case, to permit a reasonable conclusion as to its probable economic effect." Report, at 123. But the development of specific criteria was aided by a degree of experience which does not exist in conglomerate cases, where the caution to analyze in detail seems particularly sound.

Bock, The Relativity of Economic Evidence in Merger Cases—Emerging Decisions Force the Issue, 63 Mich. L. Rev. 1355, 1369, has insisted throughout this proceeding that anticompetitive effects must be proved *in fact* from post-merger evidence in order for § 7 to be applied. The Court gives little attention to this contention, but I think it must be considered seriously, both because it is arguable and because it was, in a sense, the main source of difference between the Commission and the Sixth Circuit.

In its initial decision, the Commission remanded the proceeding to the Examiner for the express purpose of taking additional evidence on the post-merger situation in the liquid bleach industry. The Commission first held that the record before it, which contained all the information upon which the second Commission decision and the Court rely, was insufficient to support the finding of a § 7 violation. 58 F. T. C. 1203. The Commission's subsequent opinion, handed down by an almost entirely changed Commission, held post-merger evidence generally irrelevant and "proper only in the unusual case in which the structure of the market has changed radically since the merger . . . ." 63 F. T. C. ——, ——. Market structure changes, rather than evidence of market behavior, were held to be the key to a § 7 analysis.

In support of this position, the Commission noted that dependence on post-merger evidence would allow controls to be evaded by the dissimulation of market power during the period of observation. For example, Procter had been aware of the § 7 challenge almost from the date of the merger,[9] and it would be unrealistic, so reasoned the Commission, to assume that market power would be used adversely to competition during the pendency of the proceeding.

[9] The merger was consummated August 1, 1957. The Commission's complaint was filed on October 7, 1957.

The Commission also emphasized the difficulty of unscrambling a completed merger, and the need for businessmen to be able to make at least some predictions as to the legality of their actions when formulating future market plans. Cf. Bromley, Business' View of the du Pont-General Motors Decision, 46 Geo. L. J. 646, 653–654. Finally, the Commission pointed to the strain which would be placed upon its limited enforcement resources by a requirement to assemble large amounts of post-merger data.

The Sixth Circuit was in disagreement with the second Commission's view. It held that "[a]ny relevant evidence must be considered in a Section 7 case . . . . The extent to which inquiry may be made into post-merger conditions may well depend on the facts of the case, and where the evidence is obtained it should not be ignored." 358 F. 2d, at 83. The court characterized as "pure conjecture" the finding that Procter's behavior might have been influenced by the pendency of the proceeding. *Ibid.*

If § 7 is to serve the purposes Congress intended for it, we must, I think, stand with the Commission on this issue.[10] Only by focusing on market structure can we begin to formulate standards which will allow the responsible agencies to give proper consideration to such mergers and allow businessmen to plan their actions with a fair degree of certainty. In the recent amendments to the Bank Merger Act, Congress has indicated its approval of rapid adjudication based on premerger conditions,[11]

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[10] Cf. *FTC* v. *Consolidated Foods Corp.*, 380 U. S. 592, where this Court held that even an extensive post-merger history, developed outside the influence of a § 7 challenge, was not to be considered a conclusive negation of the possibility of anticompetitive effects.

[11] The amendments to the Bank Merger Act (80 Stat. 7) require a merger to be challenged within 30 days of agency approval. This negates the possibility of substantial post-merger evidence. 12 U. S. C. § 1828 (c). It is noteworthy that Congress has required

and all agency decisions hinging on competitive effects must be made without benefit of post-combination results. The value of post-merger evidence seems more than offset by the difficulties encountered in obtaining it. And the post-merger evidence before us in this proceeding is at best inconclusive.

Deciding that § 7 inquiry in conglomerate or product-extension merger cases should be directed toward reasonably probable changes in market structure does not, however, determine how that inquiry should be narrowed and focused. The Commission and the Court isolate two separate structural elements, the degree of concentration in the existing market and the "condition of entry." The interplay of these two factors is said to determine the existence and extent of market power, since the "condition of entry" determines the limits potential competition places on the existing market. It must be noted, however, that economic theory teaches that potential competition will have no effect on the market behavior of existing firms unless present market power is sufficient to drive the market price to the point where entry would become a real possibility.[12] So long as existing competi-

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rapid adjudication and at the same time required a determination more complex than that which must be made under the antitrust laws. In a Bank Merger Act case the defendants may seek to have the merger upheld because "the anticompetitive effects . . . are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U. S. C. § 1828 (c)(5)(B) (1964 ed., Supp. II).

[12] Thus Bain points out that in a competitive market where market price is presumed to be cost-based the threat of entry should not affect market price because each firm is presumed to make its pricing decisions without considering their impact on the market as a whole. Even in an oligopolistic market in which each seller must assume that its price actions will have marketwide effect, the threat of entry serves to limit market price only when the optimum return would be obtained at a price sufficient to induce entry. So long as the optimum price is below the entry-triggering price, the threat of entry has no real impact on the market.

tion is sufficient to keep the market price below that point, potential competition is of marginal significance as a market regulator. Thus in a conglomerate or product-extension case, where the effects on market structure which are easiest to discover are generally effects on the "condition of entry," an understanding of the workings of the premerger market cannot be ignored, and, indeed, is critical to a determination whether the visible effects on "condition of entry" have any competitive significance.

The Commission pinned its analysis of the premerger market exclusively on its concentration, the large market share enjoyed by the leading firms. In so doing the Commission was following the path taken by this Court in judging more conventional merger cases, *e. g., United States* v. *Philadelphia National Bank, supra,* and taking the position favored by the great weight of economic authority. See, *e. g.,* Bain, Industrial Organization. The Sixth Circuit discounted the Commission's analysis because of the presence of some 200 small competitors in the market. The Court bases its agreement with the Commission and its rejection of the Court of Appeals' position on Clorox's alleged domination of the market. But domination is an elusive term, for dominance in terms of percentage of sales is not the equivalent of dominance in terms of control over price or other aspects of market behavior. Just as the total number of sellers in the market is not determinative of its operation, the percentage of sales made by any group of sellers is similarly not conclusive. The determinative issue is, instead, how the sellers interact and establish the pattern of market behavior. The significance of concentration analysis is that it allows measurement of one easily determined variable to serve as an opening key to the pattern of market behavior.

I think that the Commission, on *this* record, was entitled to regard the market as "oligopolistic" and that it could properly ignore the impact of the smaller firms. I hasten to add, however, that there are significant "economic dissents" from oligopoly analysis in general and stronger arguments that if its principles "are justified in some cases, they are not justified in all cases . . . ." Brodley, *supra,* at 292. In adjudicating § 7 questions in a conglomerate or product-extension merger context where the pattern of behavior in the existing market is apt to be crucial, I would, therefore, allow the introduction by a defendant of evidence designed to show that the actual operation of the market did not accord with oligopoly theory, or whatever other theory the Commission desires to apply. In other words, I believe that defendants in § 7 proceedings are entitled, in the case of conglomerate or product-extension mergers, to build their own economic cases for the proposition that the mergers will not substantially impair competition.

For example, had Procter desired to go beyond demonstrating the mere presence of small competitors and attempted to show that the prices of unadvertised bleaches which were cost-determined set an effective ceiling on market price through the mechanism of an acceptable differential,[13] I think that the Commission

[13] There was evidence in the record that the liquid bleach market had three separate price levels, one for nationally advertised brands (Clorox and Purex), another for regional brands, and a third for local brands. There was also some testimony by officials of the companies producing the unadvertised regional and local brands, which sold at a lower price than Clorox and Purex, that their prices were determined by their costs. Some witnesses also testified that sales of unadvertised brands were extremely price elastic, and Bain's study of the related soap industry would lend support to that observation. Bain, Barriers to New Competition, Appendix D, at 283. Thus, an argument might have been made that because of this price consciousness the prices of advertised brands could not

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would have been obliged to receive and evaluate the proof. But to challenge effectively the presumption which the Commission is entitled to draw from general economic theory, a defendant must present, in my opinion, not only contradictory facts but a more cogent explanation of the pattern of market behavior.

If the proof as a whole establishes that pricing power may be exercised by a firm or firms in the market—that prices may be raised in the long run over competitive prices—then the Commission may legitimately focus on the role of potential competition and the "condition of entry." See Bain, Barriers to New Competition 5, 27. In so doing, however, a new difficulty is encountered. The threat of potential competition merely affects the range over which price power extends. Potential competition does not compel more vigorous striving in the market, nor advance any other social goal which Congress might be said to have favored in passing § 7.[14] Thus it may legitimately be questioned whether even a substantial increase in entry barriers creates a substantial lessening of competition or tendency to monopoly as required by § 7.

Two justifications for the use of entry barriers as a determinant under § 7 can be given. The first is that an increased range over which pricing power may be exercised

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greatly exceed those of regional and local brands, and therefore costs served as the ultimate determinant of market price. On the other hand, there is testimony in the record that the pricing policy of some unadvertised producers was to follow the price of Clorox and maintain a differential sufficient to provide adequate sales.

[14] Potential entry does not keep "a large number of small competitors in business," *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 275, even if that goal could be considered desirable. In fact, by placing a ceiling on market price it may serve to drive out small competitors who may be relatively inefficient producers. Potential entry does not control the market share of dominant firms or prevent them from expanding their power to force others to accede to their practices.

is contrary to the mandate of § 7 because Congress' use of the word "competition" was a shorthand for the invocation of the benefits of a competitive market, one of which is a price close to average cost. Such an approach leads also to the conclusion that economic efficiencies produced by the merger must be weighed against anticompetitive consequences in the final determination whether the net effect on competition is substantially adverse. See Bork & Bowman, The Crisis in Antitrust, 65 Col. L. Rev. 363. The second justification is found in the tendency-to-monopoly clause of § 7. Certainly the clearest evil of monopoly is the excessive power the monopolist has over price. Since "antitrust operates to forestall concentrations of economic power which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy," Blake & Jones, In Defense of Antitrust, 65 Col. L. Rev. 377, 383, increased power over price should be attackable under § 7. Cf. S. Rep. No. 1775, 81st Cong., 2d Sess., 4–5. For these reasons I conclude that the Commission may properly find a conglomerate or product-extension merger illegal under § 7 because it substantially increases pricing power in the relevant market.

Given the development of a case against the merger in this area, however, the problem of efficiencies raised above must still be faced. The Court attempts to brush the question aside by asserting that Congress preferred competition to economies, but neglects to determine whether certain economies are inherent in the idea of competition. If it is conceded, as it must be, that Congress had reasons for favoring competition, then more efficient operation must have been among them. It is of course true that a firm's ability to achieve economies enhances its competitive position, but adverse effects on competitors must be distinguished from adverse effects on competition. *Brown Shoe Co.* v. *United States, supra,* at

320. Economies achieved by one firm may stimulate matching innovation by others, the very essence of competition. They always allow the total output to be delivered to the consumer with an expenditure of fewer resources. Thus when the case against a conglomerate or product-extension merger rests on a market-structure demonstration that the likelihood of anticompetitive consequences has been substantially increased, the responsible agency should then move on to examine and weigh possible efficiencies arising from the merger in order to determine whether, on balance, competition has been substantially lessened.[15] Where detriments to competition are apt to be "highly speculative" it seems wisest to conclude that "possibilities of adverse effects on competitive behavior are worth worrying about only when the merger does not involve substantial economies . . . ." Turner, *supra,* at 1354. The Court must proceed with caution in this area lest its decision "over the long run deter new market entry and tend to stifle the very competition it seeks to foster." *United States* v. *Von's Grocery Co.,* 384 U. S. 270, 301 (STEWART, J., dissenting).

To summarize then, four important guides to the adjudication of conglomerate or product-extension mergers under § 7 seem to come forward. First, the decision can rest on analysis of market structure without resort to evidence of post-merger anticompetitive behavior. Second, the operation of the premerger market must be understood as the foundation of successful analysis. The responsible agency may presume that the market operates in accord with generally accepted principles of economic theory, but the presumption must be open to the chal-

[15] I intimate no view on whether economies would be a defense in a situation such as that presented in *Ekco Products Co.* v. *F. T. C.,* 347 F. 2d 745, where the evidence established that the company entering the market by merger intended to eliminate all competition, and had, in fact, purchased a leading competitor after entry.

lenge of alternative operational formulations. Third, if it is reasonably probable that there will be a change in market structure which will allow the exercise of substantially greater market power, then a prima facie case has been made out under § 7. Fourth, where the case against the merger rests on the probability of increased market power, the merging companies may attempt to prove that there are countervailing economies reasonably probable which should be weighed against the adverse effects.

IV.

The Commission's decision did, I think, conform to this analysis. A review of the points the Commission relied upon is next required.

The Commission first attempted a catalogue of all the possible effects of the merger on competition, many of which were "to an important degree psychological." 63 F. T. C., at ——. Most of these "effects" were speculations on the impact of Procter's ability to obtain advertising discounts and use its financial resources for increased sales promotion. Others were predictions as to the possible responses of retailers and competitors to Procter's entry and expected promotional activities. These were, as the Court of Appeals said, speculative at best but the Commission did not place great reliance on them in reaching its ultimate conclusion.

To hold the merger unlawful, the Commission relied on five factors which taken together convinced it that "substantial" anticompetitive consequences could be expected. A "substantial" impact was said to be "significant and real, and discernible not merely to theorists or scholars but to practical, hard-headed businessmen." 63 F. T. C., at ——. The relevant factors were (1) the excessive concentration in the industry at the time of the merger and the commanding market position of Clorox, (2) the relative disparity in size and strength

between Procter and the firms in the liquid bleach industry, (3) the position of Procter in other markets, (4) the elimination of Procter as a potential competitor, and (5) the nature of the "economies" expected from the merger. The net of these factors was to establish a substantial effect on the market structure variable involved, condition of entry.

Because Clorox had 48.8% of the premerger market and six firms made 80% of the sales, the Commission's conclusion that the market was oligopolistic and Clorox was the price leader must be sustained on this record where no alternative formulation of market operation was attempted. See *United States* v. *Philadelphia National Bank, supra;* Bain, Industrial Organization. The Commission's position is aided by actual evidence in the record supporting its hypothesis. Officials of other bleach companies appearing in the proceedings testified that their prices were established with regard to Clorox's price and uniformly regarded Clorox as the leading competitor in the market. The foundation was thus adequate for a consideration of probable changes in the "condition of entry."

Procter was indisputably many times the size of any firm in the liquid bleach industry and had great financial resources. Its advertising budget was more than 20 times that of Clorox and the scale of its expenditures qualified it for quantity discounts from media as well as enabling it to purchase expensive but advantageous advertising outlets. The record clearly showed that "preselling" through advertising was a requisite for large scale liquid bleach operations,[16] and thus the difference between Procter's advertising power and that of Clorox was important to a potential entrant. The expenditure on advertising which would have to be undertaken by a potential

[16] This conclusion is supported by Bain's study of the closely related soap and detergent markets. See n. 13, *supra.*

entrant in order to capture an acceptable market would vary with the tenacity of response to be expected from existing competitors. The greater the expenditure required, the higher the price to be commanded would have to be before entry would be undertaken.[17] In this regard the substitution of Procter for Clorox was a substantial change.

Procter's strong position in other product markets is equally relevant to the probability of change in the "condition of entry." It would be unrealistic, however, to attach substantial importance to Procter's extensive financial resources unless Procter were able to bring them to bear in the liquid bleach industry. If Procter were hard pressed along all fronts of its operation, competitors could safely assume that increased pressure in the liquid bleach industry would not provoke a strong response, simply because financial resources could not be diverted to that purpose. Procter, however, was conducting highly profitable operations in other markets and had demonstrated its ability to bring large resources to bear in intensive competitive campaigns by its successful introduction of Comet cleanser and various toothpastes on a nationwide scale. Proof of demonstrated ability to mobilize and utilize large financial resources seems to me required if the introduction of such resources into the market is alleged to have a substantial effect.[18] Such proof exists in this record.

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[17] This is the "lesson" of the incident in Erie, Pennsylvania, where Clorox was able to repel Purex's assault on its market position. Purex's initial success showed that part of the market could be captured, but Procter's response made clear that the beachhead could not be maintained without continued heavy advertising expenses. Unless the price commanded was expected to be quite high, these advertising expenditures could not be sustained.

[18] This limitation was recognized by the author of the Commission's opinion in this case, Commissioner Elman, in his dissenting

Procter's role as a potential entrant was also related, by the Commission, to the "condition of entry." The Commission had "no occasion to speculate on such questions as whether or not Procter . . . would in fact have entered the bleach industry on its own . . . ." 63 F. T. C., at —. It merely noted that Procter's growth pattern, financial resources, experience in the field and management policies made it the most favorably situated potential entrant. Thus the Commission reasoned that Procter might have been induced to enter the liquid bleach market when that market had a prevailing price level lower than that necessary to attract entry by more remote competitors. The limitation potential competition places on pricing policies depends on the barriers to entry facing particular competitors, and increased insulation can stem not only from changes which make it more costly for any firm to enter the market, but also from limitation of the class of entrants to those whose entry costs are high. See Bain, Barriers to New Competition 21.

At first blush, a serious inconsistency seems to arise between the Commission's analysis of this potential competition, and its expressed fear that the merger might turn the field into one of big business competition by inducing other large firms to seek entry into the market. If Procter's entry could be shown to have increased rather than decreased the likelihood of additional entry then it could hardly be attacked because of adverse effect on the "condition of entry." And I think it irrelevant whether further entry might be by small or large firms. Although there are those who attach a talismanic significance to small firm competition, see *United States* v. *Von's*

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opinion in *National Tea Co.*, 3 Trade Reg. Rep. ¶ 17,463, at 22,708. "The answer [in a § 7 case] can only be found in a careful and detailed analysis of the nature and economic condition of the industry, the structure of the relevant geographic markets, and the overall market power of the national chain and its capacity to bring it to bear in particular local markets."

Grocery Co., supra, at 275, I do not believe that competition between dynamic, well-managed large companies is less desirable than any other form. However, there is nothing in the record to show that the Commission's discussion of this point was more than mere speculation, and I cannot attach any real significance to it.

The Commission's analysis of the economies involved in this case is critical and I regret that the Court refrains from commenting upon it. The Commission—in my opinion quite correctly—seemed to accept the idea that economies could be used to defend a merger, noting that "[a] merger that results in increased efficiency of production, distribution or marketing may, in certain cases, increase the vigor of competition in the relevant market." 63 F. T. C., at ——. But advertising economies were placed in a different classification since they were said "only to increase the barriers to new entry" and to be "offensive to at least the spirit, if not the letter, of the antitrust laws." *Ibid.* Advertising was thought to benefit only the seller by entrenching his market position, and to be of no use to the consumer.

I think the Commission's view overstated and oversimplified. Proper advertising serves a legitimate and important purpose in the market by educating the consumer as to available alternatives. This process contributes to consumer demand being developed to the point at which economies of scale can be realized in production. The advertiser's brand name may also be an assurance of quality, and the value of this benefit is demonstrated by the general willingness of consumers to pay a premium for the advertised brands. Undeniably advertising may sometimes be used to create irrational brand preferences and mislead consumers as to the actual differences between products,[19] but it is very difficult to

[19] The Commission found, for example, that Clorox was identical to other liquid bleaches. Procter contended, and the Court of

discover at what point advertising ceases to be an aspect of healthy competition. See Bork, Contrasts in Antitrust Theory: I, 65 Col. L. Rev. 401, 411, n. 11. It is not the Commission's function to decide which lawful elements of the "product" offered the consumer should be considered useful and which should be considered the symptoms of industrial "sickness." It is the consumer who must make that election through the exercise of his purchasing power. In my view, true efficiencies in the use of advertising must be considered in assessing economies in the marketing process, which as has been noted are factors in the sort of § 7 proceeding involved here.

I do not think, however, that on the record presented Procter has shown any true efficiencies in advertising. Procter has merely shown that it is able to command equivalent resources at a lower dollar cost than other bleach producers. No peculiarly efficient marketing techniques have been demonstrated, nor does the record show that a smaller net advertising expenditure could be expected. Economies cannot be premised solely on dollar figures, lest accounting controversies dominate § 7 proceedings. Economies employed in defense of a merger must be shown in what economists label "real" terms, that is in terms of resources applied to the accomplishment of the objective. For this reason, the Commission, I think, was justified in discounting Procter's efficiency defense.

For the reasons set forth in this opinion, I conclude that the Commission was justified in finding that the Procter-Clorox merger entails the reasonable probability of a substantial increase in barriers to entry and of enhancement in pricing power in the liquid bleach industry and that its order must be upheld.

Appeals concluded, that Clorox employed superior quality controls. The evidence seemed to indicate that the regional and national brands were very similar, but that some local brands varied in strength.

SPECHT *v.* PATTERSON, WARDEN, ET AL.

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

No. 831. Argued March 21, 1967.—
Decided April 11, 1967.

Petitioner was convicted of the crime of indecent liberties under a Colorado statute which provided a maximum sentence of 10 years but he was sentenced under the Sex Offenders Act for an indeterminate term of from one day to life imprisonment. The Act may be applied if the trial court believes that a person convicted of specified sex offenses "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." The requisite procedure, a complete psychiatric examination and a report thereof given to the trial judge before sentencing, was complied with in petitioner's case, but no hearing was held. The State Supreme Court approved the procedure, the Federal District Court dismissed a habeas corpus proceeding and the Court of Appeals affirmed. *Held:* The invocation of the Act, which entails the making of a new charge leading to criminal punishment, requires, under the Due Process Clause, that petitioner be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own, and that there be findings adequate to make meaningful any appeal that is allowed. *Williams* v. *New York*, 337 U. S. 241, distinguished. Pp. 608–611.

357 F. 2d 325, reversed.

Michael A. Williams, by appointment of the Court, 385 U. S. 997, argued the cause for petitioner. With him on the brief was *Hugh A. Burns*.

John E. Bush, Assistant Attorney General of Colorado, argued the cause for respondents. With him on the brief were *Duke W. Dunbar*, Attorney General, *Frank E. Hickey*, Deputy Attorney General, and *John P. Moore*, Assistant Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

We held in *Williams* v. *New York,* 337 U. S. 241, that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed. We said:

> "Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." *Id.,* 249–250.

That was a case where at the end of the trial and in the same proceeding the fixing of the penalty for first

degree murder was involved—whether life imprisonment or death.

The question is whether the rule of the *Williams* case applies to this Colorado case where petitioner, having been convicted for indecent liberties under one Colorado statute that carries a maximum sentence of 10 years (Colo. Rev. Stat. Ann. § 40–2–32 (1963)) but not sentenced under it, may be sentenced under the Sex Offenders Act, Colo. Rev. Stat. Ann. §§ 39–19–1 to 10 (1963), for an indeterminate term of from one day to life without notice and full hearing. The Colorado Supreme Court approved the procedure, when it was challenged by habeas corpus (153 Colo. 235, 385 P. 2d 423) and on motion to set aside the judgment. 156 Colo. 12, 396 P. 2d 838. This federal habeas corpus proceeding resulted, the Court of Appeals affirming dismissal of the writ, 357 F. 2d 325. The case is here on a petition for certiorari, 385 U. S. 968.

The Sex Offenders Act may be brought into play if the trial court "is of the opinion that any . . . person [convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." § 1. He then becomes punishable for an indeterminate term of from one day to life on the following conditions as specified in § 2:

> "(2) A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado psychopathic hospital or by psychiatrists designated by the district court; and
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> "(3) A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; whether or not the person should be committed to the Colorado state

> hospital or to the state home and training schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether or not the person could be adequately supervised on probation."

This procedure was followed in petitioner's case; he was examined as required and a psychiatric report prepared and given to the trial judge prior to the sentencing. But there was no hearing in the normal sense, no right of confrontation and so on.

Petitioner insists that this procedure does not satisfy due process because it allows the critical finding to be made under § 1 of the Sex Offenders Act (1) without a hearing at which the person so convicted may confront and cross-examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary; and (2) on the basis of hearsay evidence to which the person involved is not allowed access.

We adhere to *Williams* v. *New York, supra;* but we decline the invitation to extend it to this radically different situation. These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom* v. *Herold,* 383 U. S. 107, and to the Due Process Clause. We hold that the requirements of due process were not satisfied here.

The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact (*Vanderhoof* v. *People,* 152 Colo. 147, 149, 380 P. 2d 903, 904) that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed

not so much as retribution as it is to keep individuals from inflicting future harm.[1] *United States* v. *Brown*, 381 U. S. 437, 458.

The Court of Appeals for the Third Circuit in speaking of a comparable Pennsylvania statute[2] said:

> "It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those

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[1] Provisions for probation are provided (Colo. Rev. Stat. Ann. § 39–19–5–(3) (1963)); and the Board of Parole has broad powers over the person sentenced. (Colo. Rev. Stat. Ann. §§ 39–19–6 to 10 (1963)).

[2] The Pennsylvania statute (Pa. Stat., Tit. 19, §§ 1166–1174 (1964)) provides that if a court is of the opinion that a person convicted before it of certain sex offenses "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," it may, "in lieu of the sentence now provided by law," sentence the person to a state institution for an indeterminate period, from one day to life. Pa. Stat., Tit. 19, § 1166 (1964). The sentence is imposed only after the defendant has undergone a psychiatric examination and the court has received a report containing all the facts necessary to determine whether it shall impose the sentence under the act. Pa. Stat., Tit. 19, § 1167 (1964). If the court, after receiving the report, "shall be of the opinion that it would be to the best interests of justice to sentence such person under the provisions of [the] act, he shall cause such person to be arraigned before him and sentenced to" a state institution designated by the Department of Welfare. Pa. Stat., Tit. 19, § 1170 (1964). After a person is sentenced under the act, the state Board of Parole has exclusive control over him. Pa. Stat., Tit. 19, § 1173 (1964).

> safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him." *Gerchman* v. *Maroney,* 355 F. 2d 302, 312.

We agree with that view. Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" (*Graham* v. *West Virginia,* 224 U. S. 616, 625) on which a defendant "must receive reasonable notice and an opportunity to be heard." *Oyler* v. *Boles,* 368 U. S. 448, 452; *Chandler* v. *Fretag,* 348 U. S. 3, 8. Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. The case is therefore quite unlike the Minnesota statute [3] we considered in *Minnesota* v. *Probate Court,* 309 U. S. 270, where in a proceeding to have a person adjudged a "psychopathic personality" there was a hearing where he was represented by counsel and could compel the production of witnesses on his behalf. *Id.,* at 275. None of these procedural safeguards

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[3] The Minnesota statute (Chapter 369 of the Laws of Minnesota of 1939) provided that the laws relating to persons found to be insane were to apply to "persons having a psychopathic personality." It defined the term "psychopathic personality" as meaning the existence in a person of certain characteristics which rendered him "irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." The statute was not criminal in nature, and was not triggered by a criminal conviction. A person found to have a "psychopathic personality" would be committed, just as a person found to be insane. See Mason's Minn. Stat. c. 74, § 8992–176 (1938 Supp.).

we have mentioned is present under Colorado's Sex Offenders Act. We therefore hold that it is deficient in due process as measured by the requirements of the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U. S. 400.

Reversed.

MR. JUSTICE HARLAN agrees with the conclusions reached by the Court, but upon the premises set forth in his opinion concurring in the result in *Pointer* v. *Texas,* 380 U. S. 400, 408.

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NATIONAL WOODWORK MANUFACTURERS ASSOCIATION ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 110. Argued January 18 and 19, 1967.—Decided April 17, 1967.*

A general contractor (Frouge) working on a housing project in Philadelphia was subject to a collective bargaining agreement between a local carpenters' union and a general contractors' association in which it was agreed that union members would not handle premachined doors. Frouge, whose contract would have permitted "blank" doors, ordered premachined doors from a manufacturer, a member of the National Woodwork Manufacturers Association (NWMA). When the Union ordered its members not to hang the premachined doors, Frouge substituted "blank" doors, which the carpenters fitted and cut at the jobsite. The NWMA filed charges against the Union with the National Labor Relations Board (NLRB), claiming that by including the "will not handle" provision in the collective bargaining agreement and enforcing it, the Union violated two provisions which the Landrum-Griffin Act respectively added to and amended in the National Labor Relations Act—§ 8 (e), which makes it an unfair labor practice to enter into an agreement that an employer will refrain from handling the products of another employer and § 8 (b) (4) (B), which makes it an unfair labor practice to force a person to cease using the products of another manufacturer. The NLRB dismissed the charges, adopting its Trial Examiner's findings that the "will not handle" provision had as its object the preservation for jobsite carpenters of cutting out and fitting work which they had customarily performed and its enforcement against Frouge constituted "primary activity" not prohibited by §§ 8 (e) and 8 (b) (4) (B). The Court of Appeals reversed the dismissal of the § 8 (e) charge, concluding that the "will not handle" provision was designed to effect a product boycott like that con-

*Together with No. 111, *National Labor Relations Board* v. *National Woodwork Manufacturers Association et al.*, also on certiorari to the same court.

demned in *Allen Bradley Co.* v. *Union*, 325 U. S. 797; and the NLRB petitioned for certiorari (No. 111). The court sustained dismissal of the § 8 (b)(4)(B) charge, agreeing with the NLRB that the Union's conduct as to Frouge was a primary dispute and as such came within the exemption proviso of Clause (B); and the NWMA petitioned for certiorari (No. 110). *Held:*

1. Section 8 (b)(4)(B) was enacted, not to prohibit primary agreements and primary action directed to work preservation, but to prohibit "secondary" objectives, *i. e.*, the exertion of pressure on a neutral employer. Pp. 619–633.

(a) Congress has stopped short of proscribing activity to pressure the employer for agreements regulating relations between him and his own employees. P. 620.

(b) The predecessor of § 8 (b)(4)(B) (the basic thrust of which was not changed by the Landrum-Griffin amendments) was enacted to eliminate the "secondary boycott" designed to injure the business of a third person not concerned in the disagreement between an employer and the union. Pp. 623–626.

(c) Judicial decisions interpreting the predecessor of § 8 (b)(4)(B) uniformly limited its application to "secondary" situations, and this Court has consistently refused to read the provision as banning traditional primary labor activity having an impact on neutral employers, even though such activity fell within the literal terms of the provision. Pp. 626–627.

(d) *Allen Bradley Co., supra*, distinguished. Pp. 628–631.

(e) In rewriting the predecessor provision as § 8 (b)(4)(B) Congress confirmed the limited application of the section to "secondary" conduct, adding the proviso that nothing therein "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." Pp. 632–633.

2. Section 8 (e) likewise does not reach employees' primary activity and does not prohibit agreements made to pressure their employer to preserve for themselves work traditionally done by them. Pp. 633–642.

(a) The addition of § 8 (e) to the Act was designed to plug a loophole resulting from *Carpenters' Union* v. *Labor Board* (*Sand Door*), 357 U. S. 93, in which it was stressed that the mere execution of or an employer's voluntary observance of a "hot cargo" clause did not violate the predecessor of § 8 (b)(4)(B). Pp. 634–635.

(b) The legislative history of § 8 (e) and provisos preserving the *status quo* in the construction industry and exempting the garment industry from the prohibitions of §§ 8 (e) and 8 (b) (4) (B) indicate that primary work-preservation agreements were not to be within the ban of § 8 (e). Pp. 635–642.

3. Substantial evidence supported the Trial Examiner's finding, adopted by the NLRB, that the "will not handle" provision was designed to preserve work traditionally performed by jobsite carpenters, and that the Union's making of the "will not handle" agreement and its maintenance thereof did not respectively violate §§ 8 (e) and 8 (b) (4) (B). Pp. 645–646.

354 F. 2d 594, affirmed in No. 110 and reversed in No. 111.

Charles B. Mahin argued the cause and filed briefs for petitioners in No. 110 and for respondents in No. 111.

Dominick L. Manoli argued the cause for respondent in No. 110 and for petitioner in No. 111. With him on the briefs were *Solicitor General Marshall, Arnold Ordman* and *Norton J. Come.*

Briefs of *amici curiae* were filed by *William B. Barton* and *Harry J. Lambeth* for the Associated Builders & Contractors, Inc.; by *Gerard D. Reilly* and *Winthrop A. Johns* for the Associated General Contractors of America et al.; by *Kenneth C. McGuiness* and *Stanley R. Strauss* for the American Boiler Manufacturers Association; and by *J. Albert Woll, Robert C. Mayer, Laurence Gold* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the Landrum-Griffin Act amendments enacted in 1959, 73 Stat. 542, § 8 (b)(4)(A) of the National Labor Relations Act, 61 Stat. 141, became § 8 (b) (4) (B) and § 8 (e) was added. The questions here are whether, in the circumstances of these cases, the Metropolitan District Council of Philadelphia and Vicinity of the United

Brotherhood of Carpenters and Joiners of America, AFL–CIO (hereafter the Union), committed the unfair labor practices prohibited by §§ 8 (e) and 8 (b)(4)(B).[1]

Frouge Corporation, a Bridgeport, Connecticut, concern, was the general contractor on a housing project in Philadelphia. Frouge had a collective bargaining agreement with the Carpenters' International Union under which Frouge agreed to be bound by the rules and regulations agreed upon by local unions with contractors in areas in which Frouge had jobs. Frouge was therefore subject to the provisions of a collective bargaining agreement between the Union and an organization of Philadelphia contractors, the General Building Contractors Association, Inc. A sentence in a provision of that agreement entitled Rule 17 provides that ". . . No member of this District Council will handle . . . any doors . . . which have been fitted prior to being furnished on the job . . . ."[2] Frouge's Philadelphia project called for 3,600 doors. Customarily, before the doors could be hung on such projects, "blank" or "blind" doors would be mortised for the knob, routed for the hinges, and beveled to make them fit between jambs. These are tasks traditionally

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[1] The text of these sections appears in the Appendix.

[2] The full text of Rule 17 is as follows:

"No employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America. No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections."

The National Labor Relations Board determined that the first sentence violated § 8 (e), 149 N. L. R. B. 646, 655–656, and the Union did not seek judicial review of that determination.

performed in the Philadelphia area by the carpenters employed on the jobsite. However, precut and prefitted doors ready to hang may be purchased from door manufacturers. Although Frouge's contract and job specifications did not call for premachined doors, and "blank" or "blind" doors could have been ordered, Frouge contracted for the purchase of premachined doors from a Pennsylvania door manufacturer which is a member of the National Woodwork Manufacturers Association, petitioner in No. 110 and respondent in No. 111. The Union ordered its carpenter members not to hang the doors when they arrived at the jobsite. Frouge thereupon withdrew the prefabricated doors and substituted "blank" doors which were fitted and cut by its carpenters on the jobsite.

The National Woodwork Manufacturers Association and another filed charges with the National Labor Relations Board against the Union alleging that by including the "will not handle" sentence of Rule 17 in the collective bargaining agreement the Union committed the unfair labor practice under § 8 (e) of entering into an "agreement . . . whereby [the] employer . . . agrees to cease or refrain from handling . . . any of the products of any other employer . . . ," and alleging further that in enforcing the sentence against Frouge, the Union committed the unfair labor practice under § 8 (b)(4)(B) of "forcing or requiring any person to cease using . . . the products of any other . . . manufacturer . . . ." The National Labor Relations Board dismissed the charges, 149 N. L. R. B. 646.[3] The Board adopted the findings

[3] There were also charges of violation of §§ 8 (e) and 8 (b)(4)(B) arising from the enforcement of the Rule 17 provision against three other contractors whose contracts with the owners of the construction projects involved specified that the contractors should furnish and install precut and prefinished doors. The Union refused to permit its members to hang these doors. The Board held that this

of the Trial Examiner that the "will not handle" sentence in Rule 17 was language used by the parties to protect and preserve cutting out and fitting as unit work to be performed by the jobsite carpenters. The Board also adopted the holding of the Trial Examiner that both the sentence of Rule 17 itself and its maintenance against Frouge were therefore "primary" activity outside the prohibitions of §§ 8 (e) and 8 (b)(4)(B). The following statement of the Trial Examiner was adopted by the Board:

> "I am convinced and find that the tasks of cutting out and fitting millwork, including doors, has, at least customarily, been performed by the carpenters employed on the jobsite. Certainly, this provision of rule 17 is not concerned with the nature of the employer with whom the contractor does business nor with the employment conditions of other employers or employees, nor does it attempt to control such other employers or employees. The provision guards against encroachments on the cutting out and fitting work of the contract unit em-

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refusal violated § 8 (b)(4)(B). The Board reasoned that, since these contractors (in contrast to Frouge) did not have "control" over the work that the Union sought to preserve for its members, the Union's objective was secondary—to compel the project owners to stop specifying precut doors in their contracts with the employer-contractors. 149 N. L. R. B., at 658. The Union petitioned the Court of Appeals to set aside the remedial order issued by the Board on this finding, but the court sustained the Board. 354 F. 2d 594, 597. The Union did not seek review of the question here. Not before us, therefore, is the issue argued by the AFL–CIO in its brief *amicus curiae*, namely, whether the Board's "right-to-control doctrine—that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand"—is an incorrect rule of law inconsistent with the Court's decision in *Labor Board* v. *Insurance Agents' International Union*, 361 U. S. 477, 497–498.

ployees who have performed that work in the past. Its purpose is plainly to regulate the relations between the general contractor and his own employees and to protect a legitimate economic interest of the employees by preserving their unit work. Merely because it incidentally also affects other parties is no basis for invalidating this provision.

"I find that . . . [the provision] is a lawful work-protection or work-preservation provision and that Respondents have not violated Section 8 (e) of the Act by entering into agreements containing this provision and by thereafter maintaining and enforcing this provision." 149 N. L. R. B., at 657.

The Court of Appeals for the Seventh Circuit reversed the Board in this respect. 354 F. 2d 594, 599. The court held that the "will not handle" agreement violated § 8 (e) without regard to any "primary" or "secondary" objective, and remanded to the Board with instructions to enter an order accordingly. In the court's view, the sentence was designed to effect a product boycott like the one condemned in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, and Congress meant, in enacting § 8 (e) and § 8 (b)(4)(B), to prohibit such agreements and conduct forcing employers to enter into them.

The Court of Appeals sustained, however, the dismissal of the § 8 (b)(4)(B) charge. The court agreed with the Board that the Union's conduct as to Frouge involved only a primary dispute with it and held that the conduct was therefore not prohibited by that section but expressly protected by the proviso "[t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ." 354 F. 2d, at 597.

We granted certiorari on the petition of the Woodwork Manufacturers Association in No. 110 and on the petition of the Board in No. 111. 384 U. S. 968. We affirm in No. 110 and reverse in No. 111.

I.

Even on the doubtful premise that the words of § 8 (e) unambiguously embrace the sentence of Rule 17,[4] this does not end inquiry into Congress' purpose in enacting the section. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459. That principle has particular application in the construction of labor legislation which is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, United Brotherhood of Carpenters* v. *Labor Board (Sand Door)*, 357 U. S. 93, 99–100. See, *e. g., Labor Board* v. *Fruit & Vegetable Packers,* 377 U. S. 58; *Labor Board* v. *Servette, Inc.,* 377 U. S. 46; *Labor Board* v. *Drivers Local Union,* 362 U. S. 274; *Mastro Plastics Corp.* v. *Labor*

[4] The statutory language of § 8 (e) is far from unambiguous. It prohibits agreements to "cease . . . from handling . . . any of the products *of any other employer* . . . ." (Emphasis supplied.) Since both the product and its source are mentioned, the provision might be read not to prohibit an agreement relating solely to the nature of the product itself, such as a work-preservation agreement, but only to prohibit one arising from an objection to the other employers or a definable group of employers who are the source of the product, for example, their nonunion status.

Board, 350 U. S. 270; *Labor Board* v. *Lion Oil Co.,* 352 U. S. 282; *Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665; *Local 761, Electrical Workers* v. *Labor Board,* 366 U. S. 667.

Strongly held opposing views have invariably marked controversy over labor's use of the boycott to further its aims by involving an employer in disputes not his own. But congressional action to deal with such conduct has stopped short of proscribing identical activity having the object of pressuring the employer for agreements regulating relations between him and his own employees. That Congress meant §§ 8 (e) and 8 (b)(4)(B) to prohibit only "secondary" objectives clearly appears from an examination of the history of congressional action on the subject; we may, by such an examination, "reconstitute the gamut of values current at the time when the words were uttered." [5]

The history begins with judicial application of the Sherman Act (26 Stat. 209) to labor activities. Federal court injunctions freely issued against all manner of strikes and boycotts under rulings that condemned virtually every collective activity of labor as an unlawful restraint of trade.[6] The first congressional response to

[5] Letter of Judge Learned Hand, quoted in Lesnick, The Gravamen of the Secondary Boycott, 62 Col. L. Rev. 1363, 1393–1394, n. 155 (1962). See 2 Sutherland, Statutory Construction 321 (Horack ed. 1943): "Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation."

[6] See *Loewe* v. *Lawlor,* 208 U. S. 274, and 235 U. S. 522 (*Danbury Hatters' Case*). The history of this development under the Sherman Act is traced in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 800–803. See generally Berman, Labor and the Sherman Act

vehement labor protests came with § 20 of the Clayton Act in 1914. That section purported drastically to limit the injunction power of federal courts in controversies "involving, or growing out of, a dispute concerning terms or conditions of employment." In terms, it prohibited restraining any person from "ceasing to perform any work or labor" or "from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do." 38 Stat. 738. Labor hailed the law as a charter immunizing its activities from the antitrust laws. This expectation was disappointed when *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37, held that § 20 immunized only trade union activities directed against an employer by his own employees. In *Duplex,* the union carried on an elaborate scheme to coerce and restrain neutral customers of the complainant manufacturer from dealing with it, with the object of using these customers as an economic lever to bring the nonunion manufacturer to terms. The Court there stated:

> "The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott,' that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them

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(1930). Collective activity was also being restrained through the doctrine of "malicious combination." See *Duplex Printing Press Co.* v. *Deering, supra,* at 484–485 (Brandeis, J., dissenting); see generally Laidler, Boycotts and the Labor Struggle 189–194 (1914).

> to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." *Duplex Printing Press Co.* v. *Deering, supra,* at 466.

Thus "primary" but not "secondary" pressures were excepted from the antitrust laws. *Truax* v. *Corrigan,* 257 U. S. 312, 330, defined "secondary boycott" as one "where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury. . . . The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong." See 1 Teller, Labor Disputes and Collective Bargaining § 145 (1940).[7] Commentators of the day, while noting the ambiguity which lurked in the definition, discerned its core concept: union pressure directed at a neutral employer the object of which was to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute.[8]

In 1932 Congress enacted the Norris-LaGuardia Act and tipped the scales the other way. Its provisions "established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation." *United*

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[7] *Painters District Council* v. *United States,* 284 U. S. 582, which summarily affirmed 44 F. 2d 58, also involved secondary activity within the rubric of *Duplex*; the union, whose members' primary employers were painting contractors, sought to "compel *manufacturers* to bring their products into the state unfinished . . . ." 44 F. 2d, at 59. (Emphasis supplied.)

[8] See Laidler, *op. cit. supra,* n. 6, at 64; Clark, The Law of the Employment of Labor 289–290 (1911); Oakes, Organized Labor and Industrial Conflicts § 408 (1927); Frankfurter & Greene, The Labor Injunction 43 (1930).

States v. *Hutcheson,* 312 U. S. 219, 231.[9] Congress abolished, for purposes of labor immunity, the distinction between primary activity between the "immediate disputants" and secondary activity in which the employer disputants and the members of the union do not stand "in the proximate relation of employer and employee . . . ." H. R. Rep. No. 669, 72d Cong., 1st Sess., 8 (1932). Thus, in *Hutcheson, supra,* the Court held that the Norris-LaGuardia Act immunized a jurisdictional strike trapping a neutral employer in the middle of an "internecine struggle between two unions seeking the favor of the same employer," *supra,* at 232. Commentators of the post-Norris-LaGuardia era, as those before, while continuing to deplore the chameleon-like qualities of the term "secondary boycott," agreed upon its central aspect: pressure tactically directed toward a neutral employer in a labor dispute not his own.[10]

Labor abuses of the broad immunity granted by the Norris-LaGuardia Act resulted in the Taft-Hartley Act prohibitions against secondary activities enacted in § 8 (b)(4)(A), which, as amended in 1959, is now § 8 (b)(4)(B). As will appear, the basic thrust of the

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[9] Section 13 (c) of the Norris-LaGuardia Act provided that the term labor dispute and thus the scope of immunity "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" 47 Stat. 73. (Emphasis supplied.)

[10] See 1 Teller, Labor Disputes and Collective Bargaining § 145 (1940); Barnard & Graham, Labor and the Secondary Boycott, 15 Wash. L. Rev. 137 (1940); Smith, Coercion of Third Parties in Labor Disputes—The Secondary Boycott, 1 La. L. Rev. 277 (1939); Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341, 364 (1938).

accommodation there effected by Congress was not expanded by the Landrum-Griffin amendments. The congressional design in enacting § 8 (b)(4)(A) is therefore crucial to the determination of the scope of §§ 8 (e) and 8 (b)(4)(B). Senator Taft said of its purpose:

> "This provision makes it unlawful to resort to a *secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.* . . . [U]nder the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. *All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.*" [11] (Emphasis supplied.)

Senator Taft and others frequently sounded this note that § 8 (b)(4)(A) was designed to eliminate the "secondary boycott," [12] and its proponents uniformly cited examples of union conduct which evidenced labor efforts to draw in neutral employers through pressure calculated to induce them to cease doing business with the primary employer.[13] And the Senate Committee Report carefully

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[11] 93 Cong. Rec. 4198, II Legislative History of the Labor Management Relations Act, 1947 (hereafter 1947 Leg. Hist.), 1106.

[12] See, *e. g.*, S. Rep. No. 105, 80th Cong., 1st Sess., 7, 8, 22, 54, in I 1947 Leg. Hist. 413, 414, 428, 460; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in I 1947 Leg. Hist. 547; 93 Cong. Rec. 4131, 4138, 4837–4838, 4843, 4844, 4858, 4859, 4865, 5005, 5011, 5014, 6445–6446, 7537, in II 1947 Leg. Hist. 1055, 1068, 1354–1355, 1364, 1365, 1370–1371, 1372–1373, 1383, 1479, 1491, 1497, 1544, 1654. A statement of Senator Javits, an opponent of the bill, at 93 Cong. Rec. 6296, I 1947 Leg. Hist. 876, that might suggest a broader reading was merely one of the "isolated references . . . [that] appear more as asides in a debate . . . ." *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 286–287.

[13] See, *e. g.*, 93 Cong. Rec. 3424 (Rep. Hartley), 3432 (Rep. Landis), 3449 (Rep. Buck), A1910–A1911 (Rep. Meade), 1844 (Sena-

characterized the conduct prohibited by § 8 (b)(4)(A) in the same terms:

> "Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)." S. Rep. No. 105, 80th Cong., 1st Sess., 22, I 1947 Leg. Hist. 428.[14]

The other subsections of § 8 (b)(4) of the Act were similarly limited to protecting employers in the position of neutrals between contending parties. The prohibition of subsection (B) against a noncertified union's forcing recognition from an employer was designed to protect the employer trapped between the union and his employees, a majority of whom may not desire to choose the union as their representative. The prohibition of subsection (C) against a demand for recognition when another union has been certified protects the employer trapped between the noncertified and the certified unions. The prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between the two claims. The central theme pervading these provisions of protection for the neutral employer confirms the assurances of those sponsoring the section that in subsection (A) Congress likewise meant to protect the

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tor Morse), 3838 (Senator Taft), 5014 (Senator Ball), in I 1947 Leg. Hist. 614, 630, 658, 869, and II 1947 Leg. Hist. 982, 1012, 1497.

[14] See also a similar statement in H. R. Conf. Rep. No. 510, *supra*, at 43, I 1947 Leg. Hist. 547, in which the House Managers limit the "boycotts," referred to at 65, I 1947 Leg. Hist. 569.

employer only from union pressures designed to involve him in disputes not his own.[15]

Judicial decisions interpreting the broad language of § 8 (b)(4)(A) of the Act uniformly limited its application to such "secondary" situations.[16] This limitation was in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and

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[15] Cf. *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 285; *Labor Board* v. *Lion Oil Co.,* 352 U. S. 282, 288.

[16] See, *e. g., Di Giorgio Fruit Corp.* v. *Labor Board,* 89 U. S. App. D. C. 155, 191 F. 2d 642, cert. denied, 342 U. S. 869 (1951); *J. G. Roy & Sons Co.* v. *Labor Board,* 251 F. 2d 771 (C. A. 1st Cir. 1958); *Rabouin* v. *Labor Board,* 195 F. 2d 906, 912 (C. A. 2d Cir. 1952); *Piezonki* v. *Labor Board,* 219 F. 2d 879 (C. A. 4th Cir. 1955); *Labor Board* v. *General Drivers Local 968,* 225 F. 2d 205 (C. A. 5th Cir. 1955), cert. denied, 350 U. S. 914; *Local 618, Automotive Petroleum Employees Union* v. *Labor Board,* 249 F. 2d 332 (C. A. 8th Cir. 1957); *Labor Board* v. *Local Union No. 55,* 218 F. 2d 226 (C. A. 10th Cir. 1954). An oft-cited definition of the conduct banned by § 8 (b)(4)(A) was that of Judge Learned Hand in *International Bro. of Electrical Workers* v. *Labor Board,* 181 F. 2d 34, 37: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." For the scholarly acceptance of this primary-secondary dichotomy in the scope of § 8 (b)(4)(A), see Koretz, Federal Regulation of Secondary Strikes and Boycotts—A New Chapter, 37 Cornell L. Q. 235 (1952); Tower, A Perspective on Secondary Boycotts, 2 Lab. L. J. 727 (1951); Cushman, Secondary Boycotts and the Taft-Hartley Law, 6 Syracuse L. Rev. 109 (1954); Lesnick, The Gravamen of the Secondary Boycott, 62 Col. L. Rev. 1363 (1962); Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 271 (1959); Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086, 1112 (1960). For the NLRB's vacillations during the period, see Lesnick, *supra,* 62 Col. L. Rev., at 1366–1392.

others from pressures in controversies not their own." *Labor Board* v. *Denver Bldg. Trades Council,* 341 U. S. 675, 692. This Court accordingly refused to read § 8 (b) (4)(A) to ban traditional primary strikes and picketing having an impact on neutral employers even though the activity fell within its sweeping terms. *Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665; see *Local 761, Electrical Workers* v. *Labor Board,* 366 U. S. 667. Thus, however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective.

The literal terms of § 8 (b)(4)(A) also were not applied in the so-called "ally doctrine" cases, in which the union's pressure was aimed toward employers performing the work of the primary employer's striking employees. The rationale, again, was the inapplicability of the provision's central theme, the protection of neutrals against secondary pressure, where the secondary employer against whom the union's pressure is directed has entangled himself in the vortex of the primary dispute. "[T]he union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it." *Douds* v. *Metropolitan Federation of Architects,* 75 F. Supp. 672, 677 (D. C. S. D. N. Y. 1948); see *Labor Board* v. *Business Machine & Office Appliance Mechanics,* 228 F. 2d 553 (C. A. 2d Cir. 1955). We summarized our reading of § 8 (b)(4)(A) just a year before enactment of § 8 (e):

> "It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to en-

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gage in strikes or concerted refusals to handle goods." *Local 1976, United Brotherhood of Carpenters* v. *Labor Board* (*Sand Door*), 357 U. S. 93, 100.

Despite this virtually overwhelming support for the limited reading of § 8 (b)(4)(A), the Woodwork Manufacturers Association relies on *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, as requiring that the successor section, § 8 (b)(4)(B), be read as proscribing the District Council's conduct in enforcing the "will not handle" sentence of Rule 17 against Frouge. The Association points to the references to *Allen Bradley* in the legislative debates leading to the enactment of the predecessor § 8 (b)(4)(A). We think that this is an erroneous reading of the legislative history. *Allen Bradley* held violative of the antitrust laws a combination between Local 3 of the International Brotherhood of Electrical Workers and both electrical contractors and manufacturers of electrical fixtures in New York City to restrain the bringing in of such equipment from outside the city. The contractors obligated themselves to confine their purchases to local manufacturers, who in turn obligated themselves to confine their New York City sales to contractors employing members of the local, and this scheme was supported by threat of boycott by the contractors' employees. While recognizing that the union might have had an immunity for its contribution to the trade boycott had it acted alone, citing *Hutcheson, supra,* the Court held immunity was not intended by the Clayton or Norris-LaGuardia Acts in cases in which the union's activity was part of a larger conspiracy to abet contractors and manufacturers to create a monopoly.

The argument that the references to *Allen Bradley* in the debates over § 8 (b)(4)(A) have broader significance in the determination of the reach of that section is that there was no intent on Local 3's part to influence the internal labor policies of the boycotted out-of-state

manufacturers of electrical equipment. There are three answers to this argument: First, the boycott of out-of-state electrical equipment by the electrical contractors' employees was not in pursuance of any objective relating to pressuring their employers in the matter of *their* wages, hours, and working conditions; there was no work preservation or other primary objective related to the union employees' relations with their contractor employers. On the contrary, the object of the boycott was to secure benefits for the New York City electrical manufacturers and their employees. "This is a secondary object because the cessation of business was being used tactically, with an eye to its effect on conditions elsewhere." [17] Second, and of even greater significance on the question of the inferences to be drawn from the references to *Allen Bradley,* Senator Taft regarded the Local 3 boycott as in effect saying, "We will not permit any material made by any other union or by any non-union workers to come into New York City and be put into any building in New York City." 93 Cong. Rec. 4199, II 1947 Leg. Hist. 1107. This clearly shows that the Senator viewed the pressures applied by Local 3 on the employers of its members as having solely a secondary objective. The Senate Committee Report echoes the same view:

> "[It is] an unfair labor practice for a union to engage in the type of secondary boycott that has

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[17] Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8 (b) (4) and 8 (e), 113 U. Pa. L. Rev. 1000, 1017–1018 (1965).

It is suggested that the boycott in *Allen Bradley* is indistinguishable from the activity today held protected in *Houston Insulation Contractors Association* v. *Labor Board, post,* p. 664. The crucial distinction is that in *Houston Insulation Contractors Association* the boycott was being carried out to affect the labor policies of the employer of the boycotting employees, the primary employer, and not, as in *Allen Bradley,* for its effect elsewhere.

> been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of *some labor organization other than local No. 3.*" S. Rep. No. 105, 80th Cong., 1st Sess., 22, I 1947 Leg. Hist. 428. (Emphasis supplied.)

Other statements on the floor of Congress repeat the same refrain.[18] Third, even on the premise that Congress meant to prohibit boycotts such as that in *Allen Bradley* without regard to whether they were carried on to affect labor conditions elsewhere, the fact is that the boycott in *Allen Bradley* was carried on, not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword, to reach out and monopolize all the manufacturing job tasks for Local 3 members. It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. But the boycott in the present cases was not used as a sword; it was a shield carried solely to preserve the members' jobs. We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire

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[18] See 93 Cong. Rec. 4132 (Senator Ellender), II 1947 Leg. Hist. 1056: "A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employers to deal with them, even though the employees of that employer desire to be represented by other unions, or not to be represented at all. . . . [An] example is the New York Electrical Workers Union, the IBEW." See also Statement of Senator Ball, 93 Cong. Rec. 5011, II 1947 Leg. Hist. 1491, who described "one of the worst situations which has arisen, such as that in New York where a local of the IBEW is using the secondary boycott to maintain a tight little monopoly for its own employees, its own members, and a few employers in that area."

new job tasks when their own jobs are not threatened by the boycotted product.[19]

It is true that the House bill proposed to amend the Clayton Act to narrow labor's immunity from the antitrust laws. H. R. 3020, § 301 (b), I 1947 Leg. Hist. 220. This was omitted from the Conference agreement. It is suggested that this history evidences that Congress meant § 8 (b)(4)(A) to reach all product boycotts with work preservation motives. The argument is premised on a statement by the House Managers in the House Conference Report that "[s]ince the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 65, I 1947 Leg. Hist. 569. The statement is hardly probative that § 8 (b)(4)(A) enacted a broad prohibition in face of the overwhelming evidence that its Senate sponsors intended the narrower reach. Actually the statement at best reflects that the House may have receded from a broader position and accepted that of the Senate. For § 8 (b)(4)(A) constituted the "effective provisions" referred to and the House Managers' understanding of and agreement with the reach of the section as intended by its Senate sponsors is expressed at page 43 of the same Report, I 1947 Leg. Hist. 547:

> "Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling,

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[19] We likewise do not have before us in these cases, and express no view upon, the antitrust limitations, if any, upon union-employer work-preservation or work-extension agreements. See *United Mine Workers* v. *Pennington,* 381 U. S. 657, 662–665.

> handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B."

In effect Congress, in enacting § 8 (b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., supra,* and barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere.

Indeed, Congress in rewriting § 8 (b)(4)(A) as § 8 (b)(4)(B) took pains to confirm the limited application of the section to such "secondary" conduct. The word "concerted" in former § 8 (b)(4) was deleted to reach secondary conduct directed to only one individual. This was in response to the Court's holding in *Labor Board* v. *International Rice Milling Co.*, 341 U. S. 665, that "concerted" required proof of inducement of two or more employees. But to make clear that the deletion was not to be read as supporting a construction of the statute as prohibiting the incidental effects of traditional primary activity, Congress added the proviso that nothing in the amended section "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." [20] Many state-

[20] The proviso was added in the Conference Committee, the report of which stated its purpose to be, "to make it clear that the changes in section 8 (b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute." H. R.

ments and examples proffered in the 1959 debates confirm this congressional acceptance of the distinction between primary and secondary activity.[21]

II.

The Landrum-Griffin Act amendments in 1959 were adopted only to close various loopholes in the application of § 8 (b)(4)(A) which had been exposed in Board and court decisions. We discussed some of these loopholes, and the particular amendments adopted to close them, in *Labor Board* v. *Servette, Inc.*, 377 U. S. 46, 51–54. We need not repeat that discussion here, except to emphasize, as we there said, that "these changes did not expand the type of conduct which § 8 (b)(4)(A) con-

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Conf. Rep. No. 1147, 86th Cong., 1st Sess., 38 (1959), in I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereafter 1959 Leg. Hist.), 942. See *Local 761, Electrical Workers* v. *Labor Board*, 366 U. S. 667, 681.

[21] See 105 Cong. Rec. 1729–1730, II 1959 Leg. Hist. 993–994 (remarks of the Secretary of Labor, inserted into the record by Senator Dirksen); 105 Cong. Rec. 3951–3952, 6290, 6667, II 1959 Leg. Hist. 1007, 1052, 1193–1194 (Senator McClellan); 105 Cong. Rec. 6285, II 1959 Leg. Hist. 1046 (Senator Ervin); 105 Cong. Rec. 6300–6301, II 1959 Leg. Hist. 1059 (Senator Mundt); 105 Cong. Rec. 6390, 6428, 17674, II 1959 Leg. Hist. 1061, 1079, 1386 (Senator Goldwater); 105 Cong. Rec. 6670, 17907–17908, II 1959 Leg. Hist. 1197, 1440–1441 (Senator Curtis); 105 Cong. Rec. 1426, 15674, II 1959 Leg. Hist. 1462, 1616 (Rep. Bosch); 105 Cong. Rec. 3926–3927, 3928, II 1959 Leg. Hist. 1469–1470, 1471 (Rep. Lafore); 105 Cong. Rec. 14343–14344, II 1959 Leg. Hist. 1518–1519 (Rep. Landrum); 105 Cong. Rec. 14347–14348, II 1959 Leg. Hist. 1522–1523 (analysis of Landrum-Griffin bill inserted into the record by Rep. Griffin); 105 Cong. Rec. 15532, II 1959 Leg. Hist. 1568 (Rep. Griffin); 105 Cong. Rec. 15195, 15544–15545, II 1959 Leg. Hist. 1543, 1580–1581 (Rep. Rhodes); 105 Cong. Rec. 15529, II 1959 Leg. Hist. 1565 (Rep. Shelley); 105 Cong. Rec. 15551–15552, II 1959 Leg. Hist. 1587–1588 (report prepared by Rep. Elliott); 105 Cong. Rec. 15688, II 1959 Leg. Hist. 1630 (Rep. Riehlman); 105 Cong. Rec. 15691, II 1959 Leg. Hist. 1633 (Rep. Arends).

demned, that is, union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer." *Id.*, at 52–53.

Section 8 (e) simply closed still another loophole.[22] In *Local 1976, United Brotherhood of Carpenters* v. *Labor Board* (*Sand Door*), 357 U. S. 93, the Court held that it was no defense to an unfair labor practice charge under § 8 (b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under § 8 (b)(4)(A). Section 8 (e) was designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful. The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts.[23] Hearings in late 1958 before the Senate Select Committee explored seven cases of "hot cargo" clauses in Teamsters Union contracts, the use of which the Committee found conscripted neutral employers in Teamsters organizational campaigns.[24]

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[22] Throughout the committee reports and debates on § 8 (e), it was referred to as a measure designed to close a loophole in § 8 (b)(4)(A) of the 1947 Act. See, *e. g.*, S. Rep. No. 187, 86th Cong., 1st Sess., 78–79, I 1959 Leg. Hist. 474–475 (1959) (Minority Views); H. R. Rep. No. 741, 86th Cong., 1st Sess., 20–21, I 1959 Leg. Hist. 778–779.

[23] See Cox, *supra*, n. 16, at 272.

[24] See Final Report of the Senate Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1139, 86th Cong., 2d Sess., 3 (1960). The Final Report, ordered to be

This loophole-closing measure likewise did not expand the type of conduct which § 8 (b)(4)(A) condemned. Although the language of § 8 (e) is sweeping, it closely tracks that of § 8 (b)(4)(A), and just as the latter and its successor § 8 (b)(4)(B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, § 8 (e) does not prohibit agreements made and maintained for that purpose.

The legislative history of § 8 (e) confirms this conclusion. The Kennedy-Ervin bill as originally reported proposed no remedy for abuses of the "hot cargo" clauses revealed at the hearings of the Select Committee. Senators Goldwater and Dirksen filed a minority report urging that a prohibition against "hot cargo" clauses should be enacted to close that loophole. Their statement expressly acknowledged their acceptance of the reading of § 8 (b)(4)(A) as applicable only "to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer." [25] They argued that a prohibition

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printed after enactment of the Landrum-Griffin Act, defined a "hot cargo" clause as "an agreement between a union and a unionized employer that his employees shall not be required to work on or handle 'hot goods' or 'hot cargo' being manufactured or transferred by another employer with whom the union has a labor dispute or whom the union considers and labels as being unfair to organized labor." *Ibid.*

[25] S. Rep. No. 187, 86th Cong., 1st Sess., 78, I 1959 Leg. Hist. 474. The Senators explained, at 79, I 1959 Leg. Hist. 475:

"*Hot-cargo clauses.*—It has become common to find clauses in union contracts whereby the employer agrees not to handle what the union chooses to call 'hot goods,' 'unfair materials,' and 'blacklisted products.' Such clauses have become standard in contracts entered into by the Teamsters Union. Here, employer A, who has a dispute with a union or whose employees are being solicited for

against "hot cargo" clauses was necessary to further that objective. They were joined by Senator McClellan, Chairman of the Select Committee, in their proposal to add such a provision. Their statements in support consistently defined the evil to be prevented in terms of agreements which obligated neutral employers not to do business with other employers involved in labor disputes with the union.[26] Senator Gore initially proposed, and the Senate first passed, a "hot cargo" amendment to the Kennedy-Ervin bill which outlawed such agreements only for "common carriers subject to Part II of the Interstate Commerce Act." This reflected the testimony at the Select Committee hearings which attributed abuses of such clauses primarily to the Teamsters Union. Significantly, such alleged abuses by the Teamsters invariably involved uses of the clause to pressure neutral trucking employers not to handle goods of other employers involved in disputes with the Teamsters Union.[27]

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union membership, is in real trouble. He may have customers waiting for his product or he may have suppliers eager to send him raw material, but both his delivery of products and supply of raw material cannot move from or to his place of business because the carriers in either instance have 'hot cargo' clauses in their contracts with the Teamsters Union. His alternative is . . . [to] go out of business or yield to the union's demand, which often is a demand for a compulsory membership contract with a union which his employees do not want."

[26] See statements of these Senators, cited n. 21, *supra*. Both Senators Dirksen and McClellan introduced unsuccessful "hot cargo" legislation in substantially the same terms as enacted in § 8 (e), 105 Cong. Rec. 3948, 6411–6412, II 1959 Leg. Hist. 1007 (Senator McClellan), 1071 (Senator Dirksen).

[27] See, *e. g.*, remarks of Secretary of Labor Mitchell inserted into the record by Senator Dirksen, 105 Cong. Rec. 1730, II 1959 Leg. Hist. 993: "The testimony before the select committee again and again illustrated the method by which certain unions, particularly the Teamsters, utilized the inadequacies of the present secondary boycott provisions to force employers to do business with only those people approved by union officials."

The House Labor Committee first reported out a bill containing a provision substantially identical to the Gore amendment.[28] The House Report expressly noted that since that proposal tracked the language of § 8 (b)(4)(A) "it preserved the established distinction between primary activities and secondary boycotts." [29] The substitute Landrum-Griffin bill, however, expanded the proposal to cover all industry and not common carriers alone. H. R. 8400, § 705 (b)(1) in I 1959 Leg. Hist. 683. Representative Landrum stated, "I submit if such contracts are bad in one segment of our economy, they are undesirable in all segments." 105 Cong. Rec. 14343, II 1959 Leg. Hist. 1518. In describing the substitute bill, Representative Landrum pointedly spoke of the situation "where the union, in a dispute with one employer, puts pressure upon another employer or his employees, in order to force the second employer or his employees, to stop doing business with the first employer, and 'bend his knee to the union's will.'" *Ibid.* An analysis of the substitute bill submitted by Representative Griffin referred to the need to plug the various loopholes in the "secondary boycott" provisions, one of which is the "hot cargo" agreement.[30] In Conference Committee, the Landrum-Griffin application to all industry, and not just to common carriers, was adopted.

However, provisos were added to § 8 (e) to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8 (e)

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[28] H. R. 8342, § 705 (a)(2) (Elliott bill), in I 1959 Leg. Hist. 755–757.

[29] H. R. Rep. No. 741, 86th Cong., 1st Sess., 21, I 1959 Leg. Hist. 779.

[30] 105 Cong. Rec. 14347, II 1959 Leg. Hist. 1522–1523. Rep. Griffin noted that the present law did not "prohibit resort to . . . [secondary] activity to force [secondary] employers to sign contracts or agreements not to handle or transport goods coming from a source characterized by a union as 'unfair.'"

and 8 (b)(4)(B). This action of the Congress is strong confirmation that Congress meant that both §§ 8 (e) and 8 (b)(4)(B) reach only secondary pressures. If the body of § 8 (e) applies only to secondary activity, the garment industry proviso is a justifiable exception which allows what the legislative history shows it was designed to allow, secondary pressures to counteract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors.[31] First, this motivation for the proviso sheds light on the central theme of the body of § 8 (e), to which the proviso is an exception. Second, if the body of that provision and § 8 (b)(4)(B) were construed to prohibit primary agreements and their maintenance, such as those concerning work preservation, the proviso would have the highly unlikely effect, unjustified in any of the statute's history, of permitting garment workers, but garment workers only, to preserve their jobs against subcontracting or prefabrication by such agreements and by strikes and boycotts to enforce them. Similarly, the construction industry proviso, which permits "hot cargo" agreements only for jobsite work, would have the curious and unsupported result of allowing the construction worker to make agreements preserving his traditional tasks against jobsite prefabrication and subcontracting, but not against nonjobsite prefabrication and subcontracting. On the other hand, if the heart of § 8 (e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site be-

[31] See, *e. g.*, 105 Cong. Rec. 6668, 17327, II 1959 Leg. Hist. 1195, 1377 (Senator Kennedy).

cause of the close community of interests there,[32] but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other. The provisos are therefore substantial probative support that primary work preservation agreements were not to be within the ban of § 8 (e).[33]

The only mention of a broader reach for § 8 (e) appears in isolated statements by opponents of that provision, expressing fears that work preservation agreements would be banned.[34] These statements have scant probative value against the backdrop of the strong evidence to the contrary. Too, "we have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to

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[32] See *Essex County and Vicinity Dist. Council of Carpenters* v. *Labor Board,* 332 F. 2d 636 (C. A. 3d Cir. 1964); Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L. J. 673, 684–689 (1951).

[33] See *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 285–286, and cases there cited.

[34] 105 Cong. Rec. 17884, II 1959 Leg. Hist. 1428 (Senator Morse); 105 Cong. Rec. 16590, II 1959 Leg. Hist. 1708 (analysis of "Secondary Boycotts and Hot Cargo Contracts" by Senator Kennedy and Rep. Thompson). It is somewhat unclear whether statements by Senator McNamara and Reps. Thompson and Kearns respecting plumbing prefabrication clauses for construction projects concerned agreements with a primary or a secondary objective. 105 Cong. Rec. 19785, 19809, 20004–20005, II 1959 Leg. Hist. 1815, 1816, 1861. As described by Senator McNamara, the clause in question permitted fabrication, so long as it was accomplished by members of a local union of the pipefitters. 105 Cong. Rec. 19785, II 1959 Leg. Hist. 1815. Moreover, the statements purported only to indicate their interpretation of the construction industry proviso. In any event, these statements could represent only the personal views of these legislators, since the statements were inserted in the Congressional Record after passage of the Act.

overstate its reach." *Labor Board* v. *Fruit & Vegetable Packers,* 377 U. S. 58, 66. "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 394–395. See *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 288.

In addition to all else, "[t]he silence of the sponsors of [the] amendments is pregnant with significance. . . ." *Labor Board* v. *Fruit & Vegetable Packers, supra,* at 66. Before we may say that Congress meant to strike from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs, that meaning should plainly appear. "[I]n this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor." *Fibreboard Paper Prods. Corp.* v. *Labor Board,* 379 U. S. 203, 225 (concurring opinion of STEWART, J.). We would expect that legislation curtailing the ability of management and labor voluntarily to negotiate for solutions to these significant and difficult problems would be preceded by extensive congressional study and debate, and consideration of voluminous economic, scientific, and statistical data. The silence regarding such matters in the Eighty-sixth Congress is itself evidence that Congress, in enacting § 8 (e), had no thought of prohibiting agreements directed to work preservation.[35] In fact, since the

[35] In fact, Rep. Alger introduced a bill which would have banned union attempts to limit prefabrication of building materials, which bill was given no attention whatever and failed of adoption. 105 Cong. Rec. 12137, II 1959 Leg. Hist. 1508. The understanding of

enactment of § 8 (e), the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, and the Subcommittee on Unemployment and the Impact of Automation and the Select Subcommittee on Labor of the House Committee on Education and Labor have been extensively studying the threats to workers posed by increased technology and automation,[36] and some legislation directed to the prob-

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Congress with regard to that issue might have been best reflected in a statement on the House floor by Rep. Holland: "When the labor reform bill is out of the way—labor and management could, as they eventually must, sit down together and work toward a solution of our most serious problem—automation—which has already affected the employment picture through more productivity and less employment. If allowed to go unchecked, automation will eventually create many thousands of displaced persons, and unless this problem is properly worked out, it portends a serious threat to our national economy." 105 Cong. Rec. 13133, II 1959 Leg. Hist. 1511.

[36] See Hearings before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess., pts. 1–9 (1963), 88th Cong., 2d Sess., pt. 10 (1964), on the Nation's Manpower Revolution (concluding with recommendations for a National Commission on Automation and Technological Progress), and Hearings, 88th Cong., 1st Sess. (1963), on Manpower Retraining; Hearings before the Select Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 2d Sess. (1964), on H. R. 10310 and Related Bills "To Establish a National Commission on Automation and Technological Progress"; Hearings before the Subcommittee on Unemployment and the Impact of Automation of the House Committee on Education and Labor, 87th Cong., 1st Sess. (1961), on H. R. 7373, a "Bill Relating to the Occupational Training, Development, and Use of the Manpower Resources of the Nation." See statement in these latter hearings of then Secretary of Labor, Arthur Goldberg, at 3: "Many achievements in attempting to overcome the difficulties created by radical technological change can and should be accomplished through collective bargaining and joint labor-management efforts. Much has been achieved through such efforts in recent years. Even greater concentration by labor and management on these problems is needed in the period ahead."

lem has been passed.[37] We cannot lightly impute to Congress an intent in § 8 (e) to preclude labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology.

Moreover, our decision in *Fibreboard Paper Prods. Corp., supra,* implicitly recognizes the legitimacy of work preservation clauses like that involved here. Indeed, in the circumstances presented in *Fibreboard,* we held that bargaining on the subject was made mandatory by § 8(a)(5) of the Act, concerning as it does "terms and conditions of employment," § 8 (d). *Fibreboard* involved an alleged refusal to bargain with respect to the contracting-out of plant maintenance work previously performed by employees in the bargaining unit. The Court recognized that the "termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit," *supra,* at 210, is "a problem of vital concern to labor and management . . . ," *supra,* at 211. We further noted, *supra,* at 211–212:

> "Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process.

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[37] See the Manpower Development and Training Act of 1962, § 102 (1), 76 Stat. 24, which directs the Secretary of Labor to "evaluate the impact of, and benefits and problems created by automation, technological progress, and other changes in the structure of production and demand on the use of the Nation's human resources; establish techniques and methods for detecting in advance the potential impact of such developments; develop solutions to these problems, and publish findings pertaining thereto." The Secretary has, pursuant to this direction, published numerous bulletins. See, *e. g.,* Technological Trends in Major American Industries, Dept. of Labor Bulletin No. 1474.

> Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework. Provisions relating to contracting out exist in numerous collective bargaining agreements, and '[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.' *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584."

See *Local 24, Teamsters Union* v. *Oliver,* 358 U. S. 283, 294. It would therefore be incongruous to interpret § 8 (e) to invalidate clauses over which the parties may be mandated to bargain and which have been successfully incorporated through collective bargaining in many of this Nation's major labor agreements.

Finally, important parts of the historic accommodation by Congress of the powers of labor and management are §§ 7 and 13 of the National Labor Relations Act, passed as part of the Wagner Act in 1935 and amended in 1947. The former section assures to labor "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 13 preserves the right to strike, of which the boycott is a form, except as specifically provided in the Act. In the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions. See *Labor Board* v. *Drivers Local Union,* 362 U. S. 274; *Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665, 672–673; *Labor Board* v. *Denver Bldg. Trades Council,* 341 U. S. 675, 687; *Mastro Plastics Corp.* v. *Labor Board, supra,* at 284, 287.

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The Woodwork Manufacturers Association and *amici* who support its position advance several reasons, grounded in economic and technological factors, why "will not handle" clauses should be invalid in all circumstances. Those arguments are addressed to the wrong branch of government. It may be "that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. Major revisions of the basic statute were enacted in 1947 and 1959. To be sure, then, Congress might be of opinion that greater stress should be put on . . . eliminating more and more economic weapons from the . . . [Union's] grasp . . . . But Congress' policy has not yet moved to this point . . . ." *Labor Board* v. *Insurance Agents' International Union,* 361 U. S. 477, 500.

III.

The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated § 8 (e) and § 8 (b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the

[38] As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 *et seq.* (1964).

agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim.[39] The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees.[40] This will not always be a simple test to apply.[41] But "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Local 761, Electrical Workers* v. *Labor Board,* 366 U. S. 667, 674.

That the "will not handle" provision was not an unfair labor practice in these cases is clear. The finding of the

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[39] See Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8 (b)(4) and 8 (e), 113 U. Pa. L. Rev. 1000, 1018, 1040 (1965).

[40] See *Orange Belt District Council of Painters* v. *Labor Board,* 117 U. S. App. D. C. 233, 328 F. 2d 534 (1964); *Retail Clerks Union Local 770* v. *Labor Board,* 111 U. S. App. D. C. 246, 296 F. 2d 368 (1961); *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbldg. Workers,* 344 F. 2d 107 (C. A. 2d Cir. 1965); *Labor Board* v. *Local 825, Int'l Union of Operating Engineers,* 326 F. 2d 218 (C. A. 3d Cir. 1964); *Labor Board* v. *Joint Council of Teamsters,* 338 F. 2d 23, 28 (C. A. 9th Cir. 1964); *Milk Drivers & Dairy Employees Union* (Minnesota Milk Co.), 133 N. L. R. B. 1314, enforced, 314 F. 2d 761 (C. A. 8th Cir. 1963); *Ohio Valley Carpenters District Council* (Cardinal Industries), 136 N. L. R. B. 977 (1962).

[41] See, *e. g., Retail Clerks Union Local 770* v. *Labor Board,* 111 U. S. App. D. C. 246, 296 F. 2d 368 (1961); *Baltimore Lithographers* (Alco-Gravure), 160 N. L. R. B. No. 90, 63 L. R. R. M. 1126 (1966); *Joliet Contractors Assn.* v. *Labor Board,* 202 F. 2d 606 (C. A. 7th Cir. 1953), cert. denied, 346 U. S. 824; *Labor Board* v. *Local 11, United Bro. of Carpenters,* 242 F. 2d 932 (C. A. 6th Cir. 1957). See generally Lesnick, *supra,* n. 39; Comment, 62 Mich. L. Rev. 1176 (1964).

Trial Examiner, adopted by the Board, was that the objective of the sentence was preservation of work traditionally performed by the jobsite carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the "will not handle" agreement was not a violation of § 8 (e).

Similarly, the Union's maintenance of the provision was not a violation of § 8 (b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters.

The judgment is affirmed in No. 110, and reversed in No. 111.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 141, 73 Stat. 542, 29 U. S. C. § 158), are as follows:

8 (b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or

in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

. . . . .

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other em-

ployer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Memorandum of MR. JUSTICE HARLAN.

In joining the Court's opinion, I am constrained to add these few words by way of underscoring the salient factors which, in my judgment, make for the decision that has been reached in these difficult cases.

1. The facts as found by the Board and the Court of Appeals show that the contractual restrictive-product rule in question, and the boycott in support of its enforcement, had as their sole objective the protection of union members from a diminution of work flowing from changes in technology. Union members traditionally had performed the task of fitting doors on the jobsite, and there is no evidence of any motive for this contract provision and its companion boycott other than the preservation of that work. This, then, is not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs.

2. The only question thus to be decided, and which is decided, is whether Congress meant, in enacting §§ 8 (b)(4)(B) and 8 (e) of the National Labor Relations Act, to prevent this kind of labor-management arrangement designed to forestall possible adverse effects upon workers arising from changing technology.

3. Because of the possibly profound impacts that the answer to this question may have upon labor-management

relations and upon other aspects of the economy, both sides of today's division in the Court agree that we must be especially careful to eschew a resolution of the issue according to our own economic ideas and to find one in what Congress has done. It is further agreed that in pursuing the search for the true intent of Congress we should not stop with the language of the statute itself, but must look beneath its surface to the legislative history.

4. It is recognized by court and counsel on both sides that the legislative history of § 8 (b)(4)(B), with which § 8 (e), it is agreed, is to be taken *pari passu,* contains only the most tangential references to problems connected with changing technology. Also, a circumspect reading of the legislative record evincing Congress' belief that the statutory provisions in question prohibited agreements and conduct of the kind involved in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, will not support a confident assertion that Congress also had in mind the sort of union-management activity before us here. And although it is arguable that Congress, in the temper of the times, would have readily accepted a proposal to outlaw work-preservation agreements and boycotts, even, as here, in their most limited sense, such a surmise can hardly serve as a basis for the construction of an existing statute.

5. We are thus left with a legislative history which, on the precise point at issue, is essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem these cases present. In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of the boycott as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of such an opaque

legislative record, a purpose to outlaw the kind of collective bargaining and conduct involved in these cases. Especially at a time when Congress is continuing to explore methods for meeting the economic problems increasingly arising in this technological age from scientific advances, this Court should not take such a step until Congress has made unmistakably clear that it wishes wholly to exclude collective bargaining as one avenue of approach to solutions in this elusive aspect of our economy.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE CLARK join, dissenting.

The Union's boycott of the prefitted doors clearly falls within the express terms of the federal labor law, which makes such conduct unlawful when "an object thereof" is "forcing or requiring any person to cease using . . . the products of any other . . . manufacturer . . . ." [1] And the collective bargaining provision that authorizes such a boycott likewise stands condemned by the law's prohibition of any agreement whereby an employer "agrees to cease or refrain from handling . . . any of the products of any other employer . . . ." [2] The Court undertakes a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases. But the fact is that the relevant history fully confirms that Congress meant what it said, and I therefore dissent.

The Court concludes that the Union's conduct in these cases falls outside the ambit of § 8 (b)(4) because it had an ultimate purpose that the Court characterizes as

[1] National Labor Relations Act, as amended, § 8 (b)(4)(B), 73 Stat. 543, 29 U. S. C. § 158 (b)(4)(B).

[2] National Labor Relations Act, as amended, § 8 (e), 73 Stat. 543, 29 U. S. C. § 158 (e).

"primary" in nature—the preservation of work for union members. But § 8 (b)(4) is not limited to boycotts that have as their only purpose the forcing of any person to cease using the products of another; it is sufficient if that result is "an object" of the boycott. Legitimate union objectives may not be accomplished through means proscribed by the statute. See *Labor Board* v. *Denver Bldg. Trades Council,* 341 U. S. 675, 688–689.[3] Without question, preventing Frouge from using prefitted doors was "an object" of the Union's conduct here.[4]

It is, of course, true that courts have distinguished "primary" and "secondary" activities, and have found the former permitted despite the literal applicability of

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[3] As originally drafted, § 8 (b)(4) proscribed only those strikes and boycotts that had "the purpose of" forcing employers to cease using products manufactured by another, etc. The significance of the adoption in conference of the language found in the Act was explained by Senator Taft: "Section 8 (b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.' Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful." 93 Cong. Rec. 6859, II Legislative History of the Labor Management Relations Act, 1947 (hereinafter 1947 Leg. Hist.), 1623.

[4] In *Local 598 Plumbers & Steamfitters,* 131 N. L. R. B. 787, the employees of a contractor, Scott Co., boycotted tunnel sections with prefabricated supports manufactured by Eaton. In rejecting a work-preservation "primary purpose" argument like that advanced in this case, the Board stated: "To say that the object of the [union] was to induce or compel Scott Company to assign the work of installing the disputed supports to the [union's] members . . . and not to force Scott Company to cease using Eaton's product or to cease doing business with Eaton is . . . to pretend that the latter object is not a necessary consequence of the former object. The two objects are inseparable. It is immaterial that one objective might be legal if the other is illegal." 131 N. L. R. B., at 800.

the statutory language. See *Local 761, Electrical Workers* v. *Labor Board,* 366 U. S. 667. But the Court errs in concluding that the product boycott conducted by the Union in these cases was protected primary activity. As the Court points out, a typical form of secondary boycott is the visitation of sanctions on Employer A, with whom the union has no dispute, in order to force him to cease doing business with Employer B, with whom the union does have a dispute. But this is not the only form of secondary boycott that § 8 (b)(4) was intended to reach. The Court overlooks the fact that a product boycott for work preservation purposes has consistently been regarded by the courts, and by the Congress that passed the Taft-Hartley Act, as a proscribed "secondary boycott."

In the interim between the passage of § 20 of the Clayton Act, 38 Stat. 738, and the enactment of the Norris-LaGuardia Act, 47 Stat. 70, this Court established that secondary strikes and boycotts were not exempt from the coverage of the antitrust laws. In *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, the antitrust laws were found applicable to a secondary boycott of the Employer A-Employer B type described above. A refusal to install stone that had not been cut by union labor was held an illegal secondary boycott in *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37. Then in *Painters District Council* v. *United States,* 284 U. S. 582, the Court on the authority of *Bedford Cut Stone* affirmed a decision holding that a product boycott for work preservation purposes was an illegal secondary boycott. The case involved a refusal to install prefinished kitchen cabinets by workmen who sought to secure the work of finishing for themselves.[5]

In 1932 Congress reversed *Duplex* and its progeny by passing the Norris-LaGuardia Act. See *Drivers' Union*

[5] See *United States* v. *Painters' District Council,* 44 F. 2d 58.

v. *Lake Valley Co.*, 311 U. S. 91, 100–103; *United States* v. *Hutcheson*, 312 U. S. 219, 229–231, 235–237. But in enacting the Taft-Hartley Act in 1947, 61 Stat. 136, Congress clearly provided that, quite apart from the antitrust laws or the Norris-LaGuardia Act, a product boycott of the kind involved in these cases was to be an unfair labor practice.

A proper understanding of the purpose of Congress in enacting § 8 (b)(4) in that year requires an appreciation of the impact of this Court's 1945 decision in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797. *Allen Bradley* was a private antitrust action brought against the electrical workers union in New York City. Union members were employed by contractors to install electrical equipment in buildings. Other union members were employed by New York City manufacturers of electrical equipment. As part of a conspiracy between the manufacturers, the contractors and the union, union members refused to install any electrical equipment manufactured outside the city. The Union's interest in this scheme is plainly set forth in the Court's opinion; it was to obtain "work for its own members." 325 U. S., at 799. "The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members." 325 U. S., at 800. Just as in the cases before us, the union enforced the product boycott to protect the work opportunities of its members.[6] The Court found the antitrust laws appli-

[6] The present cases, in which the boycotting employees were protecting their own work opportunities, cannot be distinguished from *Allen Bradley* on the ground that there the boycotting employees were protecting the work opportunities of other members of their union. For today in *Houston Insulation Contractors Assn.* v. *Labor Board, post*, p. 664, the Court applies its holding in the present cases to validate a boycott by employees to protect the work opportunities of other workers who were not even members of their union.

cable to the union's role in the scheme, but solely on the ground that the union had conspired with the manufacturers and contractors. Significantly for present purposes, the Court stated that "had there been no union-contractor-manufacturer combination the union's actions here . . . would not have been violations of the Sherman Act." 325 U. S., at 807. The Court further indicated that, by itself, a bargaining agreement authorizing the product boycott in question would not transgress the antitrust laws. 325 U. S., at 809. In conclusion, the Court recognized that allowing unions to effect product boycotts might offend sound public policy, but indicated that the remedy lay in the hands of the legislature:

> "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. That, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress." 325 U. S., at 810.

Congress responded when it enacted the Taft-Hartley Act. Although there have been differing views within the Court as to the scope of labor unions' exemption from the antitrust laws,[7] the Court in *Allen Bradley* had plainly stated that a work preservation product boycott by a union acting alone fell within that exemption. Two years after the *Allen Bradley* decision, the 80th Congress prohibited such product boycotts, but did so through the Taft-Hartley Act rather than by changing the antitrust

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[7] See *United Mine Workers* v. *Pennington,* 381 U. S. 657, 672; *Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676, 697, 735.

laws. The Senate report on § 8 (b)(4)(A)[8] of the bill that became law clearly indicates that Congress intended to proscribe not only the Employer A-Employer B model of secondary boycott, but also product boycotts like that involved in *Allen Bradley* and in the cases before us:

> "Under paragraph (A) strikes or boycotts, or attempts to induce or encourage such action, are made violations of the act if the purpose is to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute). This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See . . . *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U. S. 797.)" [9]

This clear expression of legislative intent is confirmed by the floor debates.[10] It is entirely understandable that

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[8] In the 1959 amendments to the National Labor Relations Act, § 8 (b)(4)(A) of the original Act was, with changes not here relevant, retitled § 8 (b)(4)(B). See n. 14, *infra*.

[9] S. Rep. No. 105, 80th Cong., 1st Sess., 22, I 1947 Leg. Hist. 428.

[10] A strong supporter of the Act, Senator Ellender, cited the New York City electrical workers' work preservation product boycott as an example of "the secondary boycott" that the Act would prohibit,

Congress should have sought to prohibit product boycotts having a work preservation purpose. Unlike most strikes and boycotts, which are temporary tactical maneuvers in a particular labor dispute, work preservation product boycotts are likely to be permanent, and the restraint on the free flow of goods in commerce is direct and pervasive, not limited to goods manufactured by a particular employer with whom the union may have a given dispute.

Although it was deeply concerned with the extensive restraints on trade caused by product boycotts, the 80th Congress specifically declined to amend the anti-trust laws to reach the *Allen Bradley* type of secondary

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adding that "one can readily understand that such procedure is unconscionable and that it results in high costs to those engaged in the erection of office buildings, homes, and stores . . . ." 93 Cong. Rec. 4132, II 1947 Leg. Hist. 1056. In contrasting the coverage of the Act with shortcomings in the measures suggested by the President, Senator Ball noted that the Administration's proposals "would not touch at all one of the worst situations which has arisen, such as that in New York where a local of the IBEW is using the secondary boycott to maintain a tight little monopoly for its own employees, its own members, and a few employers . . . ." 93 Cong. Rec. 5011, II 1947 Leg. Hist. 1491. Replying to criticisms by Senator Pepper, Senator Taft stated that Senator Pepper's position would entail approval of the New York City electrical workers' product boycott: "The principle announced by the Senator from Florida would make that stand lawful, as it is lawful today. Of course we propose to change the law in that respect." 93 Cong. Rec. 4199, II 1947 Leg. Hist. 1107. Opponents of the bill likewise recognized that the Act would prohibit work preservation boycotts, and at least one of them, Representative Javits, accepted this feature of § 8 (b) (4) but criticized the Act for also prohibiting secondary boycotts that he believed had legitimate purposes. He stated that such legitimate boycotts were "not the kind of boycott which is contrary to the public interest, that other kind results from a misguided labor union's efforts to keep certain goods out of a market because the labor union fears the effect of new inventions or new methods. But while dealing with this . . . abuse, the bill also has the effect of depriving labor of a right of self-preservation which has never been questioned before." 93 Cong. Rec. 6296, I 1947 Leg. Hist. 876.

boycott because it correctly understood that such practices were already directly covered by § 8 (b)(4) of the 1947 Act. The House Conference Report explained why a provision in the House draft that would have amended "the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged in combinations or conspiracies . . . [to] impose restrictions or conditions upon the purchase, sale, or use of any product, material, machine, or equipment . . ." was dropped in the conference that agreed on the Taft-Hartley Act. It stated that "Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." [11]

The Court seeks to avoid the thrust of this legislative history stemming from *Allen Bradley* by suggesting that in the present cases, the product boycott was used to preserve work opportunities traditionally performed by the Union, whereas in *Allen Bradley* the boycott was originally designed to create new job opportunities. But it is misleading to state that the union in *Allen Bradley* used the product boycott as a "sword." The record in that case establishes that the boycott was undertaken for the defensive purpose of restoring job opportunities lost in the depression. Moreover, the Court is unable to cite anything in *Allen Bradley,* or in the Taft-Hartley Act and its legislative history, to support a distinction in the applicability of § 8 (b)(4) based on the origin of the job opportunities sought to be preserved by a product boycott. The Court creates its sword and shield distinction out of thin air; nothing could more clearly indicate

[11] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 65, I 1947 Leg. Hist. 569.

that the Court is simply substituting its own concepts of desirable labor policy for the scheme enacted by Congress.

The courts and the National Labor Relations Board fully recognized that Congress had intended to ban product boycotts along with other forms of the secondary boycott, and that it had not distinguished between "good" and "bad" secondary boycotts.[12] In a 1949 decision involving § 8 (b)(4), the Board stated that "Congress considered the 'product boycott' one of the precise evils which that provision was designed to curb."[13] The courts agreed. In *Joliet Contractors Assn.* v. *Labor Board,* 202 F. 2d 606, cert. denied, 346 U. S. 824, the Court of Appeals for the Seventh Circuit held that a glaziers' union boycott of preglazed sashes to preserve work they had traditionally performed was an unfair labor practice under § 8 (b)(4). A similarly motivated boycott of prefabricated doors by construction workers was likewise held illegal by the Court of Appeals for the Sixth Circuit in *Labor Board* v. *Local 11, United Bro. of Carpenters,* 242 F. 2d 932. There were no court decisions to the contrary prior to the 1959 amendments to the National Labor Relations Act. Although it made extensive other changes in § 8 at that time, Congress did not disturb

[12] In the floor debates, Senator Taft stated that "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 Cong. Rec. 4198, II 1947 Leg. Hist. 1106.

This reading of § 8 (b)(4) is confirmed by the Senate Minority Report, which complained that it "ignores valid distinctions between justified and unjustified boycotts based on the objective of the union in carrying on such a boycott . . . . It indiscriminately bans all such boycotts, whether justified or not." S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., 20, I 1947 Leg. Hist. 482.

[13] *United Brotherhood of Carpenters,* 81 N. L. R. B. 802, 806, enforced, 184 F. 2d 60.

the law firmly established by these decisions.[14] The conclusion is inescapable that the Union's boycott of the prefitted doors in these cases clearly violated § 8 (b)(4)(B).[15]

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[14] In addition to recasting the original § 8 (b) (4) (A) as § 8 (b) (4) (B), the 1959 amendments produced §§ 8 (b) (4) (i) and (ii) expanding the modes of union pressure covered by § 8 (b) (4). See *Labor Board* v. *Servette, Inc.*, 377 U. S. 46, 51–54. Among the changes was the deletion of the Act's original requirement that union pressure on individuals for the objectives proscribed must be pressure commanding "concerted" activity on the part of those individuals. This was the legislative response to *Labor Board* v. *International Rice Milling Co.*, 341 U. S. 665, where the Court had indicated that jobsite picketing directed at truck drivers employed by a customer of the struck employer was not an unfair labor practice because there was no attempt to persuade the truck drivers to engage in "concerted" activity. In addition to dropping the "concerted" activity requirement and thus bringing secondary conduct directed at an individual employee within § 8 (b) (4), Congress also added the proviso that nothing in the amended section "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The purpose of this proviso was simply to make clear that Congress did not intend to disturb another ground of the Court's decision in *Rice Milling*—that jobsite picketing of the employees of others was protected primary activity. See *Local 761, Electrical Workers* v. *Labor Board*, 366 U. S. 667, 681.

Thus, the proviso was not intended to modify the distinction between proscribed secondary boycotts and permitted primary strikes and picketing embodied in the original Act. The conference report on the 1959 amendments specifically states that "the changes in section 8 (b) (4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute." H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 38, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter 1959 Leg. Hist.), 942. Congress thus intended no change in the Taft-Hartley Act's proscription of product boycotts, which court decisions had consistently recognized as "secondary" and illegal.

[15] What has been said establishes that product boycotts are normally illegal regardless of the employer's contractual relations with the supplier of the boycotted goods, or with other persons. Thus it appears that the concept of "control" which the Board applied in these cases lacks relevance to the correct determination of whether a

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In 1959 Congress enacted § 8 (e) to ensure that § 8 (b)(4)'s ban on boycotts would not be circumvented by unions that obtained management's agreement to practices which would give rise to a § 8 (b)(4) violation if the union attempted unilaterally to enforce their observance. In the *Sand Door* decision in 1958,[16] the Court had indicated that the execution of a union-employer agreement authorizing a secondary boycott, and the employer's observance of that agreement, did not constitute an unfair labor practice. Section 8 (e) was the congressional response. Congress also added a new paragraph (A) to § 8 (b)(4), proscribing union pressure on an employer to force him to execute an agreement banned by § 8 (e). It is thus evident that §§ 8 (b)(4)(A), 8 (b)(4)(B) and 8 (e) must be construed in harmony as prohibiting various union methods of implementing the type of boycotts that Congress sought to prohibit in the Taft-Hartley Act. As the Court observes, the sweep of § 8 (e) is no greater than that of § 8 (b)(4). By the same logic, it is no narrower. The relation between the two sections was set forth in *Ohio Valley Carpenters*, 136 N. L. R. B. 977, 987:

> "[T]he validity of a restrictive agreement challenged under 8 (e) must be considered in terms of whether that agreement, if enforced by prohibited means, would result in an unfair labor practice under Section 8 (b)(4)(B). Clearly, there is little point and no logic in declaring an agreement lawful under 8 (e), but in finding its enforcement condemned under 8 (b)(4)(B) . . . ."

Since, as has been shown, the product boycott enforced by the union in the cases before us violates § 8 (b)

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§ 8 (b)(4)(B) violation has occurred. Cf. n. 3 to the Court's opinion, *ante*, at 616.

[16] *Local 1976, United Brotherhood of Carpenters* v. *Labor Board*, 357 U. S. 93.

(4)(B), it follows that Rule 17, the provision in the collective bargaining agreement applied to authorize this same boycott by agreement, equally violates § 8 (e). As the Court points out, an important element in the political impetus behind the enactment of § 8 (e) was congressional opposition to "hot cargo" boycotts imposed by the Teamsters Union. But the language and logic of § 8 (e) has a broader scope, and the legislative history clearly establishes that § 8 (e) was intended to prohibit all agreements authorizing product boycotts violative of § 8 (b)(4).[17]

The content of the construction industry proviso to § 8 (e) is also persuasive of that section's principal scope. That proviso exempts only construction industry agreements "relating to the contracting or subcontracting of work to be done at the site of the construction . . . ." The logical inference from this language is that boycotts of products shipped from outside the worksite are prohibited by § 8 (e), and that inference is confirmed by the House Conference Report:

> "It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from

[17] The Court and the Board point to H. R. Rep. No. 741, 86th Cong., 1st Sess., 21, I 1959 Leg. Hist. 779, which noted the similarity in language between § 8 (b)(4) and a provision in a Senate bill somewhat similar to what became § 8 (e) and characterized the latter as preserving "the established distinction between primary activities and secondary boycotts." But the "established distinction" embodied in the Taft-Hartley Act and recognized by the courts classified product boycotts as secondary and illegal.

The floor debates show that both proponents and opponents of the Landrum-Griffin bill acknowledged that it would prohibit product boycotts, including those with work preservation purposes. For example, see 105 Cong. Rec. 17884, II 1959 Leg. Hist. 1428 (remarks of Senator Morse); 105 Cong. Rec. 15545, II 1959 Leg. Hist. 1581 (remarks of Representative Rhodes).

> section 8 (e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction." [18]

The Court indeed recognizes that the § 8 (e) construction industry proviso does not immunize product boycotts from the reach of that section. By a curious inversion of logic, the Court purports to deduce from this fact the proposition that product boycotts are not covered by § 8 (e). But if § 8 (e) and its legislative history are approached without preconceptions, it is evident that Congress intended to bar the use of any provisions in a collective agreement to authorize the product boycott involved in the cases before us.

Finally, the Court's reliance on *Fibreboard Paper Prods. Corp.* v. *Labor Board*, 379 U. S. 203, is wholly misplaced. That case involved an employer's use of workers hired by an independent contractor to perform in its own plant maintenance work formerly done by its own employees. This reassignment of work was held by the Court to be a mandatory subject of collective bargaining. The circumscribed nature of the decision is established by the Court's careful observation that

> "The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant . . . the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U. S., at 213.

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[18] H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39, I 1959 Leg. Hist. 943.

An employer's decision as to the products he wishes to buy presents entirely different issues. That decision has traditionally been regarded as one within management's discretion, and *Fibreboard* does not indicate that it is a mandatory subject of collective bargaining, much less a permissible basis for a product boycott made illegal by federal labor law.

The relevant legislative history confirms and reinforces the plain meaning of the statute and establishes that the Union's product boycott in these cases and the agreement authorizing it were both unfair labor practices. In deciding to the contrary, the Court has substituted its own notions of sound labor policy for the word of Congress. There may be social and economic arguments for changing the law of product boycotts established in § 8, but those changes are not for this Court to make.

I respectfully dissent.

HOUSTON INSULATION CONTRACTORS ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 206. Argued January 19, 1967.—Decided April 17, 1967.*

In a collective bargaining agreement between a contractors' association and Local 22 of an insulators and asbestos workers' union, it is provided that the employer will not contract out work relating to the preparation, distribution and application of pipe and boiler coverings. In No. 206, Johns-Manville (J-M), an association member engaged in a construction project, purchased from a manufacturer precut stainless steel bands for fastening insulation material around pipes. Since customarily the cutting work was reserved by the collective bargaining agreement for J-M employee members of Local 22, the union instructed its members at the jobsite not to install the precut bands. The association charged Local 22 with violating § 8 (b) (4) (B) of the National Labor Relations Act. The NLRB, holding that the union's conduct had been taken to protest a deprivation of work traditionally performed by its members and thus constituted primary activity, dismissed the charge, and the Court of Appeals affirmed. The association petitioned for certiorari. In No. 413, Armstrong Company, an association member, was engaged in a construction project within the jurisdiction of Local 113, a sister union of Local 22. Armstrong bought from a manufacturer asbestos fittings upon which had already been performed the cutting and mitering operations customarily performed by Local 22 at an Armstrong shop. Local 113's agents informed Armstrong that the fittings would not be installed unless the cutting and mitering had been performed by its sister Local 22. The association charged Local 113 with violating § 8 (b) (4) (B). The NLRB having found Local 113's conduct had been taken to preserve work customarily performed by Armstrong's own employees, and was thus primary, dismissed the charge. The Court of

*Together with No. 413, *National Labor Relations Board* v. *Houston Insulation Contractors Association,* also on certiorari to the same court.

Appeals reversed, holding that Local 113 had no economic interest in Local 22's breach of contract claim and that therefore Local 113 was coercing Armstrong not for its own benefit but for that of another local at the expense of a neutral employer. The NLRB petitioned for certiorari. *Held:*

1. In No. 206, there having been substantial evidence to support the NLRB's finding, the judgment is affirmed on the authority of *National Woodwork Mfrs. Assn.* v. *NLRB, ante,* p. 612. Pp. 666–667.

2. In No. 413, the NLRB's finding, supported by substantial evidence, was that Local 113's object was to influence Armstrong in a dispute with Armstrong employees, and not for its effect elsewhere. Since collective activity by employees of the primary employer was involved, the purpose of which was to affect its labor policies, the conduct of the members of Local 113 in support of their fellow employees was not secondary and thus not violative of § 8 (b) (4) (B). *National Woodwork Mfrs. Assn., supra,* followed. Pp. 668–669.

357 F. 2d 182, affirmed in No. 206, reversed in No. 413.

W. D. Deakins, Jr., argued the cause and filed briefs for petitioner in No. 206 and for respondent in No. 413.

Norton J. Come argued the cause for respondent in No. 206 and for petitioner in No. 413. With him on the brief were *Solicitor General Marshall, Arnold Ordman* and *Dominick L. Manoli.*

Mr. Justice Brennan delivered the opinion of the Court.

These are companion cases to Nos. 110 and 111, *National Woodwork Mfrs. Assn.* v. *NLRB,* and *NLRB* v. *National Woodwork Mfrs. Assn., ante,* p. 612. A provision of the collective bargaining agreement between the Houston Insulation Contractors Association and Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL–CIO, provides, in pertinent part, that the employer will not contract out work relating to "the preparation, distribution and application of pipe and boiler coverings." In No. 206,

the Contractors Association seeks review of the dismissal by the National Labor Relations Board, 148 N. L. R. B. 866, affirmed by the Court of Appeals for the Fifth Circuit, 357 F. 2d 182, 189, of § 8 (b)(4)(B) charges brought against Local 22 because of its activities designed to enforce the agreement. National Labor Relations Act, as amended, 73 Stat. 543. In No. 413, the Board challenges the holding of the Court of Appeals, reversing the Board, that similar conduct by a sister Local 113, designed to protect the work guaranteed to Local 22 by the agreement, violated § 8 (b)(4)(B). We granted both petitions and set them for argument with Nos. 110 and 111. We affirm in No. 206 and reverse in No. 413.

No. 206: Johns-Manville Company, a member of the Contractors Association, engaged in a construction project in Texas City, Texas, purchased from Techalloy Corporation, a manufacturer of insulation materials, stainless steel bands used to fasten asbestos material around pipes to be insulated. The bands had been precut to specification by Techalloy's employees. Customarily, Johns-Manville had ordered rolls of wire which were then cut to size by members of Local 22. The cutting work was reserved for Johns-Manville employee members of Local 22 by the quoted provision of the collective bargaining agreement between the Association and the Local. Agents of Local 22 instructed its members on the jobsite not to install the precut bands. After the hearing on the complaint issued on the Contractors Association's charge that this conduct violated § 8 (b)(4)(B), the Board held that "[t]he conduct complained of herein was taken to protest . . . a deprivation of work, its object being to protect or preserve for employees certain work customarily performed by them. This conduct constituted primary activity and is protected by the Act . . . ." 148 N. L. R. B., at 869. The Court of

Appeals found that there was substantial evidence to support this finding and sustained it.[1] The Association here attacks the substantiality of the evidence supporting the Board's finding, but we agree with the Court of Appeals. See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. In that circumstance our holding today in *National Woodwork Mfrs. Assn.* v. *NLRB, supra,* requires an affirmance in No. 206.

No. 413: Armstrong Company, a member of the Contractors Association, was engaged in a construction project in Victoria, Texas, within the jurisdiction of Local 113 of the Heat and Frost Insulators and Asbestos Workers. The cutting and mitering of asbestos fittings for such jobs was customarily performed at Armstrong's Houston shop, which was within Local 22's jurisdiction. Armstrong purchased from Thorpe Company, a manufacturer of insulation materials, asbestos fittings upon which the cutting and mitering work had already been performed. Agents of Local 113 informed Armstrong that fittings would not be installed unless the cutting and mitering had been performed by its sister Local 22 as provided by Local 22's bargaining agreement.[2] The Board found,

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[1] The Association did not charge the Union with violation of § 8 (e) (73 Stat. 543), and the validity of the work-preservation clause was not an issue in the hearing before the Board. But the Board appears to have assumed that the clause was valid in holding that the object of the Union's conduct pursuant thereto was a primary one of work preservation. The Court of Appeals expressly held, as an aspect of its finding that § 8(b)(4)(B) was not violated by Local 22's activities, that the clause was valid. 357 F. 2d, at 188–189.

[2] A mitered fitting is described by the president of Thorpe Company as "an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to."

as it had in No. 206, that the object of this refusal was primary—the preservation of work customarily performed by Armstrong's own employees. 148 N. L. R. B., at 869. The Court of Appeals reversed on the ground that Local 113 "had no economic interest in Local 22's claim of breach of contract," and that therefore "it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer." 357 F. 2d, at 189. We disagree.

National Woodwork Mfrs., supra, holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity. "Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union." [3] The finding of the Board, supported by substantial evidence, was that Local 113's object was to influence Armstrong in a dispute with Armstrong employees, and not for its effect elsewhere.

Primary employees have traditionally been assured the right to take concerted action against their employer to gain the "mutual aid or protection" guaranteed by § 7 of the National Labor Relations Act, as amended, 61 Stat. 140, whether or not the resolution of the particular dispute directly affects all of them. As Judge Learned Hand stated in *Labor Board* v. *Peter Cailler Kohler Swiss Chocolates Co.,* 130 F. 2d 503, 505–506:

> "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual

[3] *United Association of Journeymen, Local 106* (Columbia-Southern Chemical Corporation), 110 N. L. R. B. 206, 209.

> aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute, or because only engaged in by some of the primary employees, and not the entire group. Since that situation does not involve the employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary and, therefore, not a violation of § 8 (b)(4)(B).

The judgment of the Court of Appeals in No. 206 is affirmed and in No. 413 is reversed.

It is so ordered.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, and MR. JUSTICE STEWART dissent for the reasons expressed in MR. JUSTICE STEWART's dissenting opinion in *National Woodwork Mfrs. Assn.* v. *NLRB, ante,* p. 650.

THORPE *v.* HOUSING AUTHORITY OF THE CITY OF DURHAM.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 712. Argued March 21, 1967.—Decided April 17, 1967.

Petitioner was a tenant in a federally assisted public housing project in Durham, with a lease providing for a month-to-month tenancy terminable by either party on 15 days' notice. The day following her election as president of a tenants' organization she was given a notice of cancellation of her lease with no reasons stated. Respondent did not accede to her demands for an explanation but brought an ejectment action when she refused to vacate the premises. An eviction judgment was affirmed by the North Carolina Supreme Court despite petitioner's contention that she was constitutionally entitled to notice containing the reasons for cancellation and a hearing thereon, and her suggestion that the eviction was invalid because it was based on her constitutionally protected associational activities. Following the grant of certiorari, the Department of Housing and Urban Development issued a directive to local housing authorities requiring that tenants be given the reasons for eviction and an opportunity to reply or explain, and that records be kept of evictions, the reasons therefor, and summaries of conferences with tenants in connection therewith. *Held:* Since this case would assume a different posture if the procedure in the directive were followed, the judgment is vacated and the case remanded for such further proceedings as may be appropriate in light of the directive.

267 N. C. 431, 148 S. E. 2d 290, vacated and remanded.

James M. Nabrit III argued the cause for petitioner. With him on the briefs were *Jack Greenberg, Charles Stephen Ralston, Charles H. Jones, Jr.,* and *Michael Meltsner.*

Daniel K. Edwards argued the cause for respondent. With him on the brief was *William Y. Manson.*

PER CURIAM.

In November 1964, the petitioner became a tenant in McDougald Terrace, a federally assisted, low-rent public

housing project owned and managed by the Housing Authority of the City of Durham, North Carolina. The lease provided for a tenancy from month to month, and gave both the tenant and the Authority the right to terminate by giving notice at least 15 days before the end of any monthly term. On August 10, 1965, the petitioner was elected president of a McDougald Terrace tenants' organization. The next day the Authority gave her notice of termination of her tenancy as of August 31. The notice did not give any reasons for the cancellation, and the Authority declined to accede to the petitioner's demands for an explanation. The petitioner refused to vacate the premises, and the Authority thereupon brought a summary ejectment action in the Justice of the Peace Court in Durham. The Authority there obtained a judgment of eviction, which was affirmed on appeal by the Superior Court of Durham County and the Supreme Court of North Carolina.[1] We granted certiorari. 385 U. S. 967. The petitioner has remained in possession of her apartment pursuant to a stay granted by the North Carolina Supreme Court.

The petitioner contends that she was constitutionally entitled to notice setting forth the reasons for the termination of her lease, and a hearing thereon. She also suggests that her eviction was invalid because it allegedly was based on her participation in constitutionally protected associational activities.[2] We find it unnecessary

[1] 267 N. C. 431, 148 S. E. 2d 290.

[2] In the Superior Court proceedings, it was stipulated and agreed: "that if Mr. C. S. Oldham, the Executive Director of the Housing Authority of the City of Durham, were present and duly sworn and were testifying, he would testify that whatever reason there may have been, if any, for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected president of any group organized in McDougald Terrace, and specifically it was not for the reason that she was elected president of any group organized in McDougald Terrace on August 10, 1965 . . . ."

to reach the large issues stirred by these claims, because of a significant development that has occurred since we granted the writ of certiorari.

On February 7, 1967, the Department of Housing and Urban Development issued a directive to local housing authorities. After reciting the fact that dissatisfaction had been expressed with eviction procedures in low-rent housing projects and that suits had been brought to challenge evictions in which the local authority had not given any reason for its action, the circular stated:

> "Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish."

The circular goes on to require local authorities to keep future records of evictions, the reasons therefor, and summaries of any conferences held with tenants in connection with evictions.[3]

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[3] The text of the circular is as follows:

"SUBJECT: Terminations of Tenancy in Low-Rent Projects

"Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

"Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

"In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from

While the directive provides that certain records shall be kept commencing with the date of its issuance, there is no suggestion that the basic procedure it prescribes is not to be followed in all eviction proceedings that have not become final. If this procedure were accorded to the petitioner, her case would assume a posture quite different from the one now presented.[4] Compare *Wabash R. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131; *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Klapprott* v. *United States,* 335 U. S. 601.

The judgment of the Supreme Court of North Carolina is accordingly vacated, and the case remanded for such

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time to time by HUD representatives and shall contain the following information:

"1. Name of tenant and identification of unit occupied.

"2. Date of notice to vacate.

"3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.

"4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.

"5. Date and description of final action taken.

"The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

"[s] DON HUMMEL
"Assistant Secretary for Renewal
"and Housing Assistance"

The superseded circular of May 31, 1966, stated that the federal authorities "strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given [eviction] notices of the reasons for this action."

[4] Although the circular does not specify the authority under which it is issued, federal authorities are given general statutory power to make "such rules and regulations as may be necessary to carry out" federal programs for assistance to low-rent housing projects. United States Housing Act of 1937, § 8, 50 Stat. 891, as amended, 42 U. S. C. § 1408. The legal effect of the circular, the extent to which it binds local housing authorities, and whether it is in fact applicable to the petitioner are questions we do not now decide.

further proceedings as may be appropriate in the light of the February 7 circular of the Department of Housing and Urban Development.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

Petitioner and her children have been tenants in a low-income housing project constructed with federal and state funds and operated by the Housing Authority of the City of Durham, an agency of the State of North Carolina. The Housing Authority was established under state law and is "a public body and a body corporate and politic, exercising public powers." N. C. Gen. Stat. § 157–9 (1964). It has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions" of the North Carolina Housing Authorities Law (N. C. Gen. Stat. § 157–1 *et seq.* (1964)), including the powers "to manage as agent of any city or municipality . . . any housing project constructed or owned by such city" and "to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project." *Id.*, § 157–9 (1964).

The lease under which petitioner has occupied the project had an initial term from November 11 to November 30, 1964, and provided that it would be automatically renewed thereafter for successive terms of one month, provided there were no changes in income or family composition and no violations of the lease terms. The lease provides that "[t]he Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen . . . days prior to the last day of the term." The lease "shall be automatically terminated at the option of the Management" with an immediate right of re-entry and all notices required by law waived, if the tenant misrepresents a material fact in his application

or if "the Tenant fails to comply with any of the provisions of [the] lease."

As I have said, petitioner and her children moved into their home in the project on November 11, 1964. All apparently went well for eight months; the record reveals no complaints from the manager of the housing project. On August 10, 1965, petitioner was elected president of the Parents' Club, a group composed of tenants of the housing project. On August 11, 1965, the Housing Authority's Executive Director delivered a notice that petitioner's lease would be canceled effective August 31, at which time she would have to vacate the premises. No reasons were given for the sudden cancellation. The Authority merely referred to the provision of the lease stating that management may terminate the lease by giving the tenant notice 15 days prior to the last day of the term.

Petitioner requested a hearing to determine the reason for the termination; the request was summarily denied. Since she was given no reason and no hearing, petitioner refused to vacate her home. The Housing Authority brought a summary ejectment action in the Justice of the Peace Court of Durham; the court ordered that petitioner and her family be removed from their home. Petitioner appealed to the Superior Court. It was stipulated that the Superior Court could make findings and decide the case on the basis of the stipulations and affidavits. Petitioner's motion to quash claimed that her "eviction primarily resulted from her community activities as an organizer of tenants, thus constituting an unconstitutional abridgement of her freedom of expression and a denial of equal protection of the laws." Her affidavit alleged "that her eviction was prompted by [the] Manager of the Housing Authority, who wants to get her out of the project because of her efforts to organize the tenants of [the housing project] . . . ." It was stip-

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ulated that the Executive Director of the Housing Authority would testify that "whatever reason there may have been, *if any,* for giving notice to [petitioner] of the termination of her lease, it was not for the reason that she was elected president of any group organized in [the housing project] . . . ." (Emphasis added.) The Superior Court found that petitioner had not been evicted due to her efforts to organize the tenants nor due to her election as president of the Parents' Club. The court held that the Housing Authority was not required to give petitioner a hearing and was not required to give any reason for the lease termination.

The North Carolina Supreme Court affirmed. 267 N. C. 431, 148 S. E. 2d 290. It held that the Housing Authority is the "owner" of the apartment and that petitioner "has no right to occupy it except insofar as such right is conferred upon her by the written lease which she and the [Housing Authority] signed." *Id.,* at 433, 148 S. E. 2d, at 291. Since petitioner had refused to quit after the Housing Authority terminated the lease, she could be evicted so as to restore to the Authority "the possession of that which belongs to it." *Id.,* at 433, 148 S. E. 2d, at 291–292. The court thought it "immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant . . . ." *Id.,* at 433, 148 S. E. 2d, at 292. Under the rationale of the North Carolina Supreme Court, a public housing authority, organized under state law and operating a housing project financed by federal and state funds, is assimilated to the position of a private property owner who can terminate a lease for any reason or no reason at all.

The circular upon which the Court bases its decision to vacate and remand comes from the office of the Assistant Secretary for Renewal and Housing Assistance and was issued February 7, 1967, after we granted certiorari.

It is directed to "Local Housing Authorities, Assistant Regional Administrators for Housing Assistance, and HAA Division and Branch Heads" and reads in part:

> "Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish."

It goes on to provide that "[i]n addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing," specifies the information to be contained in the record and provides that the records are to be available to HUD representatives for review.

This circular superseded a prior circular which stated that the Public Housing Administration "strongly urge[s], as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given [notices to vacate] of the reasons for this action."

This case presents two issues, neither of which is resolved by the circular. The first is whether a tenant in a publicly assisted housing project operated by a state agency can be evicted for any reason or no reason at all. The second is whether a tenant in such a housing project can be evicted for the exercise of a First Amendment right.

The circular merely provides that the tenant be told "the reasons for the eviction, and [be] given an opportunity to make such reply or explanation as he may wish." From this it may be inferred that the Housing Authority must have a reason for the eviction. But the circular does not specifically state the reasons which can support eviction; it does not state that a tenant cannot

be evicted for his stand on civil rights; it does not even broach the subject. It is argued that the circular provides that the lease can be terminated only after an administrative hearing. It certainly would be desirable if a housing authority held a hearing prior to the termination of the lease. The circular, which may be no more than a press release, does not so provide. Moreover, is there a constitutional requirement for an administrative hearing where, as here, the tenant can have a full judicial hearing when the authority attempts to evict him through judicial process? Petitioner has had a hearing in the state courts. The immediate question is what reasons can support an eviction after hearing.

Over and over again we have stressed that "the nature and the theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power" (*Yick Wo* v. *Hopkins,* 118 U. S. 356, 369–370) and that the essence of due process is "the protection of the individual against arbitrary action." *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 302; *Slochower* v. *Board of Education,* 350 U. S. 551, 559. Any suggestion to the contrary "resembles the philosophy of feudal tenure." Reich, The New Property, 73 Yale L. J. 733, 769. It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." *Rudder* v. *United States,* 96 U. S. App. D. C. 329, 331, 226 F. 2d 51, 53.

The recipient of a government benefit, be it a tax exemption (*Speiser* v. *Randall,* 357 U. S. 513), unemploy-

ment compensation (*Sherbert* v. *Verner,* 374 U. S. 398), public employment (*Slochower* v. *Board of Education,* 350 U. S. 551), a license to practice law (*Spevack* v. *Klein,* 385 U. S. 511), or a home in a public housing project, cannot be made to forfeit the benefit because he exercises a constitutional right. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 328–329, the Court said that "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." This was in the tradition of *Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583, 594, where the Court emphasized that "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." In *Speiser* v. *Randall, supra,* at 518, we recognized that "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." No more can a tenant in a public housing project be evicted for the exercise of her right of association, a right protected by the First and Fourteenth Amendments. See, *e. g., NAACP* v. *Alabama,* 357 U. S. 449, 460; *Bates* v. *Little Rock,* 361 U. S. 516, 523; *Shelton* v. *Tucker,* 364 U. S. 479, 486; *Louisiana* v. *NAACP,* 366 U. S. 293, 296; *NAACP* v. *Button,* 371 U. S. 415, 430–431.

This does not mean that a public housing authority is powerless to evict a tenant. A tenant may be evicted if it is shown that he is destroying the fixtures, defacing the

walls, disturbing other tenants by boisterous conduct and for a number of other reasons which impair the successful operation of the housing project. Eviction for such reasons will completely protect the viability of the housing project without making the tenant a serf who has a home at the pleasure of the manager of the project or the housing authority.

Here, the Superior Court found that petitioner had not been evicted because she had engaged in efforts to organize the tenants of the housing project or because she had been elected president of the Parents' Club. On appeal to the North Carolina Supreme Court, petitioner contended that the finding was erroneous. The State Supreme Court did not pass on the finding of the Superior Court since it concluded that the Housing Authority could terminate the lease and evict petitioner for any reason.* As I have said, it is argued that the circular of the Department of Housing and Urban Development

*In the statement of facts preceding the names of counsel, there is an assertion that "[t]he [Superior] [C]ourt made findings of fact, each of which is supported by stipulations or by the evidence in the record." 267 N. C., at 432, 148 S. E. 2d, at 290–291. Following this is a recitation of the findings of the Superior Court, including the finding that "[w]hatever may have been the [Authority's] reason for terminating the lease, it was neither that the defendant had engaged in efforts to organize the tenants of [the housing project] nor that she was elected president of a group which was organized in [the housing project] . . . ." *Id.*, at 432, 148 S. E. 2d, at 291. My Brother WHITE argues that this amounted to an affirmance of the Superior Court's finding as supported by the evidence. But, to me, such a claim is belied by the court's statement, in the body of its opinion, that it was "immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant." *Id.*, at 433, 148 S. E. 2d, at 292. This indicates that the North Carolina Supreme Court did not make an independent review of the record to determine whether the Superior Court's finding as to the cause of eviction was supported by the evidence since it thought the reason for eviction immaterial.

answers petitioner's claim that she was entitled to an administrative hearing before her lease was terminated. But petitioner has already had a hearing in the state courts. And the status of the circular, whether a regulation or only a press release, is uncertain, an uncertainty which the Court does not remove. Vacating and remanding "for such further proceedings as may be appropriate in the light of the . . . circular" therefore furnishes no guidelines for the state courts on remand, and does not dispose of the basic issue presented. I would vacate and remand to the state courts to determine the precise reason why petitioner was evicted and whether that reason was within the permissible range for state action against the individual.

MR. JUSTICE WHITE, dissenting.

I would agree with MR. JUSTICE DOUGLAS that there are reasons for which the Authority could not terminate petitioner's lease and that the ground alleged by the petitioner to be the cause of her eviction is one of them. The trial court rejected petitioner's allegations. This finding was affirmed by the North Carolina Supreme Court as supported by the evidence, although it did say, erroneously I think, that the reasons for the eviction were "immaterial."* There could have been a more adequate record made as to the basis for the eviction but petitioner was afforded a full due process hearing in the lower court and had the opportunity to explore fully why she was evicted. I do not view the federal circular as significant to the resolution of this case, and would not remand on that basis.

I would affirm.

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*The statement of facts in the Supreme Court opinion, upon which I indeed rely, see footnote of my Brother DOUGLAS' concurring opinion, is, as I understand it, prepared by the court and in North Carolina is considered official.

LAVERNE ET AL. *v.* INCORPORATED VILLAGE OF LAUREL HOLLOW ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 984. Decided April 17, 1967.

18 N. Y. 2d 635, 219 N. E. 2d 294, appeal dismissed.

Monroe H. Freedman for appellants.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment sought to be reviewed rests upon an adequate state ground.

WALKER *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 1014. Decided April 17, 1967.

241 Ark. 300, 408 S. W. 2d 905, appeal dismissed and certiorari denied.

Fletcher Jackson for appellant.

Joe Purcell, Attorney General of Arkansas, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

STEWART ET AL. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1034. Decided April 17, 1967.

Appeal dismissed and certiorari denied.

Bernard Kleiman, Gilbert A. Cornfield, Gilbert Feldman, Jason Gesmer and *Alton Sharpe* for appellants.

Harlan L. Hackbert for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

DACEY ET AL. *v.* GRIEVANCE COMMITTEE OF THE BAR OF FAIRFIELD COUNTY.

APPEAL FROM THE SUPREME COURT OF CONNECTICUT.

No. 1049. Decided April 17, 1967.

154 Conn. 129, 222 A. 2d 339, appeal dismissed.

George A. Saden for appellants.

David Goldstein and *Jacob D. Zeldes* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MILLER BREWING CO. *v.* JONES, DIRECTOR OF REVENUE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1067. Decided April 17, 1967.

35 Ill. 2d 86, 219 N. E. 2d 494, appeal dismissed.

Frank H. Uriell and *Paul A. Teschner* for appellant.

William G. Clark, Attorney General of Illinois, and *Richard A. Michael* and *John J. O'Toole,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

UTAH PIE CO. *v.* CONTINENTAL BAKING CO. ET AL.

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

No. 18. Argued January 17, 1967.—Decided April 24, 1967.

This suit for treble damages and an injunction by petitioner, a local bakery company in Salt Lake City, against three large companies each of which is a major factor in the frozen pie market in one or more regions of the country, charged a conspiracy under §§ 1 and 2 of the Sherman Act and violations by each respondent of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. The major competitive weapon in the Salt Lake City market was price and for most of the period petitioner, which had the advantage of a local plant, had the lowest prices. Each respondent at some time engaged in discriminatory pricing and thereby contributed to a deteriorating price structure during the relevant period. Respondent Pet Milk sold pies to Safeway under the latter's label at a price well below that for its proprietary label pies; it sold an economy pie in the Salt Lake City market at a price which was at times lower than that in other markets; and it sold its proprietary label quality pies in Salt Lake City for some months at prices lower than those in California, despite freight charges from its California plant. Pet admitted sending a spy into petitioner's plant during its negotiations with Safeway, but denied using what it learned. Pet did not deny that it suffered losses on its pies during the greater part of the period involved. In June 1961 respondent Continental Baking cut its price in the Utah area to a level well below that applicable elsewhere, and less than its direct cost plus an allocation for overhead. Carnation Co., whose share of the market slipped in 1959, slashed its price in 1960, and for eight months of that year its Salt Lake City price was lower than that in other markets, and that trend continued in 1961. The jury found for respondents on the conspiracy charge and for petitioner on the price discrimination charge. Judgment was entered for petitioner for damages but the Court of Appeals reversed, holding that the evidence was insufficient to support a finding of probable injury to competition within the meaning of § 2 (a). The court concluded that Pet's price differential to Safeway was cost justified, and that Pet's

other discriminations did not provide sufficient basis on which the jury could have found a reasonably possible injury to petitioner as a competitive force or to competition generally. It concluded that the conduct of Continental and Carnation had only minimal effect, that it had not injured petitioner as a competitor, and that it had not substantially lessened competition. *Held:*

1. Section 2 (a) does not forbid price competition but it does provide that sellers may not sell goods to different purchasers at different prices if the result may be to injure competition in either the sellers' or the buyers' market unless such discriminations are justified as permitted by the Act. P. 702.

(a) There can be a reasonably possible injury to competition even though the volume of sales is rising and some of the competitors in the market continue to operate at a profit. P. 702.

(b) Section 2 (a) does not come into play solely to regulate the conduct of price discriminators who consistently undercut the prices of other competitors. P. 702.

2. The existence of predatory intent bears on the likelihood of injury to competition. Pp. 702–703.

(a) There was evidence of predatory intent with respect to each of the respondents and there was other evidence upon which the jury could find the requisite injury to competition. Pp. 702–703.

(b) Section 2 (a) reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact. P. 703.

3. Since the statutory test is one that looks forward on the basis of proven past conduct, the jury was entitled to conclude that, where the evidence showed a drastically declining price structure which could be attributed to continued or sporadic price discrimination, "the effect of such discrimination" by respondents "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ." P. 703.

349 F. 2d 122, reversed and remanded.

Joseph L. Alioto argued the cause and filed briefs for petitioner.

John H. Schafer argued the cause and filed a brief for Continental Baking Co., *Peter W. Billings* argued

the cause and filed a brief for Carnation Co., and *George P. Lamb* argued the cause and filed a brief for Pet Milk Co., respondents.

MR. JUSTICE WHITE delivered the opinion of the Court.

This suit for treble damages and injunction under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26 [1] was brought by petitioner, Utah Pie Company, against respondents, Continental Baking Company, Carnation Company and Pet Milk Company. The complaint charged a conspiracy under §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, and violations by each respondent of § 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a).[2] The jury found for respondents on the conspiracy charge and

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[1] 15 U. S. C. § 15 provides that:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U. S. C. § 26 provides injunctive relief for private parties from violation of the antitrust laws.

[2] The portion of § 2 (a) relevant to the issue before the Court provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

for petitioner on the price discrimination charge.[3] Judgment was entered for petitioner for damages and attorneys' fees and respondents appealed on several grounds. The Court of Appeals reversed, addressing itself to the single issue of whether the evidence against each of the respondents was sufficient to support a finding of probable injury to competition within the meaning of § 2 (a) and holding that it was not. 349 F. 2d 122. We granted certiorari. 382 U. S. 914.[4] We reverse.

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[3] Respondent Continental by counterclaim charged petitioner with violation of § 2 (a) in respect to certain sales. On this issue the jury found for Continental, and although petitioner failed to move for a directed verdict on the counterclaim before its submission to the jury, the trial judge granted petitioner's motion for judgment notwithstanding the verdict. The Court of Appeals reversed the judgment notwithstanding the verdict on the counterclaim, and remanded the issue for a new trial. No question concerning the counterclaim is before the Court.

[4] The order allowing certiorari requested counsel to brief and discuss at oral argument, in addition to the questions presented by the petition, the following questions:

"1. Whether, if this Court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50 (c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?

"2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50 (c)(2) within 10 days of the District Court's entry of judgment against him, the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50 (b) as interpreted by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; and *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801?

"3. Whether Rule 50 (d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents?"

In the light of our disposition of this case, we need not reach these questions.

The product involved is frozen dessert pies—apple, cherry, boysenberry, peach, pumpkin, and mince. The period covered by the suit comprised the years 1958, 1959, and 1960 and the first eight months of 1961. Petitioner is a Utah corporation which for 30 years has been baking pies in its plant in Salt Lake City and selling them in Utah and surrounding States. It entered the frozen pie business in late 1957. It was immediately successful with its new line and built a new plant in Salt Lake City in 1958. The frozen pie market was a rapidly expanding one: 57,060 dozen frozen pies were sold in the Salt Lake City market in 1958, 111,729 dozen in 1959, 184,569 dozen in 1960, and 266,908 dozen in 1961. Utah Pie's share of this market in those years was 66.5%, 34.3%, 45.5%, and 45.3% respectively, its sales volume steadily increasing over the four years. Its financial position also improved. Petitioner is not, however, a large company. At the time of the trial, petitioner operated with only 18 employees, nine of whom were members of the Rigby family, which controlled the business. Its net worth increased from $31,651.98 on October 31, 1957, to $68,802.13 on October 31, 1961. Total sales were $238,000 in the year ended October 31, 1957, $353,000 in 1958, $430,000 in 1959, $504,000 in 1960 and $589,000 in 1961. Its net income or loss for these same years was a loss of $6,461 in 1957, and net income in the remaining years of $7,090, $11,897, $7,636, and $9,216.

Each of the respondents is a large company and each of them is a major factor in the frozen pie market in one or more regions of the country. Each entered the Salt Lake City frozen pie market before petitioner began freezing dessert pies. None of them had a plant in Utah. By the end of the period involved in this suit Pet had plants in Michigan, Pennsylvania, and California; Continental in Virginia, Iowa, and California; and Carnation in California. The Salt Lake City market was supplied

by respondents chiefly from their California operations. They sold primarily on a delivered price basis.

The "Utah" label was petitioner's proprietary brand. Beginning in 1960, it also sold pies of like grade and quality under the controlled label "Frost 'N' Flame" to Associated Grocers and in 1961 it began selling to American Food Stores under the "Mayfresh" label.[5] It also, on a seasonal basis, sold pumpkin and mince frozen pies to Safeway under Safeway's own "Bel-air" label.

The major competitive weapon in the Utah market was price. The location of petitioner's plant gave it natural advantages in the Salt Lake City marketing area and it entered the market at a price below the then going prices for respondents' comparable pies. For most of the period involved here its prices were the lowest in the Salt Lake City market. It was, however, challenged by each of the respondents at one time or another and for varying periods. There was ample evidence to show that each of the respondents contributed to what proved to be a deteriorating price structure over the period covered by this suit, and each of the respondents in the course of the ongoing price competition sold frozen pies in the Salt Lake market at prices lower than it sold pies of like grade and quality in other markets considerably closer to its plants. Utah Pie, which entered the market at a price of $4.15 per dozen at the beginning of the relevant period, was selling "Utah" and "Frost 'N' Flame" pies for $2.75 per dozen when the instant suit was filed some 44 months later.[6] Pet, which was offering pies at $4.92 per dozen in February 1958, was offering

[5] Beginning in February 1960 petitioner sold frozen pies to a Spokane, Washington, buyer under the "Sonny Boy" label.

[6] The prices discussed herein refer to those charged for apple pies. The apple flavor has been used as the standard throughout this case, without objection from the parties, and we adhere to the practice here.

"Pet-Ritz" and "Bel-air" pies at $3.56 and $3.46 per dozen respectively in March and April 1961. Carnation's price in early 1958 was $4.82 per dozen but it was selling at $3.46 per dozen at the conclusion of the period, meanwhile having been down as low as $3.30 per dozen. The price range experienced by Continental during the period covered by this suit ran from a 1958 high of over $5 per dozen to a 1961 low of $2.85 per dozen.[7]

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[7] The Salt Lake City sales volumes and market shares of the parties to this suit as well as of other sellers during the period at issue were as follows:

Company	*Volume (in doz.)*	*Percent of Market*
1958		
Carnation	5,863	10.3
Continental	754	1.3
Utah Pie	37,969.5	66.5
Pet	9,336.5	16.4
Others	3,137	5.5
Total	57,060	100.0
1959		
Carnation	9,625	8.6
Continental	3,182	2.9
Utah Pie	38,372	34.3
Pet	39,639	35.5
Others	20,911	18.7
Total	111,729	100.0
1960		
Carnation	22,371.5	12.1
Continental	3,350	1.8
Utah Pie	83,894	45.5
Pet	51,480	27.9
Others	23,473.5	12.7
Total	184,569	100.0

[*Footnote 7 continued on page 692*]

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I.

We deal first with petitioner's case against the Pet Milk Company. Pet entered the frozen pie business in 1955, acquired plants in Pennsylvania and California and undertook a large advertising campaign to market its "Pet-Ritz" brand of frozen pies. Pet's initial emphasis was on quality, but in the face of competition from regional and local companies and in an expanding market where price proved to be a crucial factor, Pet was forced to take steps to reduce the price of its pies to the ultimate consumer. These developments had consequences in the Salt Lake City market which are the substance of petitioner's case against Pet.

First, Pet successfully concluded an arrangement with Safeway, which is one of the three largest customers for frozen pies in the Salt Lake market, whereby it would sell frozen pies to Safeway under the latter's own "Bel-air" label at a price significantly lower than it was selling its comparable "Pet-Ritz" brand in the same Salt Lake market and elsewhere.[8] The initial price on "Bel-air"

1961

Company	*Volume (in doz.)*	*Percent of Market*
Carnation	20,067	8.8
Continental	18,799.5	8.3
Utah Pie	102,690	45.3
Pet	66,786	29.4
Others	18,565.5	8.2
Total	226,908	100.0

[8] The Pet-Safeway contract, entered into on January 1, 1960, obligated the Safeway organization to purchase a minimum of 1,000,000 cases (six pies per case) from Pet during the year. The contract was orally renewed for one year and thereafter to the time of the trial the production of "Bel-air" pies by Pet for Safeway was continued without a formal contract. All of the volume of the Safeway purchases under the contract of course did not find its way to the Salt Lake City market.

pies was slightly lower than Utah's price for its "Utah" brand of pies at the time, and near the end of the period the "Bel-air" price was comparable to the "Utah" price but higher than Utah's "Frost 'N' Flame" brand. Pet's Safeway business amounted to 22.8%, 12.3%, and 6.3% of the entire Salt Lake City market for the years 1959, 1960, and 1961, respectively, and to 64%, 44%, and 22% of Pet's own Salt Lake City sales for those same years.

Second, it introduced a 20-ounce economy pie under the "Swiss Miss" label and began selling the new pie in the Salt Lake market in August 1960 at prices ranging from $3.25 to $3.30 for the remainder of the period. This pie was at times sold at a lower price in the Salt Lake City market than it was sold in other markets.

Third, Pet became more competitive with respect to the prices for its "Pet-Ritz" proprietary label. For 18 of the relevant 44 months its offering price for Pet-Ritz pies was $4 per dozen or lower, and $3.70 or lower for six of these months. According to the Court of Appeals, in seven of the 44 months Pet's prices in Salt Lake were lower than prices charged in the California markets. This was true although selling in Salt Lake involved a 30- to 35-cent freight cost.

The Court of Appeals first concluded that Pet's price differential on sales to Safeway must be put aside in considering injury to competition because in its view of the evidence the differential had been completely cost justified and because Utah would not in any event have been able to enjoy the Safeway custom. Second, it concluded that the remaining discriminations on "Pet-Ritz" and "Swiss Miss" pies were an insufficient predicate on which the jury could have found a reasonably possible injury either to Utah Pie as a competitive force or to competition generally.

We disagree with the Court of Appeals in several respects. First, there was evidence from which the jury

could have found considerably more price discrimination by Pet with respect to "Pet-Ritz" and "Swiss Miss" pies than was considered by the Court of Appeals. In addition to the seven months during which Pet's prices in Salt Lake were lower than prices in the California markets, there was evidence from which the jury could reasonably have found that in 10 additional months the Salt Lake City prices for "Pet-Ritz" pies were discriminatory as compared with sales in western markets other than California. Likewise, with respect to "Swiss Miss" pies, there was evidence in the record from which the jury could have found that in five of the 13 months during which the "Swiss Miss" pies were sold prior to the filing of this suit, prices in Salt Lake City were lower than those charged by Pet in either California or some other western market.

Second, with respect to Pet's Safeway business, the burden of proving cost justification was on Pet [9] and, in our view, reasonable men could have found that Pet's lower priced, "Bel-air" sales to Safeway were not cost justified in their entirety. Pet introduced cost data for 1961 indicating a cost saving on the Safeway business greater than the price advantage extended to that customer. These statistics were not particularized for the Salt Lake market, but assuming that they were adequate to justify the 1961 sales, they related to only 24% of the Safeway sales over the relevant period. The evidence concerning the remaining 76% was at best incomplete and inferential. It was insufficient to take the

[9] Section 2 (b) of the Robinson-Patman Act assigns the burden. "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . ." 49 Stat. 1526, 15 U. S. C. § 13 (b). See *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 44–45; *United States* v. *Borden Co.*, 370 U. S. 460, 467.

defense of cost justification from the jury, which reasonably could have found a greater incidence of unjustified price discrimination than that allowed by the Court of Appeals' view of the evidence.[10]

With respect to whether Utah would have enjoyed Safeway's business absent the Pet contract with Safeway, it seems clear that whatever the fact is in this regard, it is not determinative of the impact of that contract on competitors other than Utah and on competition generally. There were other companies seeking the Safeway business, including Continental and Carnation, whose pies may have been excluded from the Safeway shelves by what the jury could have found to be discriminatory sales to Safeway.[11] What is more, Pet's evidence that Utah's unwillingness to install quality control equipment prevented Utah from enjoying Safeway's private label business is not the only evidence in the record relevant to that question. There was other evidence to the con-

[10] The only evidence cited by the Court of Appeals to justify the remaining 76% of Pet's sales to Safeway was Safeway's established practice of requiring its sellers to cost justify sales that otherwise would be illegally discriminatory. This practice was incorporated in the Pet-Safeway contract. We are unprepared to hold that a contractual obligation to cost justify price differentials is legally dispositive proof that such differentials are in fact so justified. Pet admitted that its cost-justification figures were drawn from past performance, so even crediting the data accompanying the 1960 contract regarding cost differences, Pet's additional evidence would bring under the justification umbrella only the 1959 sales. Thus, at the least, the jury was free to consider the 1960 Safeway sales as inadequately cost justified. Those sales accounted for 12.3% of the entire Salt Lake City market in that year. In the context of this case, the sales to Safeway are particularly relevant since there was evidence that private label sales influenced the general market, in this case depressing overall market prices.

[11] The jury was in fact charged that it could find for petitioner if from respondents' conduct "there is reasonably likely to be a substantial injury to competition *among sellers of frozen pies in the Utah area.*" R., at 1355. (Emphasis supplied.)

trary. The jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business.

Third, the Court of Appeals almost entirely ignored other evidence which provides material support for the jury's conclusion that Pet's behavior satisfied the statutory test regarding competitive injury. This evidence bore on the issue of Pet's predatory intent to injure Utah Pie.[12] As an initial matter, the jury could have con-

[12] The dangers of predatory price discrimination were recognized in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, where such pricing was held violative of § 2 (a). Subsequently, the Court noted that "the decisions of the federal courts in primary-line-competition cases . . . consistently emphasize the unreasonably low prices and the predatory intent of the defendants." *F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 548. See also *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 369; *Maryland Baking Co.* v. *F. T. C.*, 243 F. 2d 716; *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950; *Anheuser-Busch, Inc.* v. *F. T. C.*, 289 F. 2d 835. In the latter case the court went so far as to suggest that:

"If . . . the projection [to ascertain the future effect of price discrimination] is based upon predatoriness or buccaneering, it can reasonably be forecast that an adverse effect on competition *may* occur. In that event, the discriminations in their incipiency are such that they *may* have the prescribed effect to establish a violation of § 2 (a). If one engages in the latter type of pricing activity, a reasonable probability may be inferred that its willful misconduct may substantially lessen, injure, destroy or prevent competition." 289 F. 2d, at 843.

Chief Justice Hughes noted in a related antitrust context that "knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences." *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 372, and we do not think it unreasonable for courts to follow that lead. Although the evidence in this regard against Pet seems obvious, a jury would be free to ascertain a seller's intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory. See Rowe, Price Discrimination Under the Robinson-Patman Act 141–150 (1962), commenting on the

cluded that Pet's discriminatory pricing was aimed at Utah Pie; Pet's own management, as early as 1959, identified Utah Pie as an "unfavorable factor," one which "d[u]g holes in our operation" and posed a constant "check" on Pet's performance in the Salt Lake City market. Moreover, Pet candidly admitted that during the period when it was establishing its relationship with Safeway, it sent into Utah Pie's plant an industrial spy to seek information that would be of use to Pet in convincing Safeway that Utah Pie was not worthy of its custom. Pet denied that it ever in fact used what it had learned against Utah Pie in competing for Safeway's business. The parties, however, are not the ultimate judges of credibility. But even giving Pet's view of the incident a measure of weight does not mean the jury was foreclosed from considering the predatory intent underlying Pet's mode of competition. Finally, Pet does not deny that the evidence showed it suffered substantial losses on its frozen pie sales during the greater part of the time involved in this suit, and there was evidence from which the jury could have concluded that the losses Pet sustained in Salt Lake City were greater than those incurred elsewhere. It would not have been an irrational step if the jury concluded that there was a relationship between price and the losses.

It seems clear to us that the jury heard adequate evidence from which it could have concluded that Pet had engaged in predatory tactics in waging competitive warfare in the Salt Lake City market. Coupled with the incidence of price discrimination attributable to Pet,

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Court's statement in *F. T. C.* v. *Anheuser-Busch, Inc., supra,* that "a price reduction below cost tends to establish [predatory] intent." 363 U. S., at 552. See also *Ben Hur Coal Co.* v. *Wells,* 242 F. 2d 481, 486, and *Balian Ice Cream Co.* v. *Arden Farms Co., supra,* at 368, in which the courts recognized the inferential value of sales below cost on the issue of intent.

the evidence as a whole established, rather than negated, the reasonable possibility that Pet's behavior produced a lessening of competition proscribed by the Act.

II.

Petitioner's case against Continental is not complicated. Continental was a substantial factor in the market in 1957. But its sales of frozen 22-ounce dessert pies, sold under the "Morton" brand, amounted to only 1.3% of the market in 1958, 2.9% in 1959, and 1.8% in 1960. Its problems were primarily that of cost and in turn that of price, the controlling factor in the market. In late 1960 it worked out a co-packing arrangement in California by which fruit would be processed directly from the trees into the finished pie without large intermediate packing, storing, and shipping expenses. Having improved its position, it attempted to increase its share of the Salt Lake City market by utilizing a local broker and offering short-term price concessions in varying amounts. Its efforts for seven months were not spectacularly successful. Then in June 1961, it took the steps which are the heart of petitioner's complaint against it. Effective for the last two weeks of June it offered its 22-ounce frozen apple pies in the Utah area at $2.85 per dozen. It was then selling the same pies at substantially higher prices in other markets. The Salt Lake City price was less than its direct cost plus an allocation for overhead. Utah's going price at the time for its 24-ounce "Frost 'N' Flame" apple pie sold to Associated Grocers was $3.10 per dozen, and for its "Utah" brand $3.40 per dozen. At its new prices, Continental sold pies to American Grocers in Pocatello, Idaho, and to American Food Stores in Ogden, Utah. Safeway, one of the major buyers in Salt Lake City, also purchased 6,250 dozen, its requirements for about five weeks. Another purchaser ordered 1,000 dozen. Utah's response was immediate. It reduced

its price on all of its apple pies to $2.75 per dozen. Continental refused Safeway's request to match Utah's price, but renewed its offer at the same prices effective July 31 for another two-week period. Utah filed suit on September 8, 1961. Continental's total sales of frozen pies increased from 3,350 dozen in 1960 to 18,800 dozen in 1961. Its market share increased from 1.8% in 1960 to 8.3% in 1961. The Court of Appeals concluded that Continental's conduct had had only minimal effect, that it had not injured or weakened Utah Pie as a competitor, that it had not substantially lessened competition and that there was no reasonable possibility that it would do so in the future.

We again differ with the Court of Appeals. Its opinion that Utah was not damaged as a competitive force apparently rested on the fact that Utah's sales volume continued to climb in 1961 and on the court's own factual conclusion that Utah was not deprived of any pie business which it otherwise might have had. But this retrospective assessment fails to note that Continental's discriminatory below-cost price caused Utah Pie to reduce its price to $2.75. The jury was entitled to consider the potential impact of Continental's price reduction absent any responsive price cut by Utah Pie. Price was a major factor in the Salt Lake City market. Safeway, which had been buying Utah brand pies, immediately reacted and purchased a five-week supply of frozen pies from Continental, thereby temporarily foreclosing the proprietary brands of Utah and other firms from the Salt Lake City Safeway market. The jury could rationally have concluded that had Utah not lowered its price, Continental, which repeated its offer once, would have continued it, that Safeway would have continued to buy from Continental and that other buyers, large as well as small, would have followed suit. It could also have reasonably concluded that a competitor who is forced to

reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force.

Even if the impact on Utah Pie as a competitor was negligible, there remain the consequences to others in the market who had to compete not only with Continental's 22-ounce pie at $2.85 but with Utah's even lower price of $2.75 per dozen for both its proprietary and controlled labels. Petitioner and respondents were not the only sellers in the Salt Lake City market, although they did account for 91.8% of the sales in 1961. The evidence was that there were nine other sellers in 1960 who sold 23,473 dozen pies, 12.7% of the total market. In 1961 there were eight other sellers who sold less than the year before—18,565 dozen or 8.2% of the total—although the total market had expanded from 184,569 dozen to 226,908 dozen. We think there was sufficient evidence from which the jury could find a violation of § 2 (a) by Continental.

III.

The Carnation Company entered the frozen dessert pie business in 1955 through the acquisition of "Mrs. Lee's Pies" which was then engaged in manufacturing and selling frozen pies in Utah and elsewhere under the "Simple Simon" label. Carnation also quickly found the market extremely sensitive to price. Carnation decided, however, not to enter an economy product in the market, and during the period covered by this suit it offered only its quality "Simple Simon" brand. Its primary method of meeting competition in its markets was to offer a variety of discounts and other reductions, and the technique was not unsuccessful. In 1958, for example, Carnation enjoyed 10.3% of the Salt Lake City market, and although its volume of pies sold in that market increased substantially in the next year, its percentage of the market temporarily slipped to 8.6%. However, 1960 was a turnaround year for Carnation in

the Salt Lake City market; it more than doubled its volume of sales over the preceding year and thereby gained 12.1% of the market. And while the price structure in the market deteriorated rapidly in 1961 Carnation's position remained important.

We need not dwell long upon the case against Carnation, which in some respects is similar to that against Continental and in others more nearly resembles the case against Pet. After Carnation's temporary setback in 1959 it instituted a new pricing policy to regain business in the Salt Lake City market. The new policy involved a slash in price of 60¢ per dozen pies, which brought Carnation's price to a level admittedly well below its costs, and well below the other prices prevailing in the market. The impact of the move was felt immediately, and the two other major sellers in the market reduced their prices. Carnation's banner year, 1960, in the end involved eight months during which the prices in Salt Lake City were lower than prices charged in other markets. The trend continued during the eight months in 1961 that preceded the filing of the complaint in this case. In each of those months the Salt Lake City prices charged by Carnation were well below prices charged in other markets, and in all but August 1961 the Salt Lake City delivered price was 20¢ to 50¢ lower than the prices charged in distant San Francisco. The Court of Appeals held that only the early 1960 prices could be found to have been below cost. That holding, however, simply overlooks evidence from which the jury could have concluded that throughout 1961 Carnation maintained a below-cost price structure and that Carnation's discriminatory pricing, no less than that of Pet and Continental, had an important effect on the Salt Lake City market. We cannot say that the evidence precluded the jury from finding it reasonably possible that Carnation's conduct would injure competition.

IV.

Section 2 (a) does not forbid price competition which will probably injure or lessen competition by eliminating competitors, discouraging entry into the market or enhancing the market shares of the dominant sellers. But Congress has established some ground rules for the game. Sellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in either the sellers' or the buyers' market unless such discriminations are justified as permitted by the Act. This case concerns the sellers' market. In this context, the Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit. Nor do we think that the Act only comes into play to regulate the conduct of price discriminators when their discriminatory prices consistently undercut other competitors. It is true that many of the primary line cases that have reached the courts have involved blatant predatory price discriminations employed with the hope of immediate destruction of a particular competitor. On the question of injury to competition such cases present courts with no difficulty, for such pricing is clearly within the heart of the proscription of the Act. Courts and commentators alike have noted that the existence of predatory intent might bear on the likelihood of injury to competition.[13] In this case there was some evidence of predatory intent with respect to each of these respondents.[14] There was also other evidence upon which the

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[13] See n. 12, *supra*.

[14] It might be argued that the respondents' conduct displayed only fierce competitive instincts. Actual intent to injure another

jury could rationally find the requisite injury to competition. The frozen pie market in Salt Lake City was highly competitive. At times Utah Pie was a leader in moving the general level of prices down, and at other times each of the respondents also bore responsibility for the downward pressure on the price structure. We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact. In this case, the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination. The jury was entitled to conclude that "the effect of such discrimination," by each of these respondents, "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ." The statutory test is one that necessarily looks forward on the basis of proven conduct in the past. Proper application of that standard here requires reversal of the judgment of the Court of Appeals.[15]

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competitor does not, however, fall into that category, and neither, when viewed in the context of the Robinson-Patman Act, do persistent sales below cost and radical price cuts themselves discriminatory. Nor does the fact that a local competitor has a major share of the market make him fair game for discriminatory price cutting free of Robinson-Patman Act proscriptions. "The Clayton Act proscription as to discrimination in price is not nullified merely because of a showing that the existing competition in a particular market had a major share of the sales of the product involved." *Maryland Baking Co.*, 52 F. T. C. 1679, 1689, aff'd, 243 F. 2d 716. In that case the local competitor's share of the market when price discrimination began was 91.3%, yet the Federal Trade Commission was not impressed by the argument that the effect of the discrimination had been to terminate a monopoly and to create a competitive market.

[15] Each respondent argues here that prior price discrimination cases in the courts and before the Federal Trade Commission, in which no primary line injury to competition was found, establish

Since the Court of Appeals held that petitioner had failed to make a prima facie case against each of the respondents, it expressly declined to pass on other grounds for reversal presented by the respondents. 349 F. 2d 122, 126. Without intimating any views on the other grounds presented to the Court of Appeals, we reverse its judgment and remand the case to that court for further proceedings. *It is so ordered.*

THE CHIEF JUSTICE took no part in the decision of this case.

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

I would affirm the judgment, agreeing substantially with the reasoning of the Court of Appeals as expressed

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a standard which compels affirmance of the Court of Appeals' holding. But the cases upon which the respondents rely are readily distinguishable. In *Anheuser-Busch, Inc.* v. *F. T. C.*, 289 F. 2d 835, 839, there was no general decline in price structure attributable to the defendant's price discriminations, nor was there any evidence that the price discriminations were "a single lethal weapon aimed at a victim for a predatory purpose." *Id.*, at 842. In *Borden Co.* v. *F. T. C.*, 339 F. 2d 953, the court reversed the Commission's decision on price discrimination in one market for want of sufficient interstate connection, and the Commission's charge regarding the other market failed to show any lasting impact upon prices caused by the single, isolated incident of price discrimination proved. Absence of proof that the alleged injury was due to challenged price discriminations was determinative in *International Milling Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶¶ 16,494, 16,648. In *Uarco, Inc.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 16,807, there was no evidence from which predatory intent could be inferred and no evidence of a long-term market price decline. Similar failure of proof and absence of sales below cost were evident in *Quaker Oats Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 17,134. *Dean Milk Co.*, 3 Trade Reg. Rep. ¶ 17,357, is not to the contrary. There in the one market where the Commission found no primary line injury there was no evidence of a generally declining price structure.

in the thorough and conscientious opinion of Judge Phillips.

There is only one issue in this case in its present posture: Whether the respondents engaged in price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ." [1] Phrased more simply, did the respondents' actions have the anticompetitive effect required by the statute as an element of a cause of action?

The Court's own description of the Salt Lake City frozen pie market from 1958 through 1961, shows that the answer to that question must be no.[2] In 1958 Utah Pie had a quasi-monopolistic 66.5% of the market. In 1961—after the alleged predations of the respondents—Utah Pie still had a commanding 45.3%, Pet had 29.4%, and the remainder of the market was divided almost equally between Continental, Carnation, and other, small local bakers. Unless we disregard the lessons so laboriously learned in scores of Sherman and Clayton Act cases, the 1961 situation has to be considered more competitive than that of 1958. Thus, if we assume that the price discrimination proven against the respondents had any effect on competition, that effect must have been beneficent.

That the Court has fallen into the error of reading the Robinson-Patman Act as protecting competitors, instead of competition, can be seen from its unsuccessful attempt to distinguish cases relied upon by the respondents.[3] Those cases are said to be inapposite because they

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[1] Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (a).

[2] See *ante,* p. 691, n. 7.

[3] See *ante,* p. 703, n. 15.

involved "no general decline in price structure," and no "lasting impact upon prices." But lower prices are the hallmark of intensified competition.

The Court of Appeals squarely identified the fallacy which the Court today embraces:

> ". . . a contention that Utah Pie was entitled to hold the extraordinary market share percentage of 66.5, attained in 1958, falls of its own dead weight. To approve such a contention would be to hold that Utah Pie was entitled to maintain a position which approached, if it did not in fact amount to a monopoly, and could not exist in the face of proper and healthy competition." 349 F. 2d 122, 155.

I cannot hold that Utah Pie's monopolistic position was protected by the federal antitrust laws from effective price competition, and I therefore respectfully dissent.

CLEWIS *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 648. Argued March 15, 1967.—Decided April 24, 1967.

Petitioner was convicted of murder after a trial in which his confession was introduced in evidence over his objection that it was not voluntary. The conviction was affirmed on appeal. *Held:* On the "totality of the circumstances" in this case the confession cannot be held to have been voluntary, and its use as evidence against petitioner deprived him of due process of law. Cf. *Davis* v. *North Carolina,* 384 U. S. 737 (1966). Pp. 708–712.

415 S. W. 2d 654, reversed.

Reagan H. Legg, by appointment of the Court, 385 U. S. 944, argued the cause and filed briefs for petitioner.

Gilbert J. Pena, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Crawford C. Martin,* Attorney General, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore,* Assistant Attorney General, and *A. J. Carubbi, Jr.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner, Marvin Peterson Clewis, stands convicted of the murder, by strangulation, of his wife, Dorothy Mae Clewis. The jury which found him guilty imposed a sentence of 25 years' imprisonment. During the course of his trial, petitioner moved to exclude from evidence three statements he had made while in police custody. Petitioner claimed that these statements had not been voluntarily made, and that their use against him at his trial would deny him due process of law, as guaranteed by the Fourteenth Amendment to the Constitution.[1] Evidence was taken by the court outside of the jury's

[1] Petitioner also claimed that his right to counsel had been violated in the securing of these confessions. Cf. *Massiah* v. *United States,* 377 U. S. 201 (1964).

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presence, and the motion was overruled.[2] Petitioner's third, and last, written confession was then introduced in evidence over objection. The question of its voluntariness was presented to the jury, which, by its general verdict, resolved the question against petitioner. Petitioner's constitutional objection to the use of his statement was renewed in his motions for instructed verdict and for a new trial, both of which the trial judge overruled. On appeal, the Court of Criminal Appeals of Texas affirmed the judgment of conviction. That court reviewed the record and concluded that it could not hold "that there are any undisputed facts which rendered the confession inadmissible as a matter of law." We disagree, and we reverse.

The question for determination is whether, considering the "totality of the circumstances," [3] Marvin Clewis' statements were not voluntary and the third statement should have been excluded. We approach this question from an independent examination of the whole record, our established practice in these cases.[4] Our recent observation in *Davis* v. *North Carolina,* 384 U. S. 737, 741 (1966), applies equally here: "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogations." For the purpose of deciding this case, we need not go beyond the State's version of the facts. Accord-

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[2] The trial judge did not make written findings on the voluntariness issue at the time of trial. Some eight months later he certified that he had concluded that the (third) statement was in fact voluntary. This "belated entry and filing of the trial court's findings" was accepted as a supplement to the transcript of record by the Court of Criminal Appeals.

[3] *Fikes* v. *Alabama,* 352 U. S. 191, 197 (1957). See also, *e. g., Davis* v. *North Carolina,* 384 U. S. 737 (1966); *Haynes* v. *Washington,* 373 U. S. 503 (1963).

[4] See *Davis* v. *North Carolina,* 384 U. S. 737, 741–742 (1966).

ingly, we do not consider petitioner's claim that he was subjected to physical assaults.

The trial of this case was prior to the date of decision of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the requirements of which, therefore, are not directly applicable, *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), although relevant on the issue of voluntariness, *Davis* v. *North Carolina,* 384 U. S. 737 (1966).

Petitioner was taken into custody at about 6 a. m. on Sunday, July 8, 1962, and first gave a statement to the police late in the afternoon of Monday, July 9. Thereafter, he was taken before a magistrate. On the view most favorable to the State, petitioner had been held some 38 hours before being taken before a magistrate to be charged, had had little sleep and very little food, and appeared to the police to be sick. He had been visited briefly once or twice, but had had no contact with a lawyer. He had consistently denied all knowledge of his wife's death until the point at which he agreed to give a statement, and then had confessed to killing her in a way (by shooting) that—it later developed—was inconsistent with the facts.[5]

Petitioner next gave a statement on Thursday, July 12. The events leading up to the second "confession" may be summarized: having been formally charged, but unrepresented and unadvised by counsel, petitioner was interrogated fairly frequently and by several different officers from Monday evening to Thursday afternoon.[6] During this period he was driven on a round trip of about 600 miles, was administered several polygraph tests, was

[5] Most of the physical abuse petitioner later related allegedly occurred during this period.

[6] The State contends that Clewis did consult with an attorney on Thursday morning. He insists the conference took place on Friday morning. In any event, the State does not dispute his testimony that the only subject discussed with the lawyer was the matter of a fee, and that the lawyer declined to represent him.

detained in at least three different police buildings, and apparently had very little to eat and little contact except with policemen. Despite all this, and in the face of his earlier "confession," he steadfastly denied any guilt—or even knowledge—with respect to his wife's death until he finally produced the second "confession."

On Friday, July 13, Clewis was delivered to the custody of the Midland County Sheriff. He remained in the county jail from then until Tuesday, July 17. During this time he was apparently not interrogated, abused, or denied adequate food and sleep. He did not, however, consult with a lawyer.

At about 9:30 a. m., Tuesday, July 17, petitioner was again interrogated, this time by two deputy sheriffs. He again began by denying any guilt in connection with his wife's death. No lawyer was present, nor had petitioner been advised of his right to have one appointed. The Midland County District Attorney arrived, and shortly thereafter petitioner confessed for the third time. There is no testimony that any warning of the right to remain silent was given prior to this oral confession. About 10:45 a. m. preparation of a written statement was begun, following a formal warning of the right not to make it. Shortly thereafter, Clewis signed the statement which was introduced against him at trial.

On this record, we cannot hold that petitioner's third statement was voluntary. It plainly cannot, on these facts, be separated from the circumstances surrounding the two earlier "confessions." There is here no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before. Compare *United States* v. *Bayer,* 331 U. S. 532, 540 (1947) with *Reck* v. *Pate,* 367 U. S. 433, 444 (1961).

Among the factors which require our conclusion that the "confession" was not voluntary are the following:

(1) During this long period of custody, petitioner was never fully advised that he could consult counsel and have counsel appointed if necessary, that he was entitled to remain silent, and that anything he said could be used as evidence against him. Cf. *Davis* v. *North Carolina,* 384 U. S. 737 (1966); *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Even after he was arraigned, he was not advised of his right to appointed counsel. Post-arraignment interrogation, over a period of more than a week, occurred without the presence of counsel for the accused, and without any waiver thereof.

(2) The first statement was secured following an initial taking-into-custody which was concededly not supported by probable cause,[7] followed by 38 hours of intermittent interrogation—despite the Texas rule that an accused be taken before a magistrate "immediately." Texas Code Crim. Proc. Art. 217 (1925); now, substantially revised in other respects, Texas Code Crim. Proc. Arts. 14.06, 15.17 (1965). This was followed by prolonged, if intermittent, interrogation by numerous officers, in several buildings, punctuated by a trip to the gravesite and a long trip to another town, and accompanied by several polygraph tests. The police testimony makes it clear that the interrogation was not intended merely to secure information, but was specifically designed to elicit a signed

[7] The arresting officer testified that he merely asked petitioner to accompany him to the police station. He was of the opinion that he had no probable cause to arrest petitioner. Plainly, however, petitioner must be considered to have been taken into custody either at the time the officer came to get him, or shortly thereafter when the police, by their conduct, effectively asserted a right to detain him indefinitely at the jail. The Court of Criminal Appeals was apparently of the view that the rule of *Wong Sun* v. *United States,* 371 U. S. 471 (1963), is inapplicable to state trials—an issue upon which we express no opinion herein, since we find petitioner's statement inadmissible on other grounds.

statement of "the truth"—and the police view of "the truth" was made clear to petitioner. The petitioner repudiated each of the first two confessions shortly after it was made, and denied the truth of the third one at his trial.

(3) The record inspires substantial concern as to the extent to which petitioner's faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police. This factor takes on additional weight in that petitioner, a Negro, had only a fifth-grade education. He had apparently never been in trouble with the law before.

For the foregoing reasons, the judgment below must be, and is,[8]

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE HARLAN concur in the result.

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[8] At trial, petitioner moved for production by the State of all three confessions, as necessary to support his claim that the manner of their eliciting rendered them inadmissible. That these prior confessions might have been directly relevant to petitioner's central defense can scarcely be doubted; for example, it came out during the hearing on the motion to suppress that petitioner had initially confessed to killing his wife by shooting her—a claim contrary to his later confessions and to known facts later discovered—and this inconsistency lends some weight to petitioner's defense of nonvoluntariness. Perhaps there were other inconsistencies which petitioner could have shown, had he had access to the prior confessions. Under amended Rule 16 of the Federal Rules of Criminal Procedure, a federal defendant could, *prior to trial,* discover his own statements; it seems that under the new 1965 Texas Code of Criminal Procedure, Art. 39.14, pretrial discovery of petitioner's confessions would have been proper. Cf. also *Dennis* v. *United States,* 384 U. S. 855, 871, and n. 17 (1966). This Court has suggested that in some circumstances it may be a denial of due process for a defendant to be refused any discovery of his statements to the police. *Cicenia* v. *Lagay,* 357 U. S. 504, 510–511 (1958); *Leland* v. *Oregon,* 343 U. S. 790, 801–802 (1952). In light of our disposition of this case, however, we need not reach this question.

PROHIBITION PARTY OF MICHIGAN ET AL. *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1098. Decided April 24, 1967.

Appeal dismissed and certiorari denied.

James L. Elsman, Jr., for appellants.

Frank J. Kelley, Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Russell A. Searl,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ARNOLD *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1118. Decided April 24, 1967.

Appeal dismissed and certiorari denied.

John H. Kennett, Jr., for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

FLEISCHMANN DISTILLING CORP. ET AL. *v.* MAIER BREWING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 214. Argued February 14, 1967.—Decided May 8, 1967.

Respondents were held to have deliberately infringed petitioners' Lanham Act trademark rights. The District Court then awarded petitioners reasonable attorney's fees, relying upon case authority to the effect that such an award is permissible when the infringement is "deliberate." The Court of Appeals, having granted an interlocutory appeal, reversed. The Lanham Act provides, in § 35, for compensatory recovery measured by the defendant's profits accruing from his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances. *Held:* Attorney's fees are not recoverable under the Lanham Act. The meticulous statutory provisions set forth in § 35 are exclusive of any other monetary remedies for violation of rights protected by the Act. Pp. 717–721.

359 F. 2d 156, affirmed.

Moses Lasky argued the cause and filed briefs for petitioners.

J. Albert Hutchinson argued the cause and filed a brief for respondents.

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

This is a trademark case arising under the Lanham Act (60 Stat. 427, 15 U. S. C. §§ 1051–1127) in which our sole concern is with the relief that may be granted when deliberate infringement of a valid trademark has been established. The question is whether federal courts have power in that context to award reasonable attorney's fees as a separate element of recovery in light of § 35 of

the Act which enumerates the available compensatory remedies.[1]

The scope of petitioners'[2] trademark and the fact of respondents'[3] infringement were determined by the Court of Appeals for the Ninth Circuit at an earlier stage of this litigation. 314 F. 2d 149, cert. denied, 374 U. S. 830 (1963). The case was then remanded to the District Court for the Southern District of California which, after noting that the Court of Appeals had characterized respondents' infringing activities as deliberate, entered its own finding to that effect. In accord with prior rulings of certain courts of appeals[4] and district

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[1] Section 35 of the Lanham Act, 15 U. S. C. § 1117:

"When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. . . . In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty."

[2] The Fleischmann Distilling Corporation owns the American distribution rights to Scotch whiskey sold under the trademark "Black & White." Its co-petitioner is James Buchanan & Co., Ltd., owner and registrant of the trademark.

[3] Maier Brewing Company, the principal respondent, is an independent brewery which marketed a beer under the label "Black & White" through its co-respondent, Ralphs Grocery Company.

[4] *E. g., Baker* v. *Simmons Co.*, 325 F. 2d 580 (C. A. 1st Cir. 1963); *Wolfe* v. *National Lead Co.*, 272 F. 2d 867 (C. A. 9th Cir. 1959); *Keller Products* v. *Rubber Linings Corp.*, 213 F. 2d 382 (C. A. 7th Cir. 1954); *Century Distilling Co.* v. *Continental Distilling*

courts [5] that attorney's fees could be recovered if deliberate or willful infringement were established, the District Court awarded petitioners $60,000 after determining that such sum constituted reasonable attorney's fees for prosecution of this litigation. Respondents sought an immediate interlocutory appeal although petitioners' rights to an accounting and other relief remained for determination. The Court of Appeals first dismissed the appeal as premature, but after the District Court issued a certificate under 28 U. S. C. § 1292 (b)[6] authorization was granted. Sitting *en banc* the Court of Appeals reversed the award of attorney's fees, holding that under the Lanham Act federal courts are without power to make such awards. 359 F. 2d 156 (1966). We granted certiorari to resolve the conflict between that holding and the prior decisions of federal courts upon which the

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Corp., 205 F. 2d 140 (C. A. 3d Cir. 1953); *Admiral Corp.* v. *Penco, Inc.*, 203 F. 2d 517 (C. A. 2d Cir. 1953). As the Court of Appeals in this case pointed out, the decisions upholding awards of attorney's fees under the Lanham Act in most instances merely state the conclusion that attorney's fees are recoverable and cite prior case authority, often commencing with a pre-Lanham Act decision—*Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F. 2d 708 (C. A. 7th Cir. 1941).

[5] *E. g.*, *Youthform Co.* v. *R. H. Macy & Co.*, 153 F. Supp. 87 (D. C. N. D. Ga. 1957); *Williamson-Dickie Mfg. Co.* v. *Davis Mfg. Co.*, 149 F. Supp. 852 (D. C. E. D. Pa. 1957); *Francis H. Leggett & Co.* v. *Premier Packing Co.*, 140 F. Supp. 328 (D. C. Mass. 1956); *Singer Mfg. Co.* v. *Singer Upholstering & Sewing Co.*, 130 F. Supp. 205 (D. C. W. D. Pa. 1955).

[6] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . ."

District Court had relied. 385 U. S. 809 (1966). For the reasons elaborated below, we affirm.

As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation.[7] Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs.[8] Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special "taxing Masters" in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client.[9]

Although some American commentators have urged adoption of the English practice in this country,[10] our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in *Arcambel* v. *Wiseman,*

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[7] Statute of Gloucester, 1278, 6 Edw. 1, c. 1. This statute, which expressly mentioned only "the costs of his writ purchased," was from the outset liberally construed to encompass all legal costs of suit, including counsel fees. Goodhart, Costs, 38 Yale L. J. 849, 852 (1929).

[8] Statute of Westminster, 1607, 4 Jac. 1, c. 3.

[9] See generally McCormick, Damages § 60 (1935); Goodhart, Costs, 38 Yale L. J. 849–872 (1929) (*passim*).

[10] Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 Colo. L. Rev. 202 (1966); Note, 65 Mich. L. Rev. 593 (1967).

3 Dall. 306 (1796), and adhered to it in later decisions. See, *e. g., Hauenstein* v. *Lynham,* 100 U. S. 483 (1880); *Stewart* v. *Sonneborn,* 98 U. S. 187 (1879); *Oelrichs* v. *Spain,* 15 Wall. 211 (1872); *Day* v. *Woodworth,* 13 How. 363 (1852). In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. Cf. *Farmer* v. *Arabian American Oil Co.,* 379 U. S. 227, at 235 (1964); *id.,* at 236–239 (concurring opinion of Mr. Justice Goldberg). Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration. *Oelrichs* v. *Spain, supra,* at 231.

Limited exceptions to the American rule have, of course, developed.[11] They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees as an item of compensatory damages (not as a separate cost to be taxed). *Vaughan* v. *Atkinson,* 369 U. S. 527 (1962). And in a civil contempt action occasioned by willful disobedience of a court order an award of attorney's fees may be authorized as part of the fine to be levied on the defendant. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 426–428 (1923). The case upon which petitioners here place their principal reliance—

[11] 28 U. S. C. § 1923 (a), which is derived from the Fee Bill of 1853, 10 Stat. 161, might be termed a "general exception." It provides for recovery of nominal sums known as "Attorney's and proctor's docket fees." In ordinary litigation and "on trial or final hearing" the sum recoverable under this provision is $20, to be taxed as part of the costs defined by 28 U. S. C. § 1920.

Sprague v. *Ticonic National Bank,* 307 U. S. 161 (1939)—involved yet another exception. That exception had previously been applied in cases where a plaintiff traced or created a common fund for the benefit of others as well as himself. *Central Railroad & Banking Co.* v. *Pettus,* 113 U. S. 116 (1885); *Trustees* v. *Greenough,* 105 U. S. 527 (1882). In that situation to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff. *Sprague* itself involved a variation of the common-fund situation where, although the plaintiff had not in a technical sense sued for the benefit of others or to create a common fund, the *stare decisis* effect of the judgment obtained by the plaintiff established as a matter of law the right of a discernible class of persons to collect upon similar claims. The Court held that the general equity power "to do equity in a particular situation" supported an award of attorney's fees under such circumstances for the same reasons that underlay the common-fund decisions.

The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting. For, in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. It provided not only for injunctive relief,[12] but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances.[13] Peti-

[12] Section 34 of the Lanham Act, 60 Stat. 439, 15 U. S. C. § 1116.

[13] Section 35 of the Lanham Act, 60 Stat. 439, 15 U. S. C. § 1117 (quoted, *supra,* n. 1).

tioners have advanced the proposition that the authority to award "costs of the action" taken together with the introductory phrase "subject to the principles of equity" should be deemed implicit authority for an award of attorney's fees in light of the reference in *Sprague* to the general equity power. But none of the considerations which supported the exception recognized in *Sprague* are present here. Moreover, since, with the exception of the docket fee provided by 28 U. S. C. § 1923 (a),[14] the statutory definition of the term "costs" does not include attorney's fees,[15] acceptance of petitioners' argument would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction. When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. *Philp* v. *Nock,* 17 Wall. 460 (1873); *Teese* v. *Huntingdon,* 23 How. 2 (1860); cf. *Day* v. *Woodworth,* 13 How. 363 (1852). Congress has overturned the specific consequence of *Philp* and *Teese* by expressly allowing recovery of attorney's fees in patent cases[16] and has selectively provided a similar

[14] See n. 11, *supra.*

[15] 28 U. S. C. § 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

"(1) Fees of the clerk and marshal;

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

"(3) Fees and disbursements for printing and witnesses;

"(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

"(5) Docket fees under section 1923 of this title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

[16] 35 U. S. C. § 285. This provision was enacted in 1946, as was the Lanham Act. 60 Stat. 778. It was revised in 1952, so as to limit such recovery to "exceptional cases." 66 Stat. 813.

remedy in connection with various other statutory causes of action.[17] But several attempts to introduce such a provision into the Lanham Act have failed of enactment.[18] We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context.

Affirmed.

MR. JUSTICE STEWART, dissenting.

Until this case, every federal court that has faced the issue has upheld judicial power to award counsel fees in trademark infringement cases.[1] In order to overrule that

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[17] See, *e. g.*, Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U. S. C. § 206; Copyright Act, 17 U. S. C. § 116; Fair Labor Standards Act, § 16 (b), 52 Stat. 1069, 29 U. S. C. § 216 (b); Interstate Commerce Act, § 16, 34 Stat. 590, 49 U. S. C. § 16 (2); Packers and Stockyards Act, § 309 (f), 42 Stat. 166, 7 U. S. C. § 210 (f); Perishable Agricultural Commodities Act, § 7 (b), 46 Stat. 535, 7 U. S. C. § 499g (b); Railway Labor Act, § 3 First (p), 48 Stat. 1192, 45 U. S. C. § 153 First (p); Securities Act of 1933, § 11 (e), 48 Stat. 907, 15 U. S. C. § 77k (e); Securities Exchange Act of 1934, §§ 9 (e), 18 (a), 48 Stat. 890, 897, 15 U. S. C. §§ 78i (e), 78r (a); Servicemen's Readjustment Act, 38 U. S. C. § 1822 (b); Trust Indenture Act, § 323 (a), 53 Stat. 1176, 15 U. S. C. § 77www (a). See also Fed. Rules Civ. Proc. 37 (a) and 56 (g).

[18] S. 2540, 83d Cong., 1st Sess., § 25 (1953), containing a provision for recovery of attorney's fees, passed the Senate but failed of enactment in the House of Representatives. The Report accompanying the bill stated that the provision was intended to parallel the then recent addition to the patent statute. (See n. 16, *supra.*) A similar provision was embodied in H. R. 7734, 84th Cong., 1st Sess., § 25 (1955), which also died after passing the originating House.

[1] Footnotes 4 and 5 of the Court's opinion, *ante*, pp. 715–716, set out the copious authority supporting the power in trademark litigation to award counsel fees in appropriate circumstances.

unbroken line of authority, I would have to be satisfied that Congress has clearly declared that counsel fees may not be awarded. The Court's opinion does not convince me that Congress has made any such declaration.[2]

It is not enough to say that Congress did not expressly provide for counsel fees in the original Lanham Act and has not subsequently amended the Act to authorize their allowance. There are many reasons for rejecting that kind of approach to statutory interpretation in this case. The Court acknowledges that a pre-Lanham Act decision—*Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F. 2d 708 (C. A. 7th Cir.)—held counsel fees were recoverable in a trademark action.[3] It seems to me reasonable to assume that when Congress in the Lanham Act empowered courts to grant relief "subject to the principles of equity" [4] it was aware of the *Aladdin* decision and intended to preserve the rule of that case. Other provisions of the statute support this view of the underlying congressional intent. For example, the Act provides:

> "If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." [5]

Allowing the court to consider the "circumstances of the case" to arrive at the amount of the judgment for the plaintiff hardly comports with the Court's view that Congress rigidly limited the scope of remedies available

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[2] This case does not involve the "adoption of the English practice in this country," but simply whether the established American practice of awarding counsel fees in appropriate *trademark* cases is to be repudiated.

[3] See, *ante*, pp. 715–716, n. 4.

[4] Section 35 of the Lanham Act, 60 Stat. 439, 15 U. S. C. § 1117.

[5] *Ibid.*

in trademark litigation. I cannot say, in view of these provisions, that Congress intended *sub silentio* to overrule the *Aladdin* case.[6]

The argument that Congress has declined to amend the Act to provide explicitly for counsel fees is hardly determinative. For Congress can be assumed to have known that the federal courts were consistently exercising the power to award counsel fees after the Act's passage. The failure to amend the statute to do away with this judicial power speaks as loudly for its recognition as the failure to pass the bills referred to by the Court speaks for the contrary conclusion.

I respectfully dissent.

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[6] This was the reasoning of the District Court in *A. Smith Bowman Distillery, Inc.* v. *Schenley Distillers, Inc.*, 204 F. Supp. 374, 377:

"Mere silence and inaction by Congress cannot be held to have repealed what has been found to be a well-established judicial power. Even though the Lanham Act may have been intended to be an integrated and comprehensive set of rules for trademark regulation and litigation to the exclusion of all conflicting rules, the retention of discretionary judicial power over the fixing of costs does not seem such a threat of inconsistency that it should by implication be held pre-empted or repealed by the Act. Some more positive action on the part of the legislature is necessary to indicate the Congressional intent to regulate what has long been an orthodox judicial function." (Footnote omitted.)

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WALDRON *v.* MOORE-McCORMACK LINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 233. Argued March 13, 1967.—Decided May 8, 1967.

Petitioner, a seaman injured on respondent's ship, who contended that vessel was unseaworthy because too few crewmen were assigned to perform a specific task in a safe and prudent manner, *held* entitled to present his theory of unseaworthiness to the jury. Pp. 724–729.

356 F. 2d 247, reversed and remanded.

Theodore H. Friedman argued the cause and filed briefs for petitioner.

William M. Kimball argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The single legal question presented by this case is whether a vessel is unseaworthy when its officers assign too few crewmen to perform a particular task in a safe and prudent manner. It is to resolve this question, which the lower courts answered in the negative [1] and which has caused a conflict among circuits,[2] that we granted certiorari. 385 U. S. 810.

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[1] 356 F. 2d 247.

[2] Compare *American President Lines, Ltd.* v. *Redfern,* 345 F. 2d 629, with *The Magdapur,* 3 F. Supp. 971; *Koleris* v. *S. S. Good Hope,* 241 F. Supp. 967; and the instant case. Other cases from the Third, Fourth, Fifth, and Ninth Circuits also seem to suggest a result different from the one reached in the instant case. See, *e. g., Ferrante* v. *Swedish American Lines,* 331 F. 2d 571, cert. dismissed, 379 U. S. 801; *Thompson* v. *Calmar S. S. Corp.,* 331 F. 2d 657, cert. denied, 379 U. S. 913; *Hroncich* v. *American President Lines, Ltd.,* 334 F. 2d 282; *Scott* v. *Isbrandtsen Co.,* 327 F. 2d 113; *Blassingill*

Petitioner, a member of the crew of respondent's vessel S. S. *Mormacwind,* was engaged with four other seamen in a docking operation at the stern of the vessel as it approached a pier. At the last minute, the third mate, who was directing the docking, was instructed to put out an additional mooring line, a heavy eight-inch rope, which was completely coiled on the deck. The mate then ordered petitioner and another crewman to uncoil this heavy rope and carry it 56 feet to the edge of the ship. While petitioner was uncoiling a portion of the rope to carry it to the edge of the ship, he fell and injured his back. At the trial, as the Court of Appeals recognized, "[t]here was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute 'safe and prudent seamanship.'" 356 F. 2d 247, 248. Petitioner did not contend that the vessel as a whole was insufficiently manned or that there were too few men at the stern engaged in the overall docking operation. Neither did he contend that the third mate or the seaman assigned to uncoil the rope with him was incompetent, or that the rope was itself defective. His sole contention was that the mate's assignment of two men to do the work of three or four constituted negligence and made the vessel unseaworthy. The District Court allowed the negligence issue to go to the jury, which found for respondent, but granted a directed verdict to respondent on the unseaworthiness issue, holding that the above facts could not, as a matter of law, constitute unseaworthiness. The Court of Appeals, with one judge dissenting, affirmed, holding:

> "If someone is injured solely by reason of an act or omission on the part of any member of a crew found

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v. *Waterman S. S. Corp.,* 336 F. 2d 367; *June T., Inc.* v. *King,* 290 F. 2d 404. For a critical discussion of the decision below, see 66 Col. L. Rev. 1180 (1966).

> to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent." 356 F. 2d, at 251.

It is here unnecessary to trace the history of the judicial development and expansion of the doctrine of unseaworthiness. That task was recently performed in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 543–549, where the Court, rejecting the notion that a shipowner is liable for temporary unseaworthiness only if he is negligent, concluded: "There is no suggestion in any of the decisions that the duty is less onerous with respect to . . . an unseaworthy condition which may be only temporary. . . . What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence." 362 U. S., at 549, 550. It is that principle which we conclude the lower courts failed to apply in their decisions in this case.

The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other. As regards equipment, the classic case of unseaworthiness arises when the vessel is either insufficiently or defectively equipped.[3] In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, however, the Court made it clear that the availability of safe and sufficient gear on board does not prevent the actual use of defective gear from constituting unseaworthiness, for the test of seaworthiness is to be applied "when and where the work is to be done." *Id.*, at 104. And in *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, we further clarified the extent of

[3] See generally Gilmore & Black, The Law of Admiralty § 6–38 *et seq.* (1957).

unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy. We emphatically stated the basis of our holding: "Unseaworthiness extends not only to the vessel but to the crew." *Id.*, at 427. For that proposition the Court cited *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, where we said, "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other." *Id.*, at 339.[4]

We likewise see no reason to draw that line here. That being so, under *Mahnich* it makes no difference that respondent's vessel was fully manned or that there was a sufficient complement of seamen engaged in the overall docking operation, for there were too few men assigned "when and where" the job of uncoiling the rope was to be done.[5] And under *Crumady* it makes no difference that the third mate and two men he assigned to perform the job were themselves competent seamen, or that the rope was itself a sound piece of gear. By assigning too few men to uncoil and carry the heavy rope, the mate caused both the men and the rope to be misused.

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[4] This statement, of course, was made in the context of our holding that unseaworthiness results when a member of the crew is "not equal in disposition to the ordinary men of that calling." 348 U. S., at 340. That is so, we explained, because the shipowner has a duty to provide a crew "competent to meet the contingencies of the voyage." *Ibid.* The Court of Appeals here recognized that "the vessel must be manned by an adequate and proper number of men," 356 F. 2d, at 251 (see, *e. g.*, *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585; *June T., Inc.* v. *King*, 290 F. 2d 404), but then proceeded to draw a distinction between a well-manned ship and a well-manned operation aboard the ship.

[5] Under *Mitchell*, it makes no difference that the unseaworthy condition caused by inadequate manpower "may be only temporary." 362 U. S., at 549. See generally Note, 76 Harv. L. Rev. 819 (1963).

This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection. If petitioner had been ordered to use a defective pulley in lifting the rope, he would clearly be protected by the doctrine of unseaworthiness. If the pulley itself were sound but petitioner had been ordered to load too much rope on it, he would likewise be protected. If four men had been assigned to uncoil the rope but two of the men lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner, instead of supplying petitioner with unsafe gear, insufficient gear, or incompetent manual assistance, assigned him insufficient manual assistance? We think not. When this Court extended the shipowner's liability for unseaworthiness to longshoremen performing seamen's work, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85—either on board or on the pier, *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206, either with the ship's gear or the stevedore's gear, *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, either as employees of an independent stevedore or as employees of a shipowner *pro hac vice, Reed* v. *The Yaka,* 373 U. S. 410—we noted that "the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness," *id.,* at 413, should prevent the shipowner from delegating, shifting, or escaping his duty by using the men or gear of others to perform the ship's work. By the same token, the shipowner should not be able to escape liability merely because he has used men rather than machines or physical equipment to perform that work.

Petitioner is entitled to present his theory of unseaworthiness to the jury, and the case is reversed and remanded for that purpose.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Under the prevailing cases in this Court, there can be no doubt that a negligent or improvident act of a competent officer, crewman, or longshoreman can result in unseaworthiness if it renders otherwise seaworthy equipment unfit for the purpose for which it is used. *Crumady* v. *The J. H. Fisser,* 358 U. S. 423. Likewise, petitioner argues, an order of a ship's officer assigning too few men to do a particular task creates an unseaworthy condition because the ship is undermanned in this specific respect. He challenges therefore the prevailing rule in the Second Circuit requiring plaintiff in situations such as this to prove not only that the order was improvident but also that the officer issuing it was not equal in competence to ordinary men in the calling. See *Pinto* v. *States Marine Corp. of Delaware,* 296 F. 2d 1; *Ezekiel* v. *Volusia S. S. Co.,* 297 F. 2d 215, and authorities cited therein. The majority agrees with the petitioner, at least where the improvident order requires the performance of tasks whose safe completion calls for the assignment of more men. The majority holds that the case should have gone to the jury on both the negligence and unseaworthiness claims.

In my view, however, this case should be disposed of on other grounds. While it is true that unseaworthiness is legally independent of negligence, *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, it cannot be denied that in many cases unseaworthiness and negligence overlap. And on the facts of this case I think the claim of negli-

gence was identical with the claim of unseaworthiness. As the majority says, petitioner's sole assertion is that assigning two men instead of three or four to put out the line was "negligence and made the vessel unseaworthy." The testimony supporting the claim was that safe and prudent seamanship would require three or four men to move the line. But the jury ruled against petitioner on his negligence claim, thereby deciding that the mate employed ordinary care in assigning two men to do the task. To me, the jury simply disagreed with petitioner's witness and, based on the testimony of petitioner himself and that of the seaman who helped him, decided that it was not imprudent seamanship to have two men move the line rather than three or four. Had the jury thought otherwise and considered the job to require more than two men, it would have found the issuance of the order to be a negligent act. It is perhaps possible to conceive circumstances in which the assignment of two men to do the job of three would not be negligence, but I find no such special facts in this record. In my view, the adverse verdict on negligence makes unnecessary a retrial on the unseaworthiness claim even if one adopts the majority's resolution of the legal question presented by petitioner.

JACKSON *v.* LYKES BROS. STEAMSHIP CO., INC.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 575. Argued April 12, 1967.—Decided May 8, 1967.

A longshoreman, employed on respondent's ship in navigable waters, died from inhalation of noxious gases. Petitioner, his widow, claimed that death was caused by respondent's negligence in operating the ship or by the ship's unseaworthiness. Respondent's motion to dismiss on the ground that § 5 of the Longshoremen's and Harbor Workers' Compensation Act provided the exclusive remedy was sustained by the Louisiana trial court. The state appellate court affirmed and the Louisiana Supreme Court denied certiorari. *Held:* A longshoreman employed on a ship, whether by an independent stevedoring company or by the shipowner, can recover for the unseaworthiness of the ship, *Reed* v. *The Yaka,* 373 U. S. 410, and the judgment is reversed and remanded for adjudication to the Louisiana courts, which have broad jurisdiction of such admiralty cases. Pp. 733–736.

249 La. 460, 187 So. 2d 441, reversed and remanded.

Charles R. Maloney argued the cause and filed a brief for petitioner.

Benjamin W. Yancey argued the cause for respondent. With him on the brief were *William E. Wright* and *G. Edward Merritt.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Luther Jackson, employed by Lykes Bros. Steamship Company, inhaled noxious gases and died while working as a longshoreman on a Lykes vessel on navigable waters. His widow, Helen Jackson, filed this action against Lykes in the Louisiana state trial court claiming that her husband's death was proximately caused either by Lykes' negligence in operating the ship or by the ship's unseaworthiness. Lykes moved to dismiss on the ground that § 5 of the federal Longshoremen's and Harbor Workers' Compensation Act provides that compensation

benefits required by that Act to be given by an employer to a longshoreman or his representative for "injury or death" "shall be exclusive and in place of all other liability of such employer to the employee." [1] The trial court, sustaining Lykes' motion on the ground assigned in it, dismissed petitioner's suit and the State Court of Appeal, Fourth Circuit, affirmed. 185 So. 2d 342. The Supreme Court of Louisiana finding "no error of law," denied a writ of certiorari. 249 La. 460, 187 So. 2d 441. We granted certiorari because it appeared that, in deciding as they did, the Louisiana courts had failed to follow our holding in *Reed* v. *The Yaka,* 373 U. S. 410.[2]

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[1] 44 Stat. 1426, as set forth in 33 U. S. C. § 905, provides:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ."

Section 33 (a) of the Act, 44 Stat. 1440, as amended, set forth in 33 U. S. C. § 933, also provides compensation for injuries where third persons are liable:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

[2] The Court of Appeal, Fourth Circuit, affirmed the lower court's dismissal. That court, construing our recent opinion in *Reed* v. *The Yaka,* 373 U. S. 410, as permitting only an action against a vessel owned by an employer, concluded that the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act precluded petitioner from bringing a personal action against the shipowner employer. In so holding the Court of Appeal, Fourth Circuit, stated:

"An analysis of the Yaka case reveals language which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason for believing that the section of the

The crucial facts in *Reed* v. *The Yaka* are strikingly similar to those in the present case. Reed, a longshoreman, covered by the federal Longshoremen's and Harbor Workers' Compensation Act, was injured while loading a ship. The ship was owned by the Waterman Steamship Corporation but was being operated by a bareboat charterer as owner *pro hac vice* which had directly employed Reed to work on the ship as a longshoreman. When Reed filed his suit for damages *in rem* against the ship, the ship defended on the ground that Reed being a longshoreman could not bring a personal action against the employer-owner *pro hac vice* because of the Act's exclusive recovery features and consequently he could not sue the ship. We rejected this contention on the express ground that Reed could sue the owner *pro hac vice* personally despite the Act and despite the fact that the owner *pro hac vice* was his employer.

We held in *Yaka* that a longshoreman employed by a shipowner as a longshoreman could sue the owner for the ship's unseaworthiness. In doing so we pointed out that in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85,[3] and other cases following it, a group of maritime workers, including stevedores, carpenters, and longshoremen, although employed by an independent contractor to work on the ship, were allowed to sue the owner for unsea-

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Longshoremen's and Harbor Workers' Act referred to hereinabove has been taken upon the judicial anvil and hammered into an unexpected shape.

"In any event, we are of the opinion that it exemplifies more judicial integrity to conclude that the rationale emanating from Yaka merely permits a longshoreman to bring an action in rem against his employer in the federal court." 185 So. 2d, at 345.

[3] *Sieracki* extended the doctrine of seaworthiness to a longshoreman, even though the longshoreman was not a member of the crew, and in spite of the fact that the longshoreman was entitled to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act.

worthiness of its ship.[4] We also pointed out in *Yaka* that in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, this Court had permitted a shipowner, sued by a longshoreman who had been directly hired by an independent stevedore employer under these circumstances, to bring an action over and recover from the independent stevedore employer despite the fact that the liability of the stevedore employer under the Act "shall be exclusive and in place of all other liability."

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[4] In 1953 this Court held in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, that other kinds of maritime employees, besides stevedores, who performed jobs formerly done by seamen were entitled to the seaworthiness protection given in *Sieracki*. There we said:
"It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." 346 U. S., at 412–413.

Subsequent decisions in line with the general concepts put forth by this Court have read *Sieracki* expansively, and a wide range of maritime employees have been granted the benefits of the seaworthiness doctrine. Carpenters (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406); electricians (*Feinman* v. *A. H. Bull S. S. Co.*, 216 F. 2d 393); shipcleaners (*Torres* v. *The Kastor*, 227 F. 2d 664, and *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784); repairmen (*Read* v. *United States*, 201 F. 2d 758); and riggers (*Amerocean S. S. Co.* v. *Copp*, 245 F. 2d 291), who performed jobs formerly done by seamen, have recovered from shipowners on the seaworthiness doctrine. See Note, 75 Yale L. J. 1174, 1183.

Yaka also stressed the fact that the traditional humanitarian remedy for unseaworthiness was not to be destroyed by the kind of employment contract that a shipowner made with the people who worked on the ship.

In this case as in *Yaka,* the fact that the longshoreman was hired directly by the owner instead of by the independent stevedore company makes no difference as to the liability of the ship or its owner. In the final analysis the contention here against recovery as in *Yaka* is that the longshoreman who is employed to work on a ship by an independent stevedore company instead of the shipowner can recover for the unseaworthiness of the vessel, but a longshoreman hired by the same shipowner to do exactly the same kind of work on an unseaworthy ship cannot recover. We reject this contention as we did before.[5] We cannot accept such a construction of the Act—an Act designed to provide equal justice to every longshoreman similarly situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act.

We adhere to *Yaka* and hold that the Louisiana courts committed error in dismissing petitioner's claim. Louisiana courts have broad jurisdiction of admiralty cases such as this and have frequently exercised it. In this situation it is the duty of the Louisiana courts to adjudicate this case. The judgment is reversed and remanded for trial and further proceedings in the Louisiana courts

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[5] *Reed* v. *The Yaka,* 373 U. S., at 415:

"We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company."

not inconsistent with this opinion. *Testa* v. *Katt,* 330 U. S. 386; *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1; *Claflin* v. *Houseman,* 93 U. S. 130. See *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239.

It is so ordered.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, dissenting.

Luther Jackson was a longshoreman. He died from injuries received in the course of his employment. A federal law clearly imposes an absolute obligation upon his employer to pay compensation to his widow.[1] The law's humanitarian purpose is to ensure that all shall be compensated, regardless of the employer's fault. That law just as clearly provides that the employer's statutory obligation to pay this compensation "shall be exclusive and in place of all other liability . . . at law or in admiralty."[2] Nonetheless, Jackson's widow brought this admiralty action against his employer in Louisiana. The state courts dismissed the action, holding that the federal law means what it says.

The Court today holds that this federal law cannot mean what it says, because this would lead to an "incongruous, absurd, and unjust result." The Court says that the result it reaches is dictated by its prior decision in *Reed* v. *The Yaka,* 373 U. S. 410. The Louisiana courts thought that the *Yaka* case, which involved the intervention of a third party, was distinguishable, and so do I. But in any event I would decide this case on its own facts under the law as it was clearly written by Congress.

Congress, in setting up a federal system of workmen's compensation for longshoremen, imposing liability with-

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[1] Longshoremen's and Harbor Workers' Compensation Act, §§ 4, 9, 44 Stat. 1426, 1429, 33 U. S. C. §§ 904, 909.

[2] *Id.,* § 5, 44 Stat. 1426, 33 U. S. C. § 905.

out fault upon employers, provided that this should be the exclusive remedy against the employer himself. I cannot agree that the law Congress passed is either "incongruous," "absurd," or "unjust." If it is, then so are the workmen's compensation laws of 49 States, all of which contain the same basic provision.[3]

But even if I could agree with the Court's characterization of the law that Congress has written, I could never agree with the Court's judgment. It is our duty to apply the law, not to repeal it.

I respectfully dissent.

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[3] See 1 Schneider, Workmen's Compensation §§ 89–154 (3d ed.).

ANDERS *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 98. Argued March 14, 1967.—Decided May 8, 1967.

Counsel, appointed by a California appellate court on petitioner's motion to prosecute the appeal of his felony conviction, concluded after studying the record and consulting with petitioner, that there was no merit to the appeal and so advised the court. He also advised it that petitioner wished to file a brief in his behalf. Petitioner's request for another attorney was denied. He then filed a brief *pro se* and a reply brief to the State's response. The appellate court, after examining the record, affirmed the conviction. Six years later, petitioner, seeking to reopen his case on the ground that he had been deprived of the right to counsel on his appeal, filed in the appellate court an application for habeas corpus, which the court denied the same day. The court stated that it had again reviewed the record and determined the appeal to be "without merit" (but failed to say whether it was frivolous or not) and that the procedure here followed the California system for handling indigents' appeals approved by that State's Supreme Court as meeting the requirements of *Douglas* v. *California,* 372 U. S. 353. Claiming, *inter alia,* that the judge and prosecutor had erroneously commented on his failure to testify, petitioner filed with the State Supreme Court an application for habeas corpus, which that court denied without giving any reason for its decision. *Held:* The failure to grant this indigent petitioner seeking initial review of his conviction the services of an advocate, as contrasted with an *amicus curiae,* which would have been available to an appellant with financial means, violated petitioner's rights to fair procedure and equality under the Fourteenth Amendment. Pp. 741–745.

(a) This Court has consistently held invalid those procedures on the first appeal of a conviction where the rich man who appeals as of right enjoys the full benefits of counsel while the indigent "is forced to shift for himself." *Douglas* v. *California, supra,* at 358. P. 741.

(b) The Sixth Amendment's requirements for the right to counsel are made obligatory upon the States by the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U. S. 335. P. 742.

(c) Counsel's bare no-merit conclusion was not an adequate substitute for petitioner's right to full appellate review. To satisfy the requirement of substantial equality and fair process counsel must be an active advocate, not just an *amicus curiae*. Pp. 742–743.

(d) If counsel conscientiously decides that the appeal is wholly frivolous he should so advise the court and request permission to withdraw, at the same time furnishing the court and the indigent with a brief of anything in the record arguably supporting the appeal. P. 744.

(e) If after full review the court finds any legal points arguable it must appoint counsel to argue the appeal; otherwise it may dismiss the appeal as far as federal requirements are concerned or decide the case on the merits if state law requires. P. 744.

Reversed and remanded.

Ira Michael Heyman, by appointment of the Court, 384 U. S. 925, argued the cause and filed briefs for petitioner.

George J. Roth, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, and *William E. James,* Assistant Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

We are here concerned with the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal.

After he was convicted of the felony of possession of marijuana, petitioner sought to appeal and moved that the California District Court of Appeal appoint counsel for him. Such motion was granted; however, after a study of the record and consultation with petitioner, the appointed counsel concluded that there was no merit to the appeal. He so advised the court by letter and, at the same time, informed the court that petitioner wished

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to file a brief in his own behalf. At this juncture, petitioner requested the appointment of another attorney. This request was denied and petitioner proceeded to file his own brief *pro se*. The State responded and petitioner filed a reply brief. On January 9, 1959, the District Court of Appeal unanimously affirmed the conviction, *People* v. *Anders*, 167 Cal. App. 2d 65, 333 P. 2d 854.

On January 21, 1965, petitioner filed an application for a writ of habeas corpus in the District Court of Appeal in which he sought to have his case reopened. In that application he raised the issue of deprivation of the right to counsel in his original appeal because of the court's refusal to appoint counsel at the appellate stage of the proceedings.[1] The court denied the application on the same day, in a brief unreported memorandum opinion. The court stated that it "ha[d] again reviewed the record and [had] determined the appeal [to be] without merit." The court also stated that "the procedure prescribed by In re Nash, 61 A. C. 538, was followed in this case . . . ."[2] On June 25, 1965, petitioner submitted a petition for a writ of habeas

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[1] Previously, on January 24, 1964, petitioner, while on parole, had been arrested and convicted of the felony of burglary which was affirmed on appeal. We granted certiorari, *ante*, p. 264, vacated the judgment below and remanded for further consideration in light of *Chapman* v. *California*, *ante*, p. 18.

[2] *In re Nash*, 61 Cal. 2d 491, 393 P. 2d 405 (1964), held that the requirements of *Douglas* v. *California*, 372 U. S. 353 (1963), are met in the event appointed counsel thoroughly studies the record, consults with the defendant and trial counsel and conscientiously concludes, and so advises the appellate court, that there are no meritorious grounds of appeal; and provided that the appellate court is satisfied from its own review of the record, in light of any points personally raised by the defendant, that appointed counsel's conclusion is correct. The appeal then proceeds without the appointment of other counsel and decision is reached without argument.

corpus to the Supreme Court of California, and the petition was denied without opinion by that court on July 14, 1965. Among other trial errors, petitioner claimed that both the judge and the prosecutor had commented on his failure to testify contrary to the holding of this Court in *Griffin* v. *California,* 380 U. S. 609 (1965). We have concluded that California's action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment.

I.

For a decade or more, a continuing line of cases has reached this Court concerning discrimination against the indigent defendant on his first appeal. Beginning with *Griffin* v. *Illinois,* 351 U. S. 12 (1956) where it was held that equal justice was not afforded an indigent appellant where the nature of the review "depends on the amount of money he has," at 19, and continuing through *Douglas* v. *California,* 372 U. S. 353 (1963), this Court has consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." At 358. Indeed, in the federal courts, the advice of counsel has long been required whenever a defendant challenges a certification that an appeal is not taken in good faith, *Johnson* v. *United States,* 352 U. S. 565 (1957), and such representation must be in the role of an advocate, *Ellis* v. *United States,* 356 U. S. 674, 675 (1958), rather than as *amicus curiae.* In *Ellis, supra,* we concluded:

> "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court

> is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." At 675.

In *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the Sixth Amendment's requirement that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" was made obligatory on the States by the Fourteenth Amendment, the Court holding that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." At 344. We continue to adhere to these principles.

II.

In petitioner's case, his appointed counsel wrote the District Court of Appeal, stating:

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . . [H]e wishes to file a brief in this matter on his own behalf."

The District Court of Appeal, after having examined the record, affirmed the conviction. We believe that counsel's bare conclusion, as evidenced by his letter, was not enough. It smacks of the treatment that Eskridge received, which this Court condemned, that permitted a trial judge to withhold a transcript if he found that a defendant "has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein." *Eskridge* v. *Washington State Board,* 357 U. S. 214, 215 (1958). Such a procedure, this Court said, "cannot be an adequate substitute for the right to full appellate review available to all defendants"

who may not be able to afford such an expense. At 216. And in still another case in which "a state officer outside the judicial system" was given the power to deprive an indigent of his appeal by refusing to order a transcript merely because he thought the "appeal would be unsuccessful," we reversed, finding that such a procedure did not meet constitutional standards. *Lane* v. *Brown,* 372 U. S. 477 (1963). Here the court-appointed counsel had the transcript but refused to proceed with the appeal because he found no merit in it. He filed a no-merit letter with the District Court of Appeal whereupon the court examined the record itself and affirmed the judgment. On a petition for a writ of habeas corpus some six years later it found the appeal had no merit. It failed, however, to say whether it was frivolous or not, but, after consideration, simply found the petition to be "without merit." The Supreme Court, in dismissing this habeas corpus application, gave no reason at all for its decision and so we do not know the basis for its action. We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in *Ellis, supra.* Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. The necessity for counsel so acting is highlighted by the possible disadvantage the petitioner suffered here. In his *pro se* brief, which was filed in 1959, he urged several trial errors but failed to raise the point that both the judge and the prosecutor had commented to the jury regarding petitioner's failure to testify. In 1965, this Court in *Griffin* v. *California, supra,* outlawed California's comment rule, as embodied in Art. I, § 13, of the California Constitution.

III.

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court.[3] His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

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[3] For comparative purposes see *Tate* v. *United States*, 123 U. S. App. D. C. 261, 359 F. 2d 245, and *Johnson* v. *United States*, 124 U. S. App. D. C. 29, 360 F. 2d 844, which outline the practice followed in the District of Columbia. These guidelines are elaborated in more detail in a "Statement to be Handed by the Clerk to Appointed Counsel" which has been prepared by the Court of Appeals for the District of Columbia Circuit. We indicate no approval of the requirements set out in the statement or in the cases.

This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The system used by California for handling indigent appeals was described by the California Supreme Court in *In re Nash,* 61 Cal. 2d 491, 495, 393 P. 2d 405, 408:

> "We believe that the requirement of the *Douglas* case [372 U. S. 353] is met . . . when, as in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious

> grounds of appeal. If thereafter the appellate court is satisfied *from its own review* of the record in the light of any points raised by the defendant personally that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument." (Emphasis added.)

The Court today holds this procedure unconstitutional, and imposes upon appointed counsel who wishes to withdraw from a case he deems "wholly frivolous" the requirement of filing "a brief referring to anything in the record that might arguably support the appeal." But if the record did present any such "arguable" issues, the appeal would not be frivolous and counsel would not have filed a "no-merit" letter in the first place.*

The quixotic requirement imposed by the Court can be explained, I think, only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a "no-merit" letter is not to be trusted. That is an assumption to which I cannot subscribe. I

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*The Court concedes as much when it states such a brief should be filed only when counsel believes the case to be "wholly frivolous" and then goes on to hold "if [the California appellate court] finds any of the legal points arguable on their merits (*and therefore not frivolous*) it must . . . afford the indigent the assistance of counsel . . . ." *Ante,* p. 744. (Emphasis added.)

Even accepting the Court's requirement, one would have to perceive an "arguable" issue in Anders' case in order to remand it for a new appeal. The most that all of the courts and lawyers who have examined his case have turned up is a claim that the prosecutor commented on his silence at trial. But Anders' conviction was affirmed by the California District Court of Appeal six years before *Griffin* v. *California,* 380 U. S. 609, was decided. Our later decision in *Tehan* v. *Shott,* 382 U. S. 406, was based on the premise that prior to *Griffin* the practice of commenting on the defendant's silence was well established and thus did not raise an "arguable" issue. Cf. *O'Connor* v. *Ohio,* 385 U. S. 92.

cannot believe that lawyers appointed to represent indigents are so likely to be lacking in diligence, competence, or professional honesty. Certainly there was no suggestion in the present case that the petitioner's counsel was either incompetent or unethical.

But even if I could join in this degrading appraisal of the *in forma pauperis* bar, it escapes me how the procedure that the Court commands is constitutionally superior to the system now followed in California. The fundamental error in the Court's opinion, it seems to me, is its implicit assertion that there can be but a single inflexible answer to the difficult problem of how to accord equal protection to indigent appellants in each of the 50 States.

Believing that the procedure under which Anders' appeal was considered was free of constitutional error, I would affirm the judgment.

ENTSMINGER *v.* IOWA.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 252. Argued March 15, 1967.—Decided May 8, 1967.

Petitioner, an indigent represented by court-appointed counsel, was convicted of a felony in violation of Iowa law. As he requested, a different attorney was appointed to prepare his motion for a new trial, which was overruled. Representing petitioner on appeal, that attorney filed a notice of appeal and later, having been asked by petitioner to perfect a plenary appeal, gave notice therefor but, apparently believing the appeal lacked merit (but not asking to withdraw from the case), failed to file the entire trial record though it had been prepared by the State and counsel had advised petitioner that he would file it. Though the State Supreme Court had ordered the case submitted on the full record, briefs and argument of counsel, the court considered the case on the basis of the "clerk's transcript," under an Iowa procedure for appellate review as a matter of course on the basis of a modified transcript submitted by the trial court clerk which contains the information or indictment, the grand jury minutes, bailiff's oath, statement, and instructions but not the transcript of evidence or briefs or arguments of counsel which are also made available where appellant's counsel has requested plenary review. Shortly before the State Supreme Court affirmed the conviction petitioner had requested that the court order the "certified records" transmitted to it. *Held:* Petitioner, who was entitled to the assistance of appointed counsel acting in the role of an advocate (see *Anders* v. *California, ante,* p. 738), was precluded by his attorney's bare election to use Iowa's "clerk's transcript procedure" from obtaining complete and effective appellate review of his conviction. Pp. 751–752.

137 N. W. 2d 381, reversed and remanded.

David W. Belin, by appointment of the Court, 385 U. S. 804, argued the cause and filed a brief for petitioner.

Don R. Bennett, Assistant Attorney General of Iowa, argued the cause for respondent. With him on the brief was *Lawrence F. Scalise,* Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case, which was argued following *Anders* v. *California, ante,* p. 738, presents a similar problem in that we are here also concerned with the constitutional requirements which are binding on a State in the administration of its appellate criminal procedures with respect to convicted indigents seeking initial review of their convictions. Petitioner, who was represented at trial by a court-appointed attorney, was convicted of uttering a forged instrument in violation of Iowa law. Shortly after the verdict was rendered, he requested the trial court to appoint different counsel to aid him in the preparation of a motion for new trial. Counsel was appointed, the motion was prepared and filed but the trial court overruled it. Upon petitioner's application, the same attorney was appointed to represent him on appeal; counsel then prepared and filed a timely notice of appeal.

Iowa law provides alternate methods of appealing criminal convictions, the first method being an appeal on a "clerk's transcript" which follows the notice of appeal as a matter of course.[1] Under this procedure, the clerk of the trial court prepares and files a modified transcript of the proceedings below; such transcript contains only the Information or Indictment, the Grand Jury Minutes, the Bailiff's Oath, Statement and Instructions, various orders and judgment entries of the court, but does not contain the transcript of evidence nor the briefs and argument of counsel. This practice is used in the absence of a request on the part of counsel for a plenary review of the case. If such a request is made, the appellant is provided an appeal on a complete record of the trial, including not only those items included in

[1] Iowa Code § 793.6 (1962).

the clerk's transcript but in addition thereto, the briefs and argument of counsel.[2]

Petitioner asked his appointed attorney to perfect a plenary appeal and counsel gave notice therefor which, though belatedly filed, was allowed by the Iowa Supreme Court. However, counsel, apparently believing that the appeal was without merit, failed to file the entire record of petitioner's trial although it had been prepared by the State and counsel had advised petitioner that he would file same. It is of note that counsel never moved the court for leave to withdraw from the case. Despite the fact that the Supreme Court had ordered the case submitted on the full record, briefs and arguments of counsel—and the record here fails to reveal any rescission of that order—the court took petitioner's case into consideration on the clerk's transcript alone as it was required to do under Iowa law.[3] The conviction was affirmed by the Supreme Court of Iowa, *State* v. *Entsminger,* 137 N. W. 2d 381 (1965). This was done despite the request of the petitioner a few days before the affirmance of his conviction, that the court issue an order commanding the trial court to "transmit the certified records" to the Supreme Court for its review. We granted certiorari, 384 U. S. 1000.

The Attorney General of Iowa in the utmost candor and with most commendable fairness concedes that petitioner has not received "adequate appellate review" and is entitled to an appeal free of constitutional doubt. We have examined the record carefully and agree that the clerk's transcript procedure as applied here "can hardly be labeled adequate and effective review of the merits of

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[2] Rules of the Supreme Court, Rule 16, Iowa Code, Vol. II, p. 2716 (1962).

[3] *Id.,* Rule 15.

the proceedings culminating in a conviction." [4] He bases his conclusions in this regard upon the holding of the Iowa Supreme Court in *Weaver* v. *Herrick,* 258 Iowa 796, 140 N. W. 2d 178 (1966), where the court specifically stated:

> "To afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necessary briefs is required." At 801–802, 140 N. W. 2d, at 181.

As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal, *Douglas* v. *California,* 372 U. S. 353 (1963), and appointed counsel must function in the active role of an advocate, as opposed to that of *amicus curiae, Ellis* v. *United States,* 356 U. S. 674 (1958). In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), the Court held that a State that provided transcripts on appeal only to those who could afford them was constitutionally required to provide a "means of affording adequate and effective appellate review to indigent defendants." At 20. Again in *Burns* v. *Ohio,* 360 U. S. 252 (1959), the Court, in reaffirming the *Griffin* rule, held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." At 257. In *Smith* v. *Bennett,* 365 U. S. 708 (1961), the Court, once again considering the question, held that such principles are not limited to direct appeals but are also applicable to post-conviction proceedings.

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[4] Indeed the Attorney General has moved the Supreme Court of Iowa to change its rule with respect to the clerk's transcript system and his suggested changes and the responsibility of appointed counsel thereunder are now under advisement. We do not pass on the validity of the suggested procedure.

In that case the Court held that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." At 714. Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure as embodied in Iowa law. Such procedure automatically deprived him of a full record, briefs, and arguments on the bare election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record in the case. By such action "all hope of any [adequate and effective] appeal at all," *Lane* v. *Brown,* 372 U. S. 477, 485 (1963), was taken from the petitioner.

Since petitioner admittedly has not received the benefit of a first appeal with a full printed abstract of the record, briefs, and oral argument, as was his right under Iowa law, we do not reach the merits of his conviction here. We have discussed at some length the responsibility of both the appellate court and appointed counsel representing indigents on appeal in *Anders* v. *California, supra,* decided this day, and we need not repeat such here. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK and MR. JUSTICE HARLAN join, concurs in the judgment and in the Court's opinion, except as it refers to *Anders* v. *California,* a case which he thinks involves quite different issues.

NATIONAL BELLAS HESS, INC. *v.* DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 241. Argued February 23, 1967.—Decided May 8, 1967.

Appellant is a mail order house with its principal place of business in Missouri. It owns no tangible property in Illinois, has no sales outlets, representatives, telephone listing, or solicitors in that State, and does not advertise there by radio, television, billboards, or newspapers. It mails catalogues twice a year to customers throughout the United States, including Illinois, supplemented by occasional "flyers." Orders for merchandise are mailed to appellant's Missouri plant, and goods are sent to customers by mail or common carrier. Appellee obtained a judgment from the Illinois Supreme Court requiring appellant to collect and pay to the State the use tax imposed by Illinois upon consumers who purchase appellant's goods for use within the State. *Held:* The Commerce Clause prohibits a State from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or by mail. Pp. 756–760.

34 Ill. 2d 164, 214 N. E. 2d 755, reversed.

Archibald Cox argued the cause for appellant. With him on the briefs were *Herman A. Benjamin* and *Julian R. Wilheim.*

Terence F. MacCarthy, Special Assistant Attorney General of Illinois, argued the cause for appellee. With him on the brief were *William G. Clark,* Attorney General, and *Richard A. Michael,* Assistant Attorney General.

James B. Lewis and *Jay H. Topkis* filed a brief for the American Heritage Publishing Co., Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE STEWART delivered the opinion the Court.

The appellant, National Bellas Hess, is a mail order house with its principal place of business in North Kansas

City, Missouri. It is licensed to do business in only that State and in Delaware, where it is incorporated. Although the company has neither outlets nor sales representatives in Illinois, the appellee, Department of Revenue, obtained a judgment from the Illinois Supreme Court that National is required to collect and pay to the State the use taxes imposed by Ill. Rev. Stat. c. 120, § 439.3 (1965).[1] Since National's constitutional objections to the imposition of this liability present a substantial federal question, we noted probable jurisdiction of its appeal.[2]

The facts bearing upon National's relationship with Illinois are accurately set forth in the opinion of the State Supreme Court:

> "[National] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois." [3]

All of the contacts which National does have with the State are via the United States mail or common carrier. Twice a year catalogues are mailed to the company's active or recent customers throughout the Nation, including Illinois. This mailing is supplemented by advertising "flyers" which are occasionally mailed to past and potential customers. Orders for merchandise are mailed by the

[1] 34 Ill. 2d 164, 214 N. E. 2d 755.

[2] 385 U. S. 809.

[3] 34 Ill. 2d, at 166–167, 214 N. E. 2d, at 757.

customers to National and are accepted at its Missouri plant. The ordered goods are then sent to the customers either by mail or by common carrier.

This manner of doing business is sufficient under the Illinois statute to classify National as a "[r]etailer maintaining a place of business in this State," since that term includes any retailer:

> "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Ill. Rev. Stat. c. 120, § 439.2 (1965).

Accordingly, the statute requires National to collect and pay to the appellee Department the tax imposed by Illinois upon consumers who purchase the company's goods for use within the State.[4] When collecting this tax, National must give the Illinois purchaser "a receipt therefor in the manner and form prescribed by the [appellee]," if one is demanded.[5] It must also "keep such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the [appellee] shall require, in such form as the [appellee] shall require," and must submit to such investigations, hearings, and examinations as are needed by the appellee to administer and enforce the use tax law.[6] Failure to keep such records or to give required receipts is punishable by a fine of up to $5,000 and imprisonment of up to six months.[7] Finally, to allow service of process on an out-of-state company like National, the statute designates the Illinois Secretary of State as National's appointed agent, and jurisdiction in tax collection suits attaches

[4] Ill. Rev. Stat. c. 120, § 439.3 (1965).

[5] *Id.*, § 439.5.

[6] *Id.*, § 439.11.

[7] *Id.*, § 439.14.

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when process is served on him and the company is notified by registered mail.[8]

National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co.* v. *Pennsylvania,* 370 U. S. 607, 621–622 (concurring opinion of Mr. Justice Black). As to the former, the Court has held that "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman* v. *Hewit,* 329 U. S. 249, 253. See also *Greyhound Lines* v. *Mealey,* 334 U. S. 653, 663; *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450, 462. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the "simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444. See also *Standard Oil Co.* v. *Peck,* 342 U. S. 382; *Ott* v. *Mississippi Barge Line,* 336 U. S. 169, 174. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, 344–345; *Scripto,*

[8] *Id.,* § 439.12a.

Inc. v. *Carson,* 362 U. S. 207, 210–211.[9] See also *American Oil Co.* v. *Neill,* 380 U. S. 451, 458.

In applying these principles the Court has upheld the power of a State to impose liability upon an out-of-state seller to collect a local use tax in a variety of circumstances. Where the sales were arranged by local agents in the taxing State, we have upheld such power. *Felt & Tarrant Co.* v. *Gallagher,* 306 U. S. 62; *General Trading Co.* v. *Tax Comm'n,* 322 U. S. 335. We have reached the same result where the mail order seller maintained local retail stores. *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359; *Nelson* v. *Montgomery Ward,* 312 U. S. 373.[10] In those situations the out-of-state seller was plainly accorded the protection and services of the taxing State. The case in this Court which represents the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto, Inc.* v. *Carson,* 362 U. S. 207. There we held that Florida could constitutionally impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida. In that case the seller had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders

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[9] Strictly speaking, there is no question of the connection or link between the State and "the person . . . it seeks to tax." For that person in *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, in *Scripto, Inc.* v. *Carson,* 362 U. S. 207, and in the present case is the user of the goods to whom the out-of-state retailer sells. National is not the person being directly taxed, but rather it is asked to collect the tax from the user. It is, however, made directly liable for the payment of the tax whether collected or not. Ill. Rev. Stat. c. 120, § 439.8 (1965).

[10] National acknowledges its obligation to collect a use tax in Alabama, Kansas, and Mississippi, since it has retail outlets in those States.

from that State to Atlanta for shipment of the ordered goods." 362 U. S., at 211.

But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. Indeed, in the *Sears, Roebuck* case the Court sharply differentiated such a situation from one where the seller had local retail outlets, pointing out that "those other concerns . . . are not receiving benefits from Iowa for which it has the power to exact a price." 312 U. S., at 365. And in *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, the Court held that Maryland could not constitutionally impose a use tax obligation upon a Delaware seller who had no retail outlets or sales solicitors in Maryland. There the seller advertised its wares to Maryland residents through newspaper and radio advertising, in addition to mailing circulars four times a year. As a result, it made substantial sales to Maryland customers, and made deliveries to them by its own trucks and drivers.

In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities,[11] is a valid one, and we decline to obliterate it.

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[11] As of 1965, 11 States besides Illinois had use tax statutes which required a seller like National to participate in the tax collection system. However, state taxing administrators appear to have generally considered an advertising nexus insufficient. For they have testified that doubts as to the constitutionality of such statutes

We need not rest on the broad foundation of all that was said in the *Miller Bros.* opinion, for here there was neither local advertising nor local household deliveries, upon which the dissenters in *Miller Bros.* so largely relied. 347 U. S., at 358. Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes.[12] The many variations in rates of tax,[13] in allowable exemptions, and in administrative and record-keeping requirements[14] could entangle National's inter-

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underlay their failure to take full advantage of their statutory authority. Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H. R. Rep. No. 565, 89th Cong., 1st Sess., 631–635 (1965). These doubts were substantiated by the only other State Supreme Court that has considered the issue now before us. The Alabama Supreme Court, dealing with a situation very much like the present one, found that this application of the use tax statute would be invalid under the Federal Constitution. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 So. 2d 91.

[12] "Local sales taxes are imposed today [1965] by over 2,300 localities. . . . In most States, the local sales tax is complemented by a use tax." H. R. Rep. No. 565, *supra,* at 872.

[13] In 1964 there were seven different rates of sales and use taxes: 2, 2¼, 2½, 3, 3½, 4, and 5%. H. R. Rep. No. 565, *supra,* at 611–613, 607–608. The State of Washington has recently added an eighth, 4.2%. Wash. Rev. Code § 82.12.020 (Supp. 1965).

[14] "The prevailing system requires [the seller] to administer rules which differ from one State to another and whose application—especially for the industrial retailer—turns on facts which are often

state business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.[15]

The judgment is

Reversed.

MR. JUSTICE FORTAS, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

In my opinion, this Court's decision in *Scripto, Inc.* v. *Carson,* 362 U. S. 207 (1960), as well as a realistic approach to the facts of appellant's business, dictates affirmance of the judgment of the Supreme Court of Illinois.

National Bellas Hess is a large retail establishment specializing in wearing apparel. Directly and through subsidiaries, it operates a national retail mail order business with headquarters in North Kansas City, Missouri, and its wholly owned subsidiaries operate a large number of retail stores in various States. In 1961, appellant's net sales were in the neighborhood of

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too remote and uncertain for the level of accuracy demanded by the prescribed system." H. R. Rep. No. 565, *supra,* at 673.

"Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable." *Id.,* at 882.

[15] Congress has in fact recently evidenced an active interest in this area. See Tit. II, Pub. L. 86–272, 73 Stat. 556, as amended by Pub. L. 87–17, 75 Stat. 41, which authorized the detailed congressional study of state taxation of interstate commerce that resulted in H. R. Rep. No. 565, *supra.* See also H. R. Rep. No. 2013, 89th Cong., 2d Sess. (1966).

$60,000,000, and its accounts receivable amounted to about $15,500,000.[1]

Its sales in Illinois amounted to $2,174,744 for the approximately 15 months for which the taxes in issue in this case were assessed. This substantial volume is obtained by twice-a-year catalogue mailings, supplemented by "intermediate smaller 'sales books' or 'flyers,' " as the court below styled them. The catalogue contains about 4,000 items of merchandise. The company's mailing list includes over 5,000,000 names. The "flyers" are sent to an even larger list than the catalogues and are occasionally mailed in bulk addressed to "occupant."

A substantial part of Bellas Hess' sales is on credit. Its catalogue features "NBH Budget Aid Credit"—which requires no money down but requires the purchaser to make monthly payments which include a service fee or interest charge, and which also incorporates an agreement, unless expressly rejected by the purchaser, for "Budget Aid Family Insurance." The company also offers "charge account" services—payable monthly including a "service charge" if the account is not fully paid within 30 days. The form to be filled in for credit purchases contains the usual type of information, including place of employment, name of bank, marital status, home ownership or rental. Merchandise can also be bought c. o. d. or by sending a check or money order with the order for goods.[2]

There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient "nexus" to require Bellas Hess to collect from Illinois customers and to

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[1] Moody's Industrial Manual (1962).

[2] Because this case was tried on affidavits, reference has also been made to the National Bellas Hess Catalogue, Spring and Summer 1967, to supplement the picture of appellant's business afforded by the record.

remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in "exploitation of the consumer market" of Illinois (*Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, 347 (1954)) by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. Bellas Hess could not carry on its business in Illinois, and particularly its substantial credit business, without utilizing Illinois banking and credit facilities. Since the case was tried on affidavits, we are not informed as to the details of the company's credit operations in Illinois. We do not know whether it utilizes credit information or collection agencies, or similar institutions. The company states that it has "brought no suits in the State of Illinois." Accepting this as true, it would nevertheless be unreasonable to assume that the company does not either sell or assign its accounts or otherwise take measures to collect its delinquent accounts, or that collection does not include local activities by the company or its assignees or representatives.

Bellas Hess enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein. Indeed, if it did either, the benefit that it received from the State of Illinois would be no more than it now has—the ability to make sales of its merchandise, to utilize credit facilities, and to realize a profit; and, at the same time, it would be required to pay additional taxes. Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands

only that it collect from its customer-users—and remit to the State—the use tax which is merely equal to the sales tax which resident merchants must collect and remit. To excuse Bellas Hess from this obligation is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers. In Illinois the rate is 3½%, and when it is realized that in some communities the sales tax requires, in effect, that as much as 5% be added to the amount that customers of local, tax-paying stores must pay,[3] the importance of the competitive discrimination becomes apparent. While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional, minor and sporadic and not the result of a calculated, systematic exploitation of the market, it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis. In such cases, the difference between the nature of the business conducted by the mail order house and by the local enterprise is not entitled to constitutional significance. The national mail order business amounts to over $2,400,000,000 a year.[4] Some of this is undoubtedly subject to the full range of taxes because of the location of stores in the various States,[5] and some of it is and should be exempt from state use tax because of its sporadic or minor nature. See Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee, H. R. Rep. No. 565, 89th Cong., 1st Sess.,

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[3] This is the current rate in Pennsylvania. Pa. Stat. Ann., Tit. 72, § 3403–201 (1964). See The World Almanac (1967, Newspaper Enterprise Assn.) 136–137.

[4] U. S. Bureau of the Census, 1963 Census of Business, Retail Trade-Area Statistics, pt. 1, table 2, p. 1–8 (1966).

[5] See *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359 (1941); *Nelson* v. *Montgomery Ward*, 312 U. S. 373 (1941).

Vol. 3 (1965), at 770–777. But the volume which, under the present decision, will be placed in a favored position and exempted from bearing its fair burden of the collection of state taxes certainly will be substantial, and as state sales taxes increase, this haven of immunity may well increase in size and importance.

In *Scripto, supra,* this Court applied a sensible, practical conception of the Commerce Clause. The interstate seller which, in that case, claimed constitutional immunity from the collection of the Florida use tax had, like appellant here, no office or place of business in the State, and had no property or employees there. It solicited orders in Florida through local "independent contractors" or brokers paid on a commission basis. These brokers were furnished catalogues and samples, and forwarded orders to Scripto, out of state. The Court noted that the seller was "charged with no tax—save when . . . he fails or refuses to collect it" (362 U. S., at 211)[6] and that the State "reimburs[ed the seller] . . . for its service" as tax collector (362 U. S., at 212). The same is true in the present case.[7] I do not see how *Scripto* is

[6] Our observation in *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 365–366 (1941), is an apt response to appellant's claim that it will not be able to collect all of the tax from its purchasers: "[S]o far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid." Actually, it appears that appellant's method of doing business is such as to minimize the noncollection of the tax.

[7] The Illinois statute provides for a "discount of 2% or $5 per calendar year, whichever is greater . . . to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data . . . ." Ill. Rev. Stat. c. 120, § 439.9 (1965). Appellant does not claim that this amount is inadequate to reimburse it for its expenses in collecting the tax for the State.

meaningfully distinguishable from this case. In fact, *Scripto* involved the sale of a single article of commerce. The "exploitation" of the State's market was by no means as pervasive or comprehensive as is here involved, nor was there any reference to the company's use of the State's credit institutions.

The present case is, of course, not at all controlled by *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340 (1954). In that case, as this Court said, the company sold its merchandise at its store in Delaware; there was "no solicitation other than the incidental effects of general advertising . . . no invasion or exploitation of the consumer market . . . ." 347 U. S., at 347. As the Court noted in *Scripto, supra, Miller Bros.* was a case in which there was "no regular, systematic displaying of its products by catalogs, samples or the like." 362 U. S., at 212. On the contrary, in the present case, appellant regularly sends not only its catalogue, but even bulk mailings soliciting business addressed to "occupant," and it offers and extends credit to residents of Illinois based on their local financial references.

As the Court says, the test whether an out-of-state business must comply with a state levy is variously formulated: "whether the state has given anything for which it can ask return";[8] whether the out-of-state business enjoys the protection or benefits of the State;[9] whether there is a sufficient nexus: "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[10] However this is formulated, it seems to me entirely clear that a mail order house engaged in the business of regularly, systematically, and on a large scale offering merchandise for sale in a State in competition with local retailers, and

[8] *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444 (1940).

[9] *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 364 (1941).

[10] *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, 344–345 (1954).

soliciting deferred-payment credit accounts from the State's residents, is not excused from compliance with the State's use tax obligations by the Commerce Clause or the Due Process Clause of the Constitution.

It is hardly worth remarking that appellant's expressions of consternation and alarm at the burden which the mechanics of compliance with use tax obligations would place upon it and others similarly situated should not give us pause. The burden is no greater than that placed upon local retailers by comparable sales tax obligations; and the Court's response that these administrative and record keeping requirements could "entangle" appellant's interstate business in a welter of complicated obligations vastly underestimates the skill of contemporary man and his machines. There is no doubt that the collection of taxes from consumers is a burden; but it is no more of a burden on a mail order house such as appellant located in another State than on an enterprise in the same State which accepts orders by mail; and it is, indeed, hardly more of a burden than it is on any ordinary retail store in the taxing State.

I would affirm.

REDRUP *v.* NEW YORK.

CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 3. Argued October 10, 1966.—Decided May 8, 1967.*

Petitioners in Nos. 3 and 16 were convicted for violating New York and Kentucky laws, respectively, concerning the sale of allegedly obscene publications. In No. 50 the Arkansas courts in a civil proceeding declared certain issues of specific magazines to be obscene, enjoined their distribution, and ordered their destruction. *Held:* These cases can be and are decided upon their common constitutional basis that the distribution of the publications is protected by the First and Fourteenth Amendments from governmental suppression.

No. 50, 239 Ark. 474, 393 S. W. 2d 219, and Nos. 3 and 16, reversed.

Sam Rosenwein argued the cause for petitioner in No. 3. With him on the briefs were *Stanley Fleishman* and *Osmond K. Fraenkel*. *Mr. Fleishman* argued the cause and filed briefs for petitioner in No. 16. *Emanuel Redfield* argued the cause and filed briefs for appellants in No. 50.

H. Richard Uviller argued the cause for respondent in No. 3. With him on the brief were *Frank S. Hogan* and *Alan F. Scribner*. *John B. Browning*, Assistant Attorney General of Kentucky, argued the cause for respondent in No. 16. With him on the brief was *Robert Matthews*, Attorney General. *Fletcher Jackson*, Assistant Attorney General of Arkansas, argued the cause for appellee in No. 50. With him on the brief were *Bruce Bennett*, Attorney General, *H. Clay Robinson*, Assistant Attorney General, and *Jack L. Lessenberry*.

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*Together with No. 16, *Austin* v. *Kentucky*, on certiorari to the Circuit Court of McCracken County, Kentucky, argued on October 10–11, 1966, and No. 50, *Gent et al.* v. *Arkansas*, on appeal from the Supreme Court of Arkansas, argued October 11, 1966.

Morris B. Abram and *Jay Greenfield* filed briefs for the Council for Periodical Distributors Associations, Inc., as *amicus curiae,* urging reversal in all three cases. *Horace S. Manges* filed a brief for American Book Publishers Council, Inc., as *amicus curiae,* urging reversal in No. 50.

Charles H. Keating, Jr., and *James J. Clancy* filed briefs for Citizens for Decent Literature, Inc., as *amicus curiae,* urging affirmance in Nos. 3 and 16.

PER CURIAM.

These three cases arise from a recurring conflict—the conflict between asserted state power to suppress the distribution of books and magazines through criminal or civil proceedings, and the guarantees of the First and Fourteenth Amendments of the United States Constitution.

I.

In No. 3, *Redrup* v. *New York,* the petitioner was a clerk at a New York City newsstand. A plainclothes patrolman approached the newsstand, saw two paperback books on a rack—Lust Pool, and Shame Agent—and asked for them by name. The petitioner handed him the books and collected the price of $1.65. As a result of this transaction, the petitioner was charged in the New York City Criminal Court with violating a state criminal law.[1] He was convicted, and the conviction was affirmed on appeal.

In No. 16, *Austin* v. *Kentucky,* the petitioner owned and operated a retail bookstore and newsstand in Paducah, Kentucky. A woman resident of Paducah purchased two magazines from a salesgirl in the petitioner's store, after asking for them by name—High Heels, and Spree. As a result of this transaction the petitioner stands convicted

[1] N. Y. Pen. Law § 1141 (1).

in the Kentucky courts for violating a criminal law of that State.[2]

In No. 50, *Gent* v. *Arkansas,* the prosecuting attorney of the Eleventh Judicial District of Arkansas brought a civil proceeding under a state statute,[3] to have certain issues of various magazines declared obscene, to enjoin their distribution and to obtain a judgment ordering their surrender and destruction. The magazines proceeded against were: Gent, Swank, Bachelor, Modern Man, Cavalcade, Gentleman, Ace, and Sir. The County Chancery Court entered the requested judgment after a trial with an advisory jury, and the Supreme Court of Arkansas affirmed, with minor modifications.[4]

In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince* v. *Massachusetts,* 321 U. S. 158; cf. *Butler* v. *Michigan,* 352 U. S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard* v. *Alexandria,* 341 U. S. 622; *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451. And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg* v. *United States,* 383 U. S. 463.

II.

The Court originally limited review in these cases to certain particularized questions, upon the hypothesis that the material involved in each case was of a character described as "obscene in the constitutional sense" in

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[2] Ky. Rev. Stat. § 436.100. The Kentucky Court of Appeals denied plenary review of the petitioner's conviction, the Chief Justice dissenting. 386 S. W. 2d 270.

[3] Ark. Stat. Ann. §§ 41–2713 to 41–2728.

[4] 239 Ark. 474, 393 S. W. 2d 219.

Memoirs v. *Massachusetts,* 383 U. S. 413, 418.[5] But we have concluded that the hypothesis upon which the Court originally proceeded was invalid, and accordingly that the cases can and should be decided upon a common and controlling fundamental constitutional basis, without prejudice to the questions upon which review was originally granted. We have concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam* or *in rem.*[6]

Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity."[7] A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material.[8] Others have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it

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[5] *Redrup* v. *New York,* 384 U. S. 916; *Austin* v. *Kentucky,* 384 U. S. 916; *Gent* v. *Arkansas,* 384 U. S. 937.

[6] In each of the cases before us, the contention that the publications involved were basically protected by the First and Fourteenth Amendments was timely but unsuccessfully asserted in the state proceedings. In each of these cases, this contention was properly and explicitly presented for review here.

[7] See *Ginzburg* v. *United States,* 383 U. S. 463, 476, 482 (dissenting opinions); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (concurring opinion); *Roth* v. *United States,* 354 U. S. 476, 508 (dissenting opinion).

[8] See *Ginzburg* v. *United States,* 383 U. S. 463, 499, and n. 3 (dissenting opinion). See also Magrath, The Obscenity Cases: Grapes of Roth, 1966 Supreme Court Review 7, 69–77.

affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value," emphasizing that the "three elements must coalesce," and that no such material can "be proscribed unless it is found to be *utterly* without redeeming social value." *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418–419. Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity. *Id.,* at 460–462 (dissenting opinion).

Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand. Accordingly, the judgment in each case is reversed.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

Two of these cases, *Redrup* v. *New York* and *Austin* v. *Kentucky,* were taken to consider the standards governing the application of the *scienter* requirement announced in *Smith* v. *California,* 361 U. S. 147, for obscenity prosecutions. There it was held that a defendant criminally charged with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined. The third case, *Gent* v. *Arkansas,* was taken to consider the validity of a comprehensive Arkansas anti-obscenity statute, in light of the doctrines of "vagueness" and "prior restraint." The writs of certiorari in *Redrup* and *Austin,* and the notation of probable jurisdiction in *Gent,* were respectively limited to these issues, thus laying aside, for the purposes of these cases, the permissibility of the state determinations as to the obscenity of the challenged publications. Accordingly, the obscenity *vel non* of these publications was not dis-

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cussed in the briefs or oral arguments of any of the parties.

The three cases were argued together at the beginning of this Term. Today, the Court rules that the materials could not constitutionally be adjudged obscene by the States, thus rendering adjudication of the other issues unnecessary. In short, the Court disposes of the cases on the issue that was deliberately excluded from review, and refuses to pass on the questions that brought the cases here.

In my opinion these dispositions do not reflect well on the processes of the Court, and I think the issues for which the cases were taken should be decided. Failing that, I prefer to cast my vote to dismiss the writs in *Redrup* and *Austin* as improvidently granted and, in the circumstances, to dismiss the appeal in *Gent* for lack of a substantial federal question. I deem it more appropriate to defer an expression of my own views on the questions brought here until an occasion when the Court is prepared to come to grips with such issues.

TURNER ET AL. *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 399. Argued April 12–13, 1967.—Decided May 8, 1967.

Certiorari dismissed.

Osmond K. Fraenkel argued the cause and filed briefs for petitioners.

H. Richard Uviller argued the cause for respondent. With him on the brief was *Frank S. Hogan.*

PER CURIAM.

The writ is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FORTAS concurs, dissenting.

This case arose out of an assembly in Duffy Square, New York City, protesting American policy in Vietnam. After a few minutes of speeches, the police dispersed the crowd, utilizing two policemen on horseback and a dozen patrolmen.

The complaint charged disorderly conduct,

> "in that with intent to provoke a breach of the peace and under circumstances whereby a breach of the peace might be occasioned, the defendants did unlawfully congregate and assemble at the above location obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; [w]hen ordered to move on the defendants did fail to do so, after being informed that their actions were not lawful."

The evidence showed that the meeting was peaceful and orderly until the horses arrived. Up to that time the crowd was apparently small with no one paying much attention. The bulk of the evidence at the trial related to acts of individual petitioners during the period when the police were trying to disperse the crowd, that is, between the advent of the horses and the arrests. After the appearance by the police, there was a minor disturbance, one person hitting a horse with a rolled-up cardboard placard, one biting a policeman, and one lying down. But these acts were not charged in the complaint. While no opinion was written by the trial court, the Appellate Term did write and in its opinion relied heavily on these post-dispersion facts to justify the convictions. 48 Misc. 2d 611, 613–618, 619, 265 N. Y. S. 2d 841, 843–847, 849. But as stated by Judge Hofstadter in dissent:

> "The occurrences now offered as a basis for upholding the convictions were not the subject of the complaint charged. And the events, including any alleged disturbance by any defendant, ensuing upon the order, were the direct and immediate issue of a misconception by the police of the lawful warrant and scope of their authority." 48 Misc. 2d, at 630, 265 N. Y. S. 2d, at 860.

A conviction on one ground may not be sustained on grounds that might have been charged but were not. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas,* 333 U. S. 196, 201. And see *Shuttlesworth* v. *Birmingham,* 382 U. S. 87; *Ashton* v. *Kentucky,* 384 U. S. 195.

Likewise a conviction "upon a charge not made" is not consistent with due process. *De Jonge* v. *Oregon,* 299 U. S. 353, 362.

Where First Amendment rights are involved, as they were here, we have been meticulous to insist upon clean-cut violations of ordinances protecting law and order, lest broad or fuzzy applications be used to suffocate or impair the exercise of those constitutional rights. *Stromberg* v. *California,* 283 U. S. 359, 369; *Edwards* v. *South Carolina,* 372 U. S. 229, 237; *Cox* v. *Louisiana,* 379 U. S. 536, 551–552; *Ashton* v. *Kentucky, supra,* at 200–201.

Issues of that character and gravity are tendered here and I would resolve them.

OSCAR GRUSS & SON *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1060. Decided May 8, 1967.

Review by this Court of District Court's dismissal of appellant, New Haven railroad bondholder's, complaint challenging ICC's Penn-Central merger order *held* inappropriate pending outcome of ICC's further consideration of that order, see *Baltimore & Ohio R. Co.* v. *United States, ante,* p. 372, and New Haven railroad inclusion proceedings.

261 F. Supp. 386, vacated and remanded.

Myron S. Isaacs for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Robert W. Ginnane and *Jerome Nelson* for the United States et al., *Hugh B. Cox* and *Henry P. Sailer* for the Pennsylvania Railroad Co. et al., and *Joseph Auerbach* for Smith et al., appellees.

PER CURIAM.

Appellant is a bondholder of the New York, New Haven & Hartford Railroad Company (the New Haven), which is now undergoing a reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. § 205. On April 6, 1966, the Interstate Commerce Commission directed inclusion of the New Haven in the merger of the New York Central Railroad Company and the Pennsylvania Railroad Company as soon as terms and conditions could be settled, but approved the Penn-Central merger and authorized its consummation prior to such inclusion. Appellant then petitioned the Commission to reconsider this order. The Commission allowed appellant to intervene but denied the petition to reconsider, and appellant then challenged the Commission's order of April 6 in the District Court,

which dismissed the complaint on the ground, among others, that appellant lacked standing to attack the Penn-Central merger. Since that time this Court has reviewed other aspects of the Commission's order approving the merger and has directed a remand to the Commission for further proceedings. *Baltimore & Ohio R. Co.* v. *United States, ante,* p. 372. Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time. Rather, we vacate the order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court.

It is so ordered.

ARMORED CARRIER CORP. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 1011. Decided May 8, 1967.

260 F. Supp. 612, affirmed.

J. Kevin Murphy for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Nahum Litt* for the United States et al., and *Seymour D. Lewis* for B. D. C. Corp., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

FIFTH AVENUE COACH LINES, INC., ET AL. *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1095. Decided May 8, 1967.

18 N. Y. 2d 212, 741, 219 N. E. 2d 410, 221 N. E. 2d 174, appeal dismissed.

Jesse Climenko for appellants.

J. Lee Rankin for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CALLENDER *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1103. Decided May 8, 1967.

Appeal dismissed and certiorari denied.

Carl Rachlin for appellant.

Frank S. Hogan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

LAVERNE *v.* PIRANESI IMPORTS, INC.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 1114. Decided May 8, 1967.

Appeal dismissed and certiorari denied.

Monroe H. Freedman for appellant.

Leon Dicker for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MONTIETH *v.* OREGON.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1459, Misc. Decided May 8, 1967.

246 Ore. —, 417 P. 2d 1012, appeal dismissed and certiorari denied.

Howard R. Lonergan for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 780 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM JANUARY 26 THROUGH MAY 8, 1967.

JANUARY 26, 1967.

Dismissal Under Rule 60.

No. 82. HODES ET AL. *v.* UNITED STATES. C. A. 2d Cir. (Certiorari granted, 384 U. S. 968.) Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Samuel Kirshenbaum* for Hodes et al. and *Martin Schlesinger* for Mid-City Park View Apartments, Inc., petitioners. *Solicitor General Marshall* for the United States. Reported below: 355 F. 2d 746.

JANUARY 30, 1967.

Dismissal Under Rule 60.

No. 585. SUROWITZ *v.* HILTON HOTELS CORP. ET AL. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Richard F. Watt* for petitioner.

FEBRUARY 13, 1967.

Miscellaneous Orders.

No. 574, OCTOBER TERM, 1963. WILLIAMSON ET AL., EXECUTORS *v.* PEURIFOY, JUDGE. C. A. 5th Cir. (Certiorari denied, 375 U. S. 967; 376 U. S. 960.) Motion to recall, vacate and amend the order of this Court dated January 6, 1964, denied.

No. 29, Original. TEXAS ET AL. *v.* COLORADO; and

No. 952. PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. *v.* ANDERSON, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. The Solicitor General is invited to file a brief expressing the views of the United States in each of these cases.

No. 18, Original. ILLINOIS *v.* MISSOURI.

IT IS ORDERED that the Honorable Harvey M. Johnsen, Senior Judge of the United States Court of Appeals for the Eighth Circuit, be, and he is hereby appointed Special Master in this case in place of the Honorable Sam E. Whitaker, resigned. The Special Master shall have authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier orders herein, see 379 U. S. 952; 380 U. S. 901, 969; 382 U. S. 803, 1022; 384 U. S. 924.]

No. 463. UDALL, SECRETARY OF THE INTERIOR *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. (Certiorari granted, 385 U. S. 927.) Joint motion to remove case from summary calendar granted. On the motion were *Solicitor General Marshall* for petitioner and for respondent Federal Power Commission, and *William H. Dempsey, Jr.*, for respondents Pacific Northwest Power Co. et al.

No. 216. NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL. C. A. 7th Cir. (Certiorari granted, 385 U. S. 810.) Motion of International Union, UAW–AFL–CIO (Locals 248 and 401), to participate in oral argument granted and fifteen minutes allotted for that purpose. The other respondent also allotted an additional fifteen minutes for oral argument. *Joseph L. Rauh, Jr., John Silard* and *Stephen I. Schlossberg* on the motion.

No. 371. CROWN COAT FRONT CO. INC. *v.* UNITED STATES. C. A. 2d Cir. (Certiorari granted, 385 U. S. 811.) Motion of Electronic Industries Association for leave to file a brief, as *amicus curiae,* in support of the petition granted. *Graham W. McGowan* on the motion. *Solicitor General Marshall* for the United States in opposition to the motion.

No. 391. STATE FARM FIRE & CASUALTY CO. ET AL. *v.* TASHIRE ET AL. C. A. 9th Cir. (Certiorari granted, 385 U. S. 811.) Motion of Anderson & Geary et al. for leave to file a brief, as *amici curiae,* granted. *Mark C. McClanahan* for Anderson & Geary et al., as *amici curiae,* in support of the petition, on the motion.

No. 480. WARDEN, MARYLAND PENITENTIARY *v.* HAYDEN. C. A. 4th Cir. (Certiorari granted, 385 U. S. 926.) Motion of petitioner to remove case from summary calendar denied. *Francis B. Burch,* Attorney General of Maryland, and *Franklin Goldstein,* Assistant Attorney General, on the motion.

No. 1093, Misc. SKOLNICK *v.* PARSONS, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 851, Misc. SCHACK *v.* FLORIDA ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondents.

The following motions for leave to file petitions for writs of habeas corpus are denied. MR. JUSTICE DOUGLAS dissents.

No. 1, Misc. WILLIAMS *v.* TEXAS. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *Stanton Stone,* Executive Assistant Attorney General, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 11, Misc. TAYLOR *v.* TEXAS. Petitioner *pro se.* *Waggoner Carr,* Attorney General, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent.

No. 74, Misc. STEPHENS *v.* BETO, CORRECTIONS DIRECTOR; and

No. 116, Misc. SMITH *v.* BETO, CORRECTIONS DIRECTOR. Petitioners *pro se.* *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Charles B. Swanner* and *Howard M. Fender,* Assistant Attorneys General, for respondent in both cases.

No. 238, Misc. BECK *v.* BETO, CORRECTIONS DIRECTOR.

No. 1206, Misc. SKOLNICK *v.* CAMPBELL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition and other relief denied.

No. 1346, Misc. IN RE DISBARMENT OF REKEWEG. It is ordered that Wilmer D. Rekeweg of Paulding, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 931, Misc. SLIVA *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT;

No. 1084, Misc. RING *v.* SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY, ET AL.;

No. 1095, Misc. LORENZANA *v.* WARDEN, SAN JUAN DISTRICT JAIL;

No. 1098, Misc. EIDINOFF *v.* KREIMEYER, ACTING STATE HOSPITAL SUPERINTENDENT, ET AL.;

No. 1101, Misc. BOUCHER *v.* PRESTON ET AL.; and

No. 1124, Misc. STEWART *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1064, Misc. CAMPBELL *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ET AL.; and

No. 1072, Misc. GORDON *v.* MASSACHUSETTS. Motions for leave to file petitions for writs of mandamus denied.

No. 1074, Misc. SOOTS ET UX. *v.* ATTORNEY GENERAL OF THE UNITED STATES. Motion for leave to file petition for writ of mandamus denied. Petitioners *pro se*. *Solicitor General Marshall* for respondent.

No. 965, Misc. PUTT *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondents.

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Probable Jurisdiction Noted.

No. 760. UNITED STATES *v.* PENN-OLIN CHEMICAL CO. ET AL. Appeal from D. C. Del. Probable jurisdiction noted. *Solicitor General Marshall, Assistant Attorney General Turner* and *Edwin M. Zimmerman* for the United States. *William S. Potter, Albert R. Connelly* and *H. Francis DeLone* for appellees. Reported below: 246 F. Supp. 917.

No. 754. WHITEHILL *v.* ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL. Appeal from D. C. Md. Probable jurisdiction noted. *Sanford Jay Rosen, Arnold M. Weiner* and *Joseph S. Kaufman* for appellant. *Robert C. Murphy,* Attorney General of Maryland, and *Loring E. Hawes* and *Julius A. Romano,* Assistant Attorneys General, for appellees. Reported below: 258 F. Supp. 589.

No. 810. ZWICKLER *v.* KOOTA, DISTRICT ATTORNEY OF COUNTY OF KINGS. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. *Emanuel Redfield* for appellant. *Louis J. Lefkowitz,* Attorney General of New York, for appellee. Reported below: 261 F. Supp. 985.

Certiorari Granted. (See also No. 14, *ante,* p. 14, No. 71, *ante,* p. 15, No. 300, *ante,* p. 17, No. 414, Misc., *ante,* p. 12, and No. 454, Misc., *ante,* p. 13.)

No. 838. WYANDOTTE TRANSPORTATION CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Lucian Y. Ray* and *Benjamin W. Yancey* for Wyandotte Transportation Co., *George B. Matthews* for Union Barge Line Corp., and *Tom F. Phillips* for Cargill, Inc., et al., petitioners. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Alan S. Rosenthal* for the United States. Reported below: 367 F. 2d 971.

No. 424. MEMPA *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Motion to dispense with printing petition granted. Certiorari granted. *Donald A. Schmechel* for petitioner. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent. Reported below: 68 Wash. 2d 882, 416 P. 2d 104.

No. 734. WALKLING *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Motion to dispense with printing petition granted. Certiorari granted and case set for oral argument immediately following No. 424. *Donald A. Schmechel* for petitioner. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

No. 789. FEDERAL TRADE COMMISSION *v.* FRED MEYER, INC., ET AL. C. A. 9th Cir. Petition for writ of certiorari granted limited to Question 1 presented by the petition which reads as follows: "1. Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2 (d) of the Robinson-Patman Act." *Solicitor General Marshall, Assistant Attorney General Turner* and *James McI. Henderson* for petitioner. *Edward F. Howrey, Terrence C. Sheehy* and *George W. Mead* for respondents. Reported below: 359 F. 2d 351.

No. 892. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291 *v.* PHILADELPHIA MARINE TRADE ASSOCIATION. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Francis A. Scanlan* for respondent. Reported below: 365 F. 2d 295.

Certiorari Denied. (See also No. 801, *ante,* p. 9; No. 858, *ante,* p. 8; No. 963, Misc., *ante,* p. 10; No. 1030, Misc., *ante,* p. 12; No. 1063, Misc., *ante,* p. 13; and No. 851, Misc., *supra.*)

No. 703. FRED MEYER, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *Edward F. Howrey, Terrence C. Sheehy* and *George W. Mead* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner* and *James McI. Henderson* for respondent. Reported below: 359 F. 2d 351.

No. 766. JAKOB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William R. Glendon* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 366 F. 2d 853.

No. 791. WALLERSTEIN ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. *Madison B. Graves* and *Robert W. Hughes* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Henry Geller, John H. Conlin* and *Lenore G. Ehrig* for respondent.

No. 796. CRANE BOOM LIFE GUARD CO., INC., ET AL. *v.* SAF-T-BOOM CORP. ET AL. C. A. 8th Cir. Certiorari denied. *Osro Cobb* for petitioners. *Wayne W. Owen* for respondents. Reported below: 362 F. 2d 317.

No. 829. CENTRAL ILLINOIS PUBLIC SERVICE CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Elmer Nafziger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *Robert M. Perry* for the United States. Reported below: 365 F. 2d 121.

No. 844. RUSSO *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Stuart A. Barbour, Jr.*, for petitioner. Reported below: 207 Va. 251, 148 S. E. 2d 820.

No. 855. BROUSSARD *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioner.

No. 857. MARX *v.* JAFFE. Sup. Ct. N. J. Certiorari denied. *Louis Asarnow* for petitioner.

No. 862. MAGNUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz, Eugene Gressman* and *Louis Bender* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 365 F. 2d 1007.

No. 864. MCMILLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry A. Lowenberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 368 F. 2d 810.

No. 877. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles Fuller Blanchard* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 369 F. 2d 775.

No. 878. RAWDON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 364 F. 2d 803.

No. 880. KENNEDY, TREASURER OF ARIZONA, ET AL. *v.* POWELL, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Darrell F. Smith,* Attorney General of Arizona, and *John V. Riggs,* Assistant Attorney General, for petitioners Kennedy et al. *Louise C. W. Powell,* respondent, *pro se.* Briefs *amicus curiae,* in support of the petition, were filed by: *Boston E. Witt,* Attorney General, and *George Richard Schmitt,* Assistant Attorney General, for the State of New Mexico; *Forrest H. Anderson,* Attorney General, and *Donald D. MacPherson,* Special Assistant Attorney General, for the State of Montana; *William B. Saxbe,* Attorney General, and *Charles S. Lopeman,* Chief Counsel, for the State of Ohio; *Earl Faircloth,* Attorney General, and *T. T. Turnbull* and *Larry Levy,* Assistant Attorneys General, for the State of Florida; and *John J. O'Connell,* Attorney General, and *Edward B. Mackie,* Assistant Attorney General, for the State of Washington. A brief *amicus curiae,* in support of the petition, was filed by the Attorneys General for their respective States as follows: *Richmond M. Flowers* of Alabama, *Bruce Bennett* of Arkansas, *Thomas C. Lynch* of California, *David P. Buckson* of Delaware, *Bert T. Kobayashi* of Hawaii, *Allan G. Shepard* of Idaho, *Jack P. F. Gremillion* of Louisiana, *James S. Erwin* of Maine, *Francis Burch* of Maryland, *Frank J. Kelley* of Michigan, *Harvey Dickerson* of Nevada, *Thomas Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Charles Nesbitt* of Oklahoma, *Edward Friedman* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *Frank L. Farrar* of South Dakota, *George F. McCanless* of Tennessee, *Phil L. Hansen* of Utah, *Robert Y. Button* of Virginia and *John F. Raper* of Wyoming. Reported below: 366 F. 2d 346.

No. 889. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 71 Ill. App. 2d 446, 219 N. E. 2d 82.

No. 874. MARSHALL *v.* RUSSELL, EXECUTRIX, ET AL. Sup. Ct. Ga. Certiorari denied. *G. Hughel Harrison* and *Thomas M. Odom* for petitioner. Reported below: 222 Ga. 490, 150 S. E. 2d 667.

No. 882. WRIGHT *v.* PRESS PUBLISHING CO. ET AL. Sup. Ct. N. J. Certiorari denied. *Walter C. Wright, Jr.*, petitioner, *pro se*. *Saul W. Arkus* and *Harry Green* for respondents.

No. 887. UNITED STATES RUBBER CO. *v.* UNDERWATER STORAGE, INC. C. A. D. C. Cir. Certiorari denied. *Robert F. Conrad* and *Harvey E. Bumgardner, Jr.*, for petitioner. *Robert E. Sher* and *Abraham J. Harris* for respondent. Reported below: 125 U. S. App. D. C. 297, 371 F. 2d 950.

No. 890. GRAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Petitioner *pro se*. *Thomas Wade Bruton*, Attorney General of North Carolina, and *Theodore C. Brown, Jr.*, for respondent. Reported below: 268 N. C. 69, 150 S. E. 2d 1.

No. 897. IRISH, DBA RUSSELL L. IRISH INVESTMENTS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. *Harvey Erickson* for petitioner. *Solicitor General Marshall, Philip A. Loomis, David Ferber* and *Edward B. Wagner* for respondent. Reported below: 367 F. 2d 637.

No. 851. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Marvin M. Karpatkin* and *Osmond K. Fraenkel* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 72.

No. 898. YATES ET AL. *v.* HODGES ET UX. Sup. Ct. Miss. Certiorari denied. *Malcolm B. Montgomery* for petitioners. *W. H. Jolly* for respondents. Reported below: 189 So. 2d 113.

No. 900. ROOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 366 F. 2d 377.

No. 901. DE LUCIA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Charles Gordon* for respondent. Reported below: 370 F. 2d 305.

No. 902. TRAVEL CONSULTANTS, INC. *v.* TRAVEL MANAGEMENT CORP. C. A. D. C. Cir. Certiorari denied. *Worth Rowley* and *Lenox G. Cooper* for petitioner. *Lucien Hilmer* and *J. H. Krug* for respondent. Reported below: 125 U. S. App. D. C. 108, 367 F. 2d 334.

No. 907. MARBRO FOOD SERVICE, INC., DBA FAB'S FAMOUS FOODS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Clement John Murphy, Jr.,* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 366 F. 2d 477.

No. 926. BETHLEHEM STEEL CO. ET AL. *v.* UNITED STATES. C. C. P. A. Certiorari denied. *Abraham J. Harris* and *Marvin J. Coles* for petitioners. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Alan S. Rosenthal* for the United States. Reported below: 53 C. C. P. A. (Cust.) 142.

No. 908. BANKERS LIFE & CASUALTY CO. *v.* GUARANTEE RESERVE LIFE INSURANCE CO. OF HAMMOND ET AL. C. A. 7th Cir. Certiorari denied. *William T. Kirby* for petitioner. *Claude A. Roth* for respondents. Reported below: 365 F. 2d 28.

No. 912. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 258.

No. 913. ZAMORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Quincy D. Adams* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 369 F. 2d 855.

No. 917. ROOFIRE ALARM CO. *v.* UNDERWRITERS' LABORATORIES, INC. C. A. 6th Cir. Certiorari denied. *John A. Chambliss* for petitioner. *Jere T. Tipton* and *Edward H. Hickey* for respondent.

No. 919. FRIEDMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 920. BLOOMFIELD STEAMSHIP CO. *v.* HAIGHT ET AL. C. A. 5th Cir. Certiorari denied. *Robert Eikel* for petitioner. *Benjamin W. Yancey* for respondents. Reported below: 363 F. 2d 872.

No. 924. GAJEWSKI ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall* for the United States. Reported below: 368 F. 2d 533.

No. 922. MATANUSKA VALLEY LINES, INC. *v.* MOLITOR. C. A. 9th Cir. Certiorari denied. *Edgar Paul Boyko* for petitioner. Reported below: 365 F. 2d 358.

No. 923. JEFFERSON CONSTRUCTION CO. OF FLORIDA *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl A. Hiaasen* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 176 Ct. Cl. 1363, 364 F. 2d 420.

No. 935. CLARK *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *John W. Reece* for petitioner. *James V. Barbuto* and *Stephan M. Gabalac* for respondent.

No. 955. YOUNG & CO. OF HOUSTON *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. *Robert Eikel* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, and *John R. Grace* and *Kerns B. Taylor,* Assistant Attorneys General, for respondent. Reported below: 405 S. W. 2d 174.

No. 870. CURTIS ET AL. *v.* BOEGER, WARDEN; and

No. 871. GRAND ET AL. *v.* BOEGER, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles R. Oldham* for petitioners in both cases. *Thomas F. McGuire, James J. Gallagher, Gary M. Gaertner* and *Allen J. Roth* for respondent in both cases. Reported below: 362 F. 2d 999.

No. 916. HOBSON ET AL. *v.* GASCH, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Motion to dispense with printing petition granted. Certiorari denied. Petitioners *pro se. Solicitor General Marshall* for respondent.

No. 939. LAFARGUE ET VIR *v.* SAMUEL ET AL. C. A. 5th Cir. Certiorari denied. *John D. Lambert, Jr.*, for petitioners. *Thomas L. Stennis II* for respondents.

No. 906. HARRIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Lawrence F. O'Donnell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 367 F. 2d 633.

No. 854. VALRIE *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 366 F. 2d 187.

No. 868. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Motion to dispense with printing petition, and motion of respondent Workmen's Compensation Appeals Board (formerly Industrial Accident Commission) to dispense with printing its brief, granted. Certiorari denied. Petitioner *pro se. Everett A. Corten* for respondent Workmen's Compensation Appeals Board. Reported below: 366 F. 2d 479.

No. 888. HARRAH'S CLUB *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Motion of Nevada Resort Association et al. for leave to file a brief, as *amici curiae*, granted. Certiorari denied. *Nathan R. Berke* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. *David H. Mendelsohn* for Nevada Resort Association et al., as *amici curiae*, in support of the petition. Reported below: 362 F. 2d 425.

No. 921. OTTEN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *H. Gordon Davis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 367 F. 2d 579.

No. 883. ALABAMA ET AL. *v.* BELL. C. A. 5th Cir. Motion of respondent for the appointment of counsel denied. Certiorari denied. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for petitioners. Respondent *pro se.* Reported below: 367 F. 2d 243.

No. 936. CLARKE, CHIEF JUDGE, U. S. DISTRICT COURT *v.* YAX. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Lyndol L. Young* for petitioner. *Munson H. Lane* for respondent.

No. 29, Misc. POHLABEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 204, Misc. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Erdahl* and *Kirby W. Patterson* for the United States. Reported below: 358 F. 2d 50.

No. 957, Misc. DICKERSON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *Walter Stein* for petitioner. Reported below: 363 F. 2d 126.

No. 364, Misc. JONES *v.* COMSTOCK, SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Daniel J. Kremer,* Deputy Attorney General, for respondents.

No. 387, Misc. LYNOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 360 F. 2d 586.

No. 594, Misc. BURNETT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Lloyd A. Barbee* for petitioner. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz* and *Betty R. Brown,* Assistant Attorneys General, for respondent. Reported below: 30 Wis. 2d 375, 141 N. W. 2d 221.

No. 603, Misc. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *John D. Buchanan, Jr.,* and *Joseph C. Jacobs* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 701, Misc. BENNETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 364 F. 2d 499.

No. 712, Misc. BULLARD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Daniel H. Pollitt* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, for respondent. Reported below: 267 N. C. 599, 148 S. E. 2d 565.

No. 704, Misc. CANDELARIO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Edsel W. Haws* and *Roger E. Venturi,* Deputy Attorneys General, and *Doris H. Maier,* Assistant Attorney General, for respondent.

No. 714, Misc. COKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 364 F. 2d 484.

No. 852, Misc. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 364 F. 2d 630.

No. 861, Misc. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 365 F. 2d 135.

No. 877, Misc. COPLEY *v.* UNITED STATES; and

No. 886, Misc. ROSEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Luke McKissack* for petitioner in No. 877, Misc., and *William C. Wunsch* for petitioner in No. 886, Misc. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States in both cases. Reported below: 364 F. 2d 18.

No. 964, Misc. VIVEIROS *v.* STATE BOARD OF EDUCATION ET AL. Sup. Ct. R. I. Certiorari denied.

No. 945, Misc. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 574.

No. 959, Misc. WOODRUFF *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *Melvin L. Wulf* and *Alvin J. Bronstein* for petitioner. Reported below: 187 So. 2d 883.

No. 962, Misc. GOLDBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* and *George P. Walker* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for the United States.

No. 973, Misc. PARNESS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Meredith Hemphill, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 366 F. 2d 853.

No. 977, Misc. RUCKLE *v.* WARDEN, BALTIMORE CITY JAIL. C. A. 4th Cir. Certiorari denied.

No. 978, Misc. RUCKLE *v.* WARDEN, BALTIMORE CITY JAIL. Baltimore City Ct., Md. Certiorari denied.

No. 990, Misc. RASMUSSEN *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 1000, Misc. BERRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 979, Misc. VANELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 371 F. 2d 50.

No. 991, Misc. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 580.

No. 1001, Misc. LUJAN *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1002, Misc. MURRAY *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1006, Misc. HARBOLD *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 367 F. 2d 53.

No. 1009, Misc. FLOYD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1012, Misc. WILLOUGHBY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 406 S. W. 2d 725.

No. 1014, Misc. PRESTON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 406 S. W. 2d 398.

No. 1016, Misc. JACOBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1008, Misc. SMITH *v.* OLIVER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1017, Misc. ACOSTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Jerry T. Batts* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 369 F. 2d 41.

No. 1018, Misc. JUNEAU *v.* ALLGOOD, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 1019, Misc. BEADLE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1020, Misc. ZUCKER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1026, Misc. MCCAULLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1028, Misc. PARRA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1033, Misc. FIGARATTO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1034, Misc. RICHARDSON *v.* SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 371 F. 2d 542.

No. 1036, Misc. CONWAY *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 1037, Misc. CLEMONS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

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No. 1038, Misc. HANSHAW *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 1039, Misc. EIDENMUELLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1040, Misc. NELMS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1041, Misc. CRAMER *v.* CAVELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 368 F. 2d 322.

No. 1045, Misc. DALLAS *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 1046, Misc. McCREARY *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 366 F. 2d 508.

No. 1047, Misc. WHITE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1048, Misc. BELLAM *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 1049, Misc. WALKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 124 U. S. App. D. C. 194, 363 F. 2d 681.

No. 1053, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Super. Ct. Wash., Walla Walla County. Certiorari denied.

No. 1054, Misc. BANKS *v.* CALIFORNIA. Dist. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 242 Cal. App. 2d 373, 51 Cal. Rptr. 398.

No. 1056, Misc. HOPTOWIT *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1057, Misc. REED *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1058, Misc. ANDERSON *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1061, Misc. ELLIS ET VIR *v.* HARADA ET AL. Sup. Ct. Hawaii. Certiorari denied. *Joseph A. Ryan* for petitioners.

No. 1062, Misc. ELLENBOGEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 365 F. 2d 982.

No. 1071, Misc. HAAS *v.* TAHASH, WARDEN. Sup. Ct. Minn. Certiorari denied. Reported below: 275 Minn. 257, 146 N. W. 2d 188.

No. 1077, Misc. STAGGS *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1079, Misc. WOOTEN *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1082, Misc. HARVEY ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1083, Misc. FORD *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 365 F. 2d 831.

No. 1086, Misc. LEWIS *v.* MANCUSI, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 1087, Misc. LEE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1088, Misc. THOMAS *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1089, Misc. JOHNSON *v.* DEPARTMENT OF CORRECTION ET AL. C. A. 9th Cir. Certiorari denied.

No. 1090, Misc. GROVE *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1091, Misc. LEPPER *v.* LANGLOIS, WARDEN. Sup. Ct. R. I. Certiorari denied.

No. 1096, Misc. SMITH *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1099, Misc. BUTLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1102, Misc. COLEMAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1106, Misc. DANIELS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1108, Misc. KING *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 408 S. W. 2d 204.

No. 1110, Misc. PIERSON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1113, Misc. GATEWOOD *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 368 F. 2d 179.

No. 1114, Misc. JACKSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1115, Misc. HEACOCK *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 367 F. 2d 583.

No. 1116, Misc. LEE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 197 Kan. 463, 419 P. 2d 927.

No. 1118, Misc. STELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 1199, Misc. BEER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 315, Misc. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Phillip A. Hubbart* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *James T. Carlisle* and *Arden M. Siegendorf,* Assistant Attorneys General, for respondent. Reported below: 183 So. 2d 857.

No. 863, Misc. KYLE *v.* WICKERSHAM ET AL. C. A. 2d Cir. Motion to substitute Elizabeth S. Wickersham in place of Cornelius W. Wickersham, Jr., as a party respondent granted. Certiorari denied.

No. 1094, Misc. CONWAY *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari and other relief denied. Reported below: 368 F. 2d 485.

The following petitions for writs of certiorari are denied. MR. JUSTICE DOUGLAS would grant the petitions for writs of certiorari and reverse the judgments of the courts below for the reasons stated in the dissenting opinion of MR. JUSTICE BRENNAN in *Spencer* v. *Texas,* 385 U. S. 554, 587.

No. 2, Misc. GOODSPEED *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender,* Assistant Attorney General, for respondent. Reported below: 341 F. 2d 908.

No. 4, Misc. CARTER *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Derald E. Granberg* and *John F. Kraetzer,* Deputy Attorneys General, for respondents.

No. 5, Misc. BREEN *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. *Richard Tinsman* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Gilbert J. Pena,* Assistant Attorneys General, for respondent. Reported below: 341 F. 2d 96.

No. 7, Misc. STANLEY, ALIAS SAUNDERS *v.* NEW YORK. Ct. App. N. Y. *Ephraim London* for petitioner. *Frank S. Hogan* for respondent. Reported below: 15 N. Y. 2d 860, 206 N. E. 2d 193.

No. 16, Misc. WAGONER *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *J. Milton Richard-*

son and *Howard M. Fender,* Assistant Attorneys General, for respondent.

No. 17, Misc. WARDEN *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent.

No. 21, Misc. TAYLOR *v.* TEXAS. Ct. Crim. App. Tex.

No. 77, Misc. FAIRRIS *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Gilbert J. Pena,* Assistant Attorneys General, for respondent.

No. 403, Misc. STOCKWELL *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Ct. Crim. App. Tex. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondents.

No. 530, Misc. CLARK *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender,* Assistant Attorney General, for respondent. Reported below: 359 F. 2d 554.

The following petitions for writs of certiorari are denied.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS would grant the petitions for writs of certiorari and reverse the judgments of the courts

below for the reasons stated in the opinion of THE CHIEF JUSTICE in *Spencer* v. *Texas*, 385 U. S. 554, 569.

No. 6. HOWARD *v.* TEXAS. Ct. Crim. App. Tex. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender*, *Gilbert J. Pena* and *Charles B. Swanner*, Assistant Attorneys General, for respondent. Reported below: 387 S. W. 2d 387.

No. 8, Misc. LOTT *v.* TEXAS. Ct. Crim App. Tex. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent. Reported below: 386 S. W. 2d 140.

No. 13, Misc. STONEHAM *v.* TEXAS. Ct. Crim. App. Tex. *Charles E. Benson* for petitioner. Reported below: 389 S. W. 2d 468.

No. 14, Misc. CAPUCHINO *v.* TEXAS. Ct. Crim. App. Tex. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Waggoner Carr*, Attorney General of Texas, and *Howard M. Fender* and *Charles B. Swanner*, Assistant Attorneys General, for respondent. Reported below: 389 S. W. 2d 296.

No. 59, Misc. FLETCHER *v.* TEXAS. Ct. Crim. App. Tex. *Charles E. Benson* for petitioner. Reported below: 396 S. W. 2d 393.

No. 84, Misc. ABEL *v.* TEXAS. Ct. Crim. App. Tex. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Gilbert J. Pena*, Assistant

Attorneys General, for respondent. Reported below: 395 S. W. 2d 641.

No. 109, Misc. BOOKER *v.* ILLINOIS. Sup. Ct. Ill. *Richard F. Watt* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent. Reported below: 34 Ill. 2d 16, 213 N. E. 2d 542.

No. 718, Misc. GAMEZ *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 403 S. W. 2d 418.

No. 590, Misc. PLATT *v.* TEXAS. Ct. Crim. App. Tex. *William E. Gray* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 402 S. W. 2d 898.

Rehearing Denied.

No. 740. MARINA MERCANTE NICARAGUENSE, S. A., AS OWNER OF THE EL SALVADOR *v.* MCALLISTER BROTHERS, INC., AS OWNER OF THE TUG RUSSELL NO. 18, ET AL., 385 U. S. 1005;

No. 767. NAVE *v.* CITY OF SEATTLE, 385 U. S. 450;

No. 784, Misc. TODD *v.* UNITED STATES, 385 U. S. 994;

No. 824, Misc. NEWELL *v.* PAGE, WARDEN, 385 U. S. 1015;

No. 869, Misc. EBELL *v.* MCGEE ET AL., 385 U. S. 1017;

No. 997, Misc. STEPPE *v.* FLORIDA, 385 U. S. 1031; and

No. 998, Misc. KINDERMAN *v.* TAHASH, WARDEN, 385 U. S. 998. Petitions for rehearing denied.

No. 453. RUTH *v.* BLUE RIVER CONSTRUCTORS ET AL., 385 U. S. 920, 984. Motion for leave to file second petition for rehearing denied.

No. 622. SOAPE ET UX. *v.* LOUISIANA POWER & LIGHT CO. ET AL., 385 U. S. 970. Motion for leave to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 690. MARTIN *v.* PHILLIPS PETROLEUM CO. ET AL., 385 U. S. 991. Motion to defer consideration and for leave to supplement petition denied. Petition for rehearing denied.

No. 665, Misc. WEBB *v.* BETO, CORRECTIONS DIRECTOR, 385 U. S. 940; and

No. 853, Misc. POPE *v.* PARKER, WARDEN, ET AL., 385 U. S. 944. Motions for leave to file petitions for rehearing denied.

FEBRUARY 14, 1967.

Dismissal Under Rule 60.

No. 572, Misc. RUBY *v.* TEXAS. Ct. Crim. App. Tex. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *William M. Kunstler, Sam Houston Clinton, Jr., Sol A. Dann* and *Elmer Gertz* on the motion. Reported below: 403 S. W. 2d 129.

FEBRUARY 20, 1967.

Miscellaneous Orders.

No. 1128, Misc. HITCHCOCK *v.* ARIZONA ET AL.;

No. 1140, Misc. BRYANS *v.* UNITED STATES;

No. 1147, Misc. GILCHRIST *v.* FLORIDA;

No. 1161, Misc. LOFTIS *v.* EYMAN, WARDEN, ET AL.; and

No. 1184, Misc. BRABSON *v.* MANCUSI, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 891. CORVALLIS SAND & GRAVEL CO. ET AL. *v.* HOISTING & PORTABLE ENGINEERS LOCAL UNION No. 701 ET AL. Sup. Ct. Ore. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1148, Misc. WRIGHT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

Certiorari Granted. (See also No. 751, Misc., *ante,* p. 128.)

No. 929. MASSACHUSETTS *v.* PAINTEN. C. A. 1st Cir. Certiorari granted. *Edward W. Brooke,* Attorney General of Massachusetts, and *Willie J. Davis,* Assistant Attorney General, for petitioner. Reported below: 368 F. 2d 142.

No. 56, Misc. BURGETT *v.* TEXAS. Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Charles B. Swanner* and *Howard M. Fender,* Assistant Attorneys General, for respondent. Reported below: 397 S. W. 2d 79.

Certiorari Denied. (See also No. 503, Misc., *ante,* p. 127; and No. 1148, Misc, *supra.*)

No. 817. HOLT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *William Howard Payne* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Robert N. Anderson* and *Carolyn R. Just* for respondent. Reported below: 364 F. 2d 38.

No. 819. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Frank B. Stow* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 368 F. 2d 331.

No. 842. BLACK, ADMINISTRATOR *v.* UNITED STATES ET AL.; and

No. 960. ALLEN, EXECUTRIX, ET AL. *v.* MATHIASEN'S TANKER INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. *William Warner* for petitioner in No. 842, and *Abraham E. Freedman* and *Martin J. Vigderman* for petitioners in No. 960. *Solicitor General Marshall, Assistant Attorney General Sanders, David L. Rose* and *Robert V. Zener* for respondent United States in both cases. Reported below: 367 F. 2d 505.

No. 845. CONTINENTAL BAKING CO. *v.* FEDERAL TRADE COMMISSION;

No. 849. LANGENDORF UNITED BAKERIES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION; and

No. 852. SAFEWAY STORES, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *John H. Schafer* and *James V. Siena* for petitioner in No. 845; *Herbert S. Little* for petitioners in No. 849; and *Robert W. Graham* for petitioner in No. 852. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, James McI. Henderson* and *Daniel H. Hanscom* for respondent in all three cases. Reported below: 366 F. 2d 795.

No. 941. MANESS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hugh R. Dowling* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph Kovner* for the United States. Reported below: 367 F. 2d 357.

No. 927. MITSUBISHI INTERNATIONAL CORP. ET AL. *v.* A. O. ANDERSEN & CO. ET AL.;

No. 933. CHINA UNION LINES, LTD. *v.* A. O. ANDERSEN & CO. ET AL.; and

No. 934. LAN JING-CHAU ET AL. *v.* A. O. ANDERSEN & CO. ET AL. C. A. 5th Cir. Certiorari denied. *Sweeney J. Doehring* for Mitsubishi International Corp. et al., petitioners in No. 927 and respondents in No. 933. *Robert Eikel* for petitioner in No. 933. *Newton B. Schwartz* for petitioners in No. 934. *Bryan F. Williams, Jr.,* and *Carl O. Bue, Jr.,* for respondent A. O. Andersen & Co. in all three cases. *Leonard J. Matteson* for respondent American Cyanamid Co. in Nos. 933 and 934. *John V. Wheat* for respondent Duncan in No. 933. Reported below: 364 F. 2d 769.

No. 932. MACINTYRE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States.

No. 943. MARKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 368 F. 2d 566.

No. 729, Misc. MAYBERRY ET AL. *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Petitioners *pro se. Edward Friedman,* Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.,* Deputy Attorney General, for respondent Maroney.

No. 945. HICKEY ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. Sup. Ct. Ill. Certiorari denied. *Leonard R. Hartenfeld* for petitioners. *Thomas M. Thomas, Robert Mitten* and *William M. Rice* for respondent. Reported below: 35 Ill. 2d 427, 220 N. E. 2d 415.

No. 940. WALLACE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Donald J. Rizzio* for petitioner. Reported below: 35 Ill. 2d 251, 220 N. E. 2d 198.

No. 948. DUKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Robert H. Van Brunt* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 369 F. 2d 355.

No. 961. WRIGHT, TRADING AS WRIGHT'S GROCERY *v.* MASONITE CORP. C. A. 4th Cir. Certiorari denied. *H. Gardner Hudson* for petitioner. *Welch Jordan* for respondent. Reported below: 368 F. 2d 661.

No. 963. STUCKER *v.* COLLEGE LIFE INSURANCE CO. OF AMERICA. Sup. Ct. Ind. Certiorari denied. *Arthur J. Sullivan* for petitioner. *John Rabb Emison* for respondent.

No. 782, Misc. MARION *v.* HARRIST. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, and *R. L. (Bob) Lattimore, Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 363 F. 2d 139.

No. 845, Misc. DAVIS *v.* TUBBS. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* for respondent.

No. 854, Misc. GRAVES *v.* WAINWRIGHT. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *Stanley D. Kupiszewski, Jr.,* Assistant Attorney General, for respondent.

No. 912, Misc. PARSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. *Irving Morris* for petitioner. *William Swain Lee,* Deputy Attorney General of Delaware, for respondent. Reported below: —— Del. ——, 222 A. 2d 326.

No. 952, Misc. PAZ-SIERRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene R. Anderson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 367 F. 2d 930.

No. 1005, Misc. SIRES *v.* GOODWIN, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1055, Misc. URBANO *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States.

No. 1067, Misc. MATHIS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. *Charles Morgan, Jr.,* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 280 Ala. 16, 189 So. 2d 564.

No. 1104, Misc. BRITTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se.* *John R. Heilman, Jr.,* for respondent.

No. 1085, Misc. ESTEBAN *v.* CHAPPELL, CHAIRMAN, U. S. BOARD OF PAROLE. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 123 U. S. App. D. C. 152, 358 F. 2d 519.

No. 1125, Misc. LINGO *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1127, Misc. JUAREZ *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1129, Misc. MESSAMORE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 408 S. W. 2d 448.

No. 1131, Misc. FERRELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *M. Gabriel Nahas, Jr.*, for petitioner.

No. 1133, Misc. JACKSON *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1134, Misc. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1135, Misc. HOLMES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1137, Misc. THOMAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 35 Ill. 2d 388, 220 N. E. 2d 441.

No. 1149, Misc. MILLER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1143, Misc. PELLETIER *v.* PARKER, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for respondent.

No. 1150, Misc. PHELPS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1151, Misc. GOBIE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1153, Misc. ZURICA *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

The following petitions for writs of certiorari are denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 10, Misc. GOMEZ *v.* TEXAS. Ct. Crim. App. Tex. *Maury Maverick, Jr.*, for petitioner. *Waggoner Carr*, Attorney General of Texas, *James E. Barlow* and *Preston H. Dial, Jr.*, for respondent. Reported below: 389 S. W. 2d 308.

No. 646, Misc. BOTSCH *v.* UNITED STATES. C. A. 2d Cir. *Solomon Z. Ferziger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 364 F. 2d 542.

No. 788, Misc. BUTTERWOOD *v.* UNITED STATES. C. A. 10th Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 365 F. 2d 380.

No. 938, Misc. CARTWRIGHT *v.* OREGON. Sup. Ct. Ore. *Lawrence A. Aschenbrenner* and *Howard R. Lonergan* for petitioner. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: 245 Ore. ——, 418 P. 2d 822.

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No. 1155, Misc. LEWIS, AKA EHRLICH *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 1156, Misc. WERNER *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1158, Misc. LAWRENCE *v.* PATE, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 1160, Misc. HARSHAW *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

The following petitions for writs of certiorari are denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS would grant the petitions and reverse the judgments of the courts below for the reasons stated in the opinion of THE CHIEF JUSTICE in *Spencer* v. *Texas*, 385 U. S. 554, 569.

No. 15, Misc. HILLERY *v.* CALIFORNIA. Sup. Ct. Cal.

No. 1052, Misc. ROSS, AKA HARRISON *v.* TEXAS. Ct. Crim. App. Tex. *William E. Gray* for petitioner. Reported below: 406 S. W. 2d 464.

Rehearing Denied.

No. 29. OSBORN *v.* UNITED STATES, 385 U. S. 323. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 666. LESTER ET AL. *v.* UNITED STATES, 385 U. S. 1002. Motion for leave to file supplement to petition for rehearing denied. Petition for rehearing denied.

No. 777, Misc. FONTANA *v.* SCHNECKLOTH, WARDEN, ET AL., 385 U. S. 998. Motion for leave to file petition for rehearing denied.

No. 36. LEWIS *v.* UNITED STATES, 385 U. S. 206;

No. 53. NATIONAL LABOR RELATIONS BOARD *v.* C & C PLYWOOD CORP., 385 U. S. 421;

No. 758. NEHRING *v.* CITY OF DEKALB ET AL., 385 U. S. 453;

No. 761. LITTELL *v.* UDALL, SECRETARY OF THE INTERIOR, 385 U. S. 1007;

No. 803. BAFICO *v.* SOUTHERN PACIFIC CO., 385 U. S. 1025;

No. 830. GRACE LINE, INC., ET AL. *v.* KANTON, 385 U. S. 1007;

No. 841. COUNTRY MUTUAL INSURANCE CO. *v.* ANDEEN, ADMINISTRATOR, ET AL., 385 U. S. 1036;

No. 645, Misc. DODGE *v.* UTAH, 385 U. S. 1013;

No. 705, Misc. ELBEL *v.* UNITED STATES, 385 U. S. 1014;

No. 767, Misc. BOGART *v.* TRAYNOR, CHIEF JUSTICE OF CALIFORNIA, ET AL., 385 U. S. 451; and

No. 982, Misc. GREAR *v.* OHIO, 385 U. S. 1031. Petitions for rehearing denied.

FEBRUARY 27, 1967.

Miscellaneous Orders.

No. 31. UNITED STATES *v.* NATIONAL STEEL CORP. ET AL. Appeal from D. C. S. D. Tex. (Probable jurisdiction noted, 383 U. S. 905.) Joint motion to refer this case to the United States District Court for the Southern District of Texas granted and case referred to that court for consideration of the settlement agreement. *Solicitor General Marshall* for the United States, and *Denman Moody* and *C. Brien Dillon* for National Steel Corp. et al., and *B. J. Bradshaw* for Brown et al., on the motion.

No. 1208, Misc. HOUSE *v.* CIRCUIT COURT OF HOWARD COUNTY ET AL. Ct. App. Md. Motion for leave to file petition for writ of certiorari denied.

No. 32. HOFFA *v.* UNITED STATES;
No. 33. PARKS *v.* UNITED STATES;
No. 34. CAMPBELL *v.* UNITED STATES; and
No. 35. KING *v.* UNITED STATES. C. A. 6th Cir. (Decided 385 U. S. 293; rehearing denied, *post,* p. 951.)

Motion of Uniformed Sanitationmen's Association for leave to file a brief, as *amicus curiae,* granted. Motion to vacate judgment denied. MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of these motions.

Leonard B. Boudin for Uniformed Sanitationmen's Association, as *amicus curiae,* in support of motion to vacate judgment. *Morris A. Shenker, Daniel B. Maher* and *Joseph A. Fanelli* for petitioner in No. 32, *Jacques M. Schiffer* for petitioner in No. 33, *Cecil D. Branstetter* for petitioner in No. 34, and *P. D. Maktos* and *Harold E. Brown* for petitioner in No. 35 on the motion to vacate judgment. *Solicitor General Marshall* for the United States in all four cases in opposition to the motion to vacate judgment.

Certiorari Granted. (See also No. 684, Misc., *ante,* p. 212.)

No. 806. PROVIDENT TRADESMENS BANK & TRUST CO., ADMINISTRATOR *v.* PATTERSON, ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman, Avram G. Adler* and *J. Willison Smith* for petitioner. *Norman Paul Harvey* for respondents. Reported below: 365 F. 2d 802.

No. 967. UMANS *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Edward Brodsky* and *William Esbitt* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 368 F. 2d 725.

No. 975. ALBRECHT *v.* HERALD CO., DBA GLOBE-DEMOCRAT PUBLISHING CO. C. A. 8th Cir. Certiorari granted. *Donald S. Siegel* for petitioner. *Lon Hocker* for respondent. Reported below: 367 F. 2d 517.

No. 884. UNITED MINE WORKERS OF AMERICA, DISTRICT 12 *v.* ILLINOIS STATE BAR ASSOCIATION ET AL. Sup. Ct. Ill. Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief, as *amicus curiae*, granted. Certiorari granted. *Edmund Burke, Harrison Combs, Willard P. Owens* and *M. E. Boiarsky* for petitioner. *Bernard H. Bertrand* for respondents. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae*, in support of the petition. Reported below: 35 Ill. 2d 112, 219 N. E. 2d 503.

Certiorari Denied.

No. 843. VANDERPOOL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Ferdinand R. Goglio* and *Irving Frederick* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States.

No. 853. DUBIN *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied. Petitioner *pro se*. *Fred V. Skok* and *David P. Freed* for respondent.

No. 949. ESTATE OF STEINBERG *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *George T. Altman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for respondent. Reported below: 367 F. 2d 130.

February 27, 1967. 386 U. S.

No. 872. COWDEN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *J. Fleet Cowden, pro se,* and for other petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Melva M. Graney* for respondent. Reported below: 365 F. 2d 832.

No. 944. NATIONAL PNEUMATIC CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Harry Levine* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for the United States. Reported below: 176 Ct. Cl. 660.

No. 950. SPENCER ET AL. *v.* NEW ORLEANS TERMINAL CO. ET AL. C. A. 5th Cir. Certiorari denied. *Irwin Rosenthal* and *Nathan Greenberg* for petitioners. *Malcolm L. Monroe* and *W. Graham Claytor, Jr.,* for respondent New Orleans Terminal Co. Reported below: 366 F. 2d 160.

No. 964. HAWTHORNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Arnold M. Weiner* and *Sanford Jay Rosen* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 370 F. 2d 330.

No. 965. KATZ ET AL. *v.* TYLER, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Henry Mark Holzer* and *Phyllis Tate Holzer* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 970. CARRIAGA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Melvyn E. Stein* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 368 F. 2d 337.

No. 973. BRASCH *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO. Sup. Ct. Cal. Certiorari denied.

No. 980. ROGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Richard J. Bruckner* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 998.

No. 983. WORLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *N. Welch Morrisette, Jr.,* for Worley, and *Harry M. Lightsey, Jr.,* and *Charles B. Bowers* for Bennett, petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.,* for the United States. Reported below: 368 F. 2d 625.

No. 990. KAPLUS ET AL. *v.* AMERICANA OF PUERTO RICO, INC. C. A. 3d Cir. Certiorari denied. *Jack L. Cohen* for petitioners. *Manuel Maxwell* for respondent. Reported below: 368 F. 2d 431.

No. 859. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *William E. Miller, Herbert E. Forrest, Donald C. Beelar, Harold L. Russell, Paul A. Porter* and *Joseph M. Kittner* for American Trucking Associations, Inc., et al., and *John E. Stephen* for Air Transport Association of America, petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Henry Geller* and *John E. Conlin* for respondents. *Jack Werner* and *Melvin Richter* for Western Union Telegraph Co., intervenor below. Reported below: —— U. S. App. D. C. ——, 377 F. 2d 121.

No. 996. BROWNWOOD MANUFACTURING CO. ET AL. *v.* TANENBAUM TEXTILE CO., INC. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. *Harold B. Berman* for petitioners. *G. H. Kelsoe, Jr., Robert M. Kennedy* and *Martin N. Whyman* for respondent. Reported below: 404 S. W. 2d 106.

No. 997. HARRINGTON ET AL. *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. *H. M. Harrington, Jr.,* petitioner, *pro se,* and for other petitioners. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, and *Roger Tyler, Vince Taylor, Harold G. Kennedy* and *Kerns B. Taylor,* Assistant Attorneys General, for respondent. Reported below: 407 S. W. 2d 467.

No. 762. KALISH *v.* HOSIER ET AL. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Walter L. Gerash* for petitioner. *Edward J. Fillenwarth* and *Philip Hornbein, Jr.,* for respondents. Reported below: 364 F. 2d 829.

No. 976. WATKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard E. Gorman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 369 F. 2d 217.

No. 1123, Misc. JOHNSTON *v.* DUTTON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1130, Misc. LAWRENCE *v.* MCMANN, WARDEN. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 844, Misc. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 672.

No. 1024, Misc. HAGAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 124 U. S. App. D. C. 276, 364 F. 2d 669.

No. 1060, Misc. COLEMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Joseph Forer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1066, Misc. RIVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 368 F. 2d 703.

No. 1078, Misc. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1103, Misc. DORSEY *v.* MARONEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 1174, Misc. PETERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States. Reported below: 125 U. S. App. D. C. 114, 368 F. 2d 822.

No. 1122, Misc. WHITE *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1132, Misc. BRAGG *v.* SINCLAIR REFINING Co. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se.* *Newell S. Boardman* for respondent.

No. 1136, Misc. BOONE ET AL. *v.* PRITCHETT, COMMISSIONER, ET AL. Sup. Ct. N. C. Certiorari denied. *Conrad O. Pearson* and *William G. Pearson II* for petitioners. Reported below: 268 N. C. 211, 150 S. E. 2d 215.

No. 1138, Misc. DUKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1142, Misc. ZAVALA *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1146, Misc. HAYS *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 1154, Misc. RINGO *v.* WINGO, WARDEN. Ct. App. Ky. Certiorari denied. Reported below: 408 S. W. 2d 469.

No. 1157, Misc. BOLIN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 407 S. W. 2d 431.

No. 1159, Misc. STEWART *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Harold B. Anderson* for petitioner. *Joe Purcell,* Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent. Reported below: 241 Ark. 4, 406 S. W. 2d 313.

No. 1162, Misc. CONOVER *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 1166, Misc. HUTCHINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1175, Misc. ANGLIN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 244 Md. 652, 224 A. 2d 668.

No. 1182, Misc. EASON *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 367 F. 2d 381.

No. 1232, Misc. WALKER *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Robert Matthews,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent.

No. 739, Misc. PIERCE *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied. Petitioner *pro se*. *Phil L. Hansen,* Attorney General of Utah, for respondent.

MR. JUSTICE DOUGLAS:

Denial of certiorari is proper in this case. I see no constitutional bar to a state court treating a petition for habeas corpus as a petition for rehearing where the habeas corpus petition raises the same questions as an earlier appeal. But federal habeas corpus is not so cramped, and the petitioner can, of course, petition a federal district court for a writ of habeas corpus. The underlying question is whether the *M'Naghten* test of legal insanity is a constitutionally permissible test of criminal liability in light of the contemporary state of knowledge on the problems of insanity. Should that test give way to the 128 years of experience in the fields of psychiatry and

psychology since its formulation? Should it be replaced by the more sophisticated and realistic *Durham* test (*Durham* v. *United States,* 214 F. 2d 862) or some other test more in keeping with due process?

No. 1097, Misc. Ross *v.* Beto, Corrections Director. Ct. Crim. App. Tex. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Donald C. Roylance* for petitioner.

No. 1176, Misc. Sandoval *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 65 Cal. 2d 303, 419 P. 2d 187.

Mr. Justice Douglas, dissenting.

Police officers obtained warrants for the arrest of Coates and five others. They had been informed, by an informer not known to be reliable, that Coates concealed heroin and burglary loot in his home, that the house served as a narcotics headquarters, and that at least one "connection" contacted Coates there by telephone. Apparently this information had been partially corroborated by an independent investigation implicating Coates and the others in a burglary operation. Officers stationed at the house saw Coates and a woman leave. They arrested Coates, saw puncture marks on the woman's hands, and arrested her. A search of the woman's person uncovered narcotics.

The police then entered Coates' home and saw narcotics in plain view. They arrested the occupants and began an extensive search of the premises. During the search, a telephone rang and an officer answered it. A voice asked, "Is this Jessie?" The officer replied that it was. The caller said, "Man, where have you been? I've been waiting for you a long time. You were supposed to meet me some time ago." The officer replied that he had been delayed and would be along in a few minutes. The caller then said, "Well, hurry up, man, I can't stand

around with this stuff in my pocket on the street. I might get picked up." When the conversation ended, the officer asked Coates what it meant. Coates explained that he had arranged to pick up heroin from a person named Rudy, gave the police a description of Rudy and his car, and specified the meeting place. The officers rushed off to the designated place and arrested and searched petitioner, finding narcotics used at petitioner's trial for possessing narcotics.

The California Supreme Court held that the officers had probable cause to arrest petitioner. The entry into Coates' home was lawful because the discovery of the narcotics on the woman, together with the informant's information and the information from the independent investigation, gave the officers probable cause to believe that people in the house possessed narcotics. Since they were lawfully in the house the police could answer the telephone and conceal their identities in order "to learn of possible unlawful activities." 65 Cal. 2d 303, 308, 419 P. 2d 187, 190. The information given by Coates was confirmed when the officers saw petitioner. Thus, I assume that they had probable cause to arrest and search petitioner.

While we have sustained the validity of searches of the home of a person validly arrested (*Agnello* v. *United States,* 269 U. S. 20; *Harris* v. *United States,* 331 U. S. 145; *United States* v. *Rabinowitz,* 339 U. S. 56), we have stressed that the bounds of such searches are not unlimited. A search of the place where an arrest is made may be made "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody . . . ." *Agnello* v. *United States, supra,* at 30. Over and over again we have emphasized that a search incident to arrest cannot be a general exploratory search, but must be narrowly confined. See, *e. g., United States* v. *Lefkowitz,* 285 U. S.

452; *Harris* v. *United States, supra,* at 152–153; *United States* v. *Rabinowitz, supra,* at 62. In those cases the search was designed to uncover fruits or instrumentalities of the crime for which the person was arrested. In this case the officer was engaged in a fishing expedition when he answered the telephone. He sought "to learn of possible unlawful activities." 65 Cal. 2d, at 308, 419 P. 2d, at 190. And, the "possible unlawful activities" about which he was curious were not confined to those on the part of Coates or even to those of the type which gave the officers justification for entering the house. The officer who answered the telephone and used artifice was engaged in a general, exploratory search to obtain evidence and leads incriminating anyone of any possible crime. Until the intercepted conversation, there was absolutely no lead connecting petitioner with any unlawful activity.

The permissible bounds of a search of the premises of an arrest have thus been extended. The import of such extension is dangerous. Police often lawfully enter a house to make an arrest. If the decision below is sustained the police are given a roving commission to do things condemned by the Fourth Amendment—as long as they remain in the home which they have taken over. They are given license to make a general, exploratory search which the Fourth Amendment was designed to prevent.

It might be argued that petitioner lacks standing to object to the unlawful police conduct. This would be on the theory that he had no possessory interest in the home subjected to the search. It should be noted that neither the California Supreme Court nor the State relied upon petitioner's lack of standing. We have liberally interpreted the provision of Rule 41 (e) of the Federal Rules of Criminal Procedure that a defendant must be a "person aggrieved" in order to suppress evidence in a federal court. See, *e. g., United States* v. *Jeffers,*

342 U. S. 48; *Jones* v. *United States*, 362 U. S. 257. Argument is at least warranted on this point.

For the reasons stated I would grant certiorari in this case.

Rehearing Denied.

No. 682. PASSINI *v.* UNITED STATES, 385 U. S. 1024;

No. 701. COLE ET AL. *v.* UNITED STATES, 385 U. S. 1027;

No. 975, Misc. DEMARO *v.* UNITED STATES, 385 U. S. 1032; and

No. 749, Misc. WILLIAMS *v.* UNITED STATES, 385 U. S. 1042. Petitions for rehearing denied.

No. 32. HOFFA *v.* UNITED STATES;

No. 33. PARKS *v.* UNITED STATES;

No. 34. CAMPBELL *v.* UNITED STATES; and

No. 35. KING *v.* UNITED STATES, 385 U. S. 293; *ante*, p. 940. Motion of Criminal Courts Bar Association of Los Angeles County for leave to file a brief in No. 32, as *amicus curiae*, in support of petition for rehearing granted. Petition for rehearing in all four cases denied. MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this motion or this petition.

MARCH 10, 1967.

Miscellaneous Order.

No. —. KITZER ET AL. *v.* DEVITT, U. S. DISTRICT JUDGE. D. C. Minn. Application for a stay of the trial of *United States* v. *Kitzer* in the United States District Court for the District of North Dakota, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. *Myer H. Gladstone* for applicants. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States in opposition.

MARCH 13, 1967.

Miscellaneous Orders.

No. —. LEE, CORRECTIONS COMMISSIONER, ET AL. *v.* WASHINGTON ET AL. D. C. M. D. Ala. Application for a stay presented to MR. JUSTICE BLACK, and by him referred to the Court, granted pending final disposition of the appeal by this Court, provided the jurisdictional statement is filed and case docketed in this Court within 20 days from this date. *MacDonald Gallion,* Attorney General of Alabama, *Gordon Madison,* Assistant Attorney General, and *Nicholas S. Hare,* Special Assistant Attorney General, for applicants. *Charles Morgan* and *Orzell Billingsley, Jr.,* in opposition.

No. 343. PRIMA PAINT CORP. *v.* FLOOD & CONKLIN MFG. CO. C. A. 2d Cir. (Certiorari granted, 385 U. S. 897.) Motion of American Arbitration Association for leave to file a brief, as *amicus curiae,* granted. *Whitney North Seymour, Sol N. Corbin, Osmond K. Fraenkel, William J. Isaacson* and *H. H. Nordlinger* on the motion.

No. 391. STATE FARM FIRE & CASUALTY CO. ET AL. *v.* TASHIRE ET AL. C. A. 9th Cir. (*Ante,* p. 903.) Motion of petitioner Greyhound Lines, Inc., for leave to file a response to the *amici curiae* brief, after argument, granted. *John Gordon Gearin* and *J. D. Burdick* on the motion.

No. 395. LOVING ET UX. *v.* VIRGINIA. Appeal from Sup. Ct. App. Va. (Probable jurisdiction noted, 385 U. S. 986.) Motion of Japanese American Citizens League for leave to participate in oral argument, as *amicus curiae,* granted and fifteen minutes are allotted for that purpose. Appellee is allotted an additional fifteen minutes for oral argument. *William M. Marutani* on the motion.

No. 424. MEMPA *v.* RHAY, PENITENTIARY SUPERINTENDENT; and

No. 734. WALKLING *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. (Certiorari granted, *ante,* p. 907.) Motions of petitioners for leave to proceed further herein *in forma pauperis* granted. Motions of petitioners for appointment of counsel are also granted. It is ordered that *Evan L. Schwab, Esquire,* of Seattle, Washington, be, and he is hereby, appointed to serve as counsel for petitioners in these cases.

No. 1080. BURGETT *v.* TEXAS. Ct. Crim. App. Tex. (Certiorari granted, *ante,* p. 931.) Motion of petitioner for appointment of counsel granted. It is ordered that *Gordon Gooch, Esquire,* of Houston, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1262, Misc. SMITH *v.* ILLINOIS;

No. 1276, Misc. ROSS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 1283, Misc. PARKER *v.* TURNER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1021, Misc. JONES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *David U. Tumin,* Assistant Attorney General, for respondent.

No. 1296, Misc. MYLES *v.* PRESTON, JAIL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus and other relief denied.

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No. 1224, Misc. WILSON *v.* SUPREME COURT OF WASHINGTON ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 821, Misc. SIBRON *v.* NEW YORK. Appeal from Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Gretchen White Oberman* and *Leon B. Polsky* for appellant. *Aaron E. Koota* for appellee. 18 N. Y. 2d 603, 219 N. E. 2d 196.

Certiorari Granted. (See also No. 46, *ante,* p. 267; No. 759, *ante,* p. 258; No. 12, Misc., *ante,* p. 264; No. 19, Misc., *ante,* p. 271; No. 22, Misc., *ante,* p. 272; No. 23, Misc., *ante,* p. 273; No. 32, Misc., *ante,* p. 265; No. 36, Misc., *ante,* p. 263; No. 37, Misc., *ante,* p. 265; No. 38, Misc., *ante,* p. 274; No. 39, Misc., *ante,* p. 275; No. 44, Misc., *ante,* p. 276; No. 46, Misc., *ante,* p. 262; No. 50, Misc., *ante,* p. 263; No. 52, Misc., *ante,* p. 277; No. 68, Misc., *ante,* p. 279; No. 69, Misc., *ante,* p. 280; No. 140, Misc., *ante,* p. 266; No. 157, Misc., *ante,* p. 281; No. 332, Misc., *ante,* p. 282; No. 397, Misc., *ante,* p. 261; No. 465, Misc., *ante,* p. 283; No. 533, Misc., *ante,* p. 284; No. 556, Misc., *ante,* p. 285; and No. 664, Misc., *ante,* p. 286.)

No. 895. KATZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth used and occupied by the Petitioner is

obtained in violation of the Fourth Amendment to the United States Constitution.

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

"2. Whether the search warrant used by the Federal officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant."

The Court also wishes counsel to brief and present oral argument on the holding in *Frank* v. *United States,* 347 F. 2d 486, as it may affect this case. *Burton Marks* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 369 F. 2d 130.

No. 918. WILL, U. S. DISTRICT JUDGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Harvey M. Silets* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States.

Certiorari Denied. (See also No. 1180, Misc., *ante,* p. 266; No. 1193, Misc., *ante,* p. 261; and No. 1021, Misc., *supra.*)

No. 867. BUCK *v.* CITY OF OREGON. Sup. Ct. Ohio. Certiorari denied. *Merritt W. Green* for petitioner. *John J. Burkhart* for respondent.

No. 839. HENRY VAN HUMMELL, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Morrison Shafroth* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Meyer Rothwacks* for respondent. Reported below: 364 F. 2d 746.

No. 866. DUBIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *J. Frederic Taylor* and *James B. Burke* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 176 Ct. Cl. 702, 363 F. 2d 938.

No. 873. COLOZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irving Younger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 885. BRAUER ET AL. *v.* CITY OF CLEVELAND. Sup. Ct. Ohio. Certiorari denied. *Henry DuLaurence* and *Paul H. Oppmann* for petitioners. *Daniel J. O'Loughlin* for respondent. Reported below: 7 Ohio St. 2d 94, 218 N. E. 2d 599.

No. 893. SNYDER BROTHERS CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Furman Smith* and *Kirk McAlpin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harold C. Wilkenfeld* for the United States. Reported below: 367 F. 2d 980.

No. 985. NEUHOFF BROS. PACKERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Fritz L. Lyne* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Eugene B. Granof* for respondent. Reported below: 362 F. 2d 611.

No. 899. OHIO EX REL. SIBARCO CORP. ET AL. *v.* CITY OF BEREA ET AL. Sup. Ct. Ohio. Certiorari denied. *Sanford W. Likover* for petitioners. *George I. Meisel* for respondents. Reported below: 7 Ohio St. 2d 85, 218 N. E. 2d 428.

No. 903. HENRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 361 F. 2d 352.

No. 909. LIMPERIS, TRUSTEE IN BANKRUPTCY *v.* A. J. ARMSTRONG CO., INC. C. A. 7th Cir. Certiorari denied. *William S. Collen* for petitioner. *Norman H. Nachman* and *Joseph Stein* for respondent. Reported below: 369 F. 2d 513.

No. 937. BROWN ET AL. *v.* STERLING ALUMINUM PRODUCTS CORP. C. A. 8th Cir. Certiorari denied. *Jerome J. Duff* for petitioners. *Daniel Bartlett* and *William Stix* for respondent. Reported below: 365 F. 2d 651.

No. 946. WOODY ET AL. *v.* STERLING ALUMINUM PRODUCTS, INC., ET AL. C. A. 8th Cir. Certiorari denied. *Jerome J. Duff* for petitioners. *Daniel Bartlett* and *William Stix* for Sterling Aluminum Products, Inc., and *Donald S. Siegel* for International Association of Machinists et al., respondents. Reported below: 365 F. 2d 448.

No. 987. PORTER ET AL. *v.* PORTER. Sup. Ct. Ariz. Certiorari denied. *Daniel Cracchiolo* and *Frank W. Beer* for petitioners. Reported below: 101 Ariz. 131, 416 P. 2d 564.

No. 951. COLLINS *v.* GOVERNMENT OF THE VIRGIN ISLANDS OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Melvin M. Belli* for petitioner. *Francisco Corneiro,* Attorney General, for respondent Government of the Virgin Islands. Reported below: 366 F. 2d 279.

No. 969. KECO INDUSTRIES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Franklin M. Schultz* and *Paul W. Steer* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 176 Ct. Cl. 983, 364 F. 2d 838.

No. 974. KRAFT ET UX., DBA NATIONAL ART ACADEMY *v.* BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *John R. Foley* for petitioners. *Charles T. Duncan, Milton D. Korman* and *Hubert B. Pair* for respondent.

No. 979. SMITH *v.* CALIFORNIA. Super. Ct. Cal., County of Marin. Certiorari denied. *Duane B. Beeson* for petitioner.

No. 986. SOUTHERN PACIFIC CO. *v.* DUPONT ET AL. C. A. 5th Cir. Certiorari denied. *J. J. Davidson, Jr.,* for petitioner. Reported below: 366 F. 2d 193.

No. 988. PSHEMENSKY *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Al Matthews* for petitioner. Reported below: 244 Cal. App. 2d 154, 52 Cal. Rptr. 780.

No. 992. GINSBERG *v.* UNITED STATES. Sup. Ct. Fla. Certiorari denied. *Neal Rutledge* and *Allan Milledge* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Meyer Rothwacks* for the United States.

No. 991. Estate of Schildkraut et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *George C. Wildermuth* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harry Baum* for respondent. Reported below: 368 F. 2d 40.

No. 994. Borrowdale *v.* Reuland. C. A. 7th Cir. Certiorari denied. *Milton O. Gordon* for petitioner. *Charles B. Mahin* and *Joseph Keig* for respondent. Reported below: 367 F. 2d 771.

No. 1006. Muhammad et al. *v.* United States et al. C. A. 9th Cir. Certiorari denied. *Edward W. Jacko, Jr.*, for petitioners. *Solicitor General Marshall* for the United States. Reported below: 366 F. 2d 298.

No. 1008. National Maritime Union of America, AFL–CIO, et al. *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. *Abraham E. Freedman* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 367 F. 2d 171.

No. 1018. Bryan et al., dba Trakwork Equipment Co. *v.* Kershaw Manufacturing Co. C. A. 5th Cir. Certiorari denied. *Howard J. Marsh* for petitioners. *Edward E. Crowell, Jr.*, for respondent. Reported below: 366 F. 2d 497.

No. 1021. Mooreman, Trustee in Bankruptcy *v.* Mutual Life Insurance Co. of New York. C. A. 9th Cir. Certiorari denied. *William P. Mahoney, Jr.*, for petitioner. *Arthur Kaiser* for respondent. Reported below: 366 F. 2d 686.

No. 1020. MAGBANUA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Melvyn E. Stein* for petitioner. *Solicitor General Marshall* for respondent.

No. 1053. FIRESTONE TIRE & RUBBER CO. *v.* GENERAL TIRE & RUBBER CO. ET AL. C. A. 4th Cir. Certiorari denied. *Edward S. Irons* for petitioner. *Charles J. Merriam* and *Norman P. Ramsey* for respondent General Tire & Rubber Co. Reported below: 373 F. 2d 361.

No. 860. BROTHERHOOD OF SLEEPING CAR PORTERS *v.* THOMPSON. C. A. 4th Cir. Motion of Railway Labor Executives' Association for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Ernest Fleischman* for petitioner. *Taylor B. Rion* for respondent. *Edward J. Hickey, Jr.,* and *William J. Hickey* for Railway Labor Executives' Association, as *amicus curiae,* in support of the petition.

No. 881. FRANCOLINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William Sonenshine* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 367 F. 2d 1013.

No. 977. WATKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard E. Gorman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 369 F. 2d 170.

No. 1030. HINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Harold Dunbar Cooley* for petitioner. *Solicitor General Marshall* for the United States.

No. 928. TEMPLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John W. Hinsdale* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 795.

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

Under 18 U. S. C. § 401 (1) a court may punish as contempt "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." We held in *In re Michael,* 326 U. S. 224, that this contempt power, limited as Congress intended it to be, could not be used to punish a person merely for committing perjury in the court's presence without the additional showing that an actual obstruction of justice was caused thereby. Accord, *Ex parte Hudgings,* 249 U. S. 378; see *In re McConnell,* 370 U. S. 230, 234, 236; cf. *Cammer* v. *United States,* 350 U. S. 399; *Brown* v. *United States,* 356 U. S. 148, 153.

Petitioner, an attorney, represented a plaintiff in a lawsuit against the Government in federal district court. When he failed to file a brief within the time specified by the court's pretrial order, the Government moved to dismiss his client's complaint for want of prosecution. The District Judge refused to do so upon petitioner's representation in his belated brief and in open court that the delay was due to illness on his part. The court went on to hear the case on its merits and, after a trial which lasted only an hour, rendered judgment for the Government. A year later, petitioner was charged with contempt of court under § 401 (1) for having misrepresented

to the judge that he was ill. Tried summarily by that same judge without a jury, petitioner was convicted and sentenced to six months' imprisonment. Though the Court of Appeals reversed and remanded for a new trial on grounds not here material, it flatly held, with little discussion and no citation to authority, that "[l]ying to a judge is certainly misbehavior in the court's presence and therefore punishable under section 401." 349 F. 2d 116, 117. Petitioner was retried summarily before a different judge and again convicted of contempt of court, apparently on the basis of the Court of Appeals' prior holding that "lying to a judge" in and of itself constitutes contempt.

Since there is nothing in this record to suggest that either the Government attempted to prove or the trial judge found that petitioner's misrepresentation actually obstructed the administration of justice, his conviction on its face runs counter to *In re Michael.* There is not a vestige of evidence to support it. Cf. *Thompson* v. *Louisville,* 362 U. S. 199. Nevertheless, the Court of Appeals refused to reverse this illegal conviction and dismissed petitioner's appeal on the ground that, while he gave an oral notice of appeal and filed an appeal bond at the end of his trial, he did not file a written notice of appeal within the 10-day period specified by Fed. Rule Crim. Proc. 37 (a)(2). Although only four days after that period expired petitioner moved the trial court to accept a written notice of appeal, and although the trial court then found that petitioner's delay was the result of "excusable neglect," the Court of Appeals refused to hold the oral notice adequate. The court noted that the result might be different had this case arisen under the 1966 amendment to Rule 37 (a)(2) which now provides that "[u]pon a showing of excusable neglect, the district court may, before or after the time has expired, . . . extend the time for filing the notice of appeal otherwise allowed to

any party for a period not to exceed 30 days . . . ." 383 U. S. 1110–1111. The court also refrained from deciding "that an oral notice of appeal transcribed into the record would never be sufficient to invoke jurisdiction in the court of appeals." Yet the court allowed a plainly invalid conviction to stand. Because I believe that the Court of Appeals, in the words of *Fallen* v. *United States,* 378 U. S. 139, 142, "[o]verlooked . . . the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances" and because I find it "apparent when the circumstances of this case are examined" that "the Rules were not approached with sympathy for their purpose," I would grant certiorari in this case to correct a clear miscarriage of justice. Cf. *Berman* v. *United States,* 378 U. S. 530 (dissenting opinion).

No. 1000. Pacific Inland Navigation Co. *v.* Course. C. A. 9th Cir. Motion of Columbia River Towboat Association for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Floyd A. Fredrickson* for petitioner. *Stephen M. King* for respondent. *Thomas J. White* and *William F. White* for Columbia River Towboat Association, as *amicus curiae,* in support of the petition. Reported below: 368 F. 2d 540.

No. 1007. Locklin et al., dba Radiant Color Co. *v.* Switzer Brothers, Inc. C. A. 9th Cir. Motion to use record in No. 803, October Term, 1961, granted. Certiorari denied. *Carl Hoppe* for petitioners. *Benjamin H. Sherman* for respondent. Reported below: 368 F. 2d 553.

No. 1035. Paley *v.* Brenner et al. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for respondents.

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No. 1009. WESTERN NATURAL GAS CO. *v.* CITIES SERVICE GAS CO. Sup. Ct. Del. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *E. Barrett Prettyman, Jr.*, *Carroll L. Gilliam* and *Clair John Killoran* for petitioner. *Charles V. Wheeler* and *Rodney G. Buckles* for respondent. Reported below: —— Del. ——, 223 A. 2d 379.

No. 456, Misc. TROTTER *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. *George Howard, Jr.*, for petitioner. *Bruce Bennett*, Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent. Reported below: 361 F. 2d 888.

No. 457, Misc. HARRIS *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. *George Howard, Jr.*, for petitioner. *Bruce Bennett*, Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent. Reported below: 361 F. 2d 888.

No. 579, Misc. HOUSE ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty, Marshall Hartman* and *James J. Doherty* for petitioners. *William G. Clark*, Attorney General of Illinois, for respondent. Reported below: 69 Ill. App. 2d 324, 217 N. E. 2d 566.

No. 791, Misc. HARRIS *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. *Wm. I. Purifoy* for petitioner. *Joe Purcell*, Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent.

No. 879, Misc. HARRIS *v.* BISHOP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ark. Certiorari denied. *Wm. I. Purifoy* for petitioner. *Joe Purcell*, Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent.

No. 919, Misc. DAVIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 124 U. S. App. D. C. 134, 362 F. 2d 964.

No. 937, Misc. LACEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

No. 994, Misc. MURPHY *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Raymond R. Trombadore,* Deputy Attorney General of New Jersey, for respondents. Reported below: 369 F. 2d 698.

No. 1065, Misc. BROWN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1164, Misc. THOMAS *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1165, Misc. AMES *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1169, Misc. SCHMIDT *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. *Paul D. Lunde* for petitioner. Reported below: —— Iowa ——, 145 N. W. 2d 631.

No. 1171, Misc. SIMPSON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 32 Wis. 2d 195, 145 N. W. 2d 206.

No. 1172, Misc. ISAACS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1173, Misc. CALHOUN ET AL. *v.* HERTWIG, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 363 F. 2d 257.

No. 1177, Misc. DEMERS *v.* SHEHAB ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 224 A. 2d 380.

No. 1181, Misc. KOPETKA *v.* TAHASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1183, Misc. EDWARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1185, Misc. BOULWARE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 1186, Misc. MILLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1187, Misc. CHANCE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 4 Ariz. App. 38, 417 P. 2d 551.

No. 1189, Misc. WEATHERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 394.

No. 1191, Misc. NAILOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1192, Misc. HOY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 1196, Misc. AMES *v.* MIDDLEBROOKS, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 369 F. 2d 113.

No. 1197, Misc. HACKER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 197 Kan. 712, 421 P. 2d 40.

No. 1201, Misc. CONDE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1203, Misc. LOSIEAU *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 180 Neb. 616, 144 N. W. 2d 210.

No. 1204, Misc. FERRO *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1205, Misc. COX *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1207, Misc. HURLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 1211, Misc. GOODPASTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 35 Ill. 2d 478, 221 N. E. 2d 251.

No. 1214, Misc. SCHACK *v.* KATZENBACH. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent.

No. 1215, Misc. PERRY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 407 S. W. 2d 714.

No. 1222, Misc. ARGUELLO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1225, Misc. DANIELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States.

No. 1226, Misc. NOYES *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 69 Wash. 2d 441, 418 P. 2d 471.

No. 1227, Misc. SANTOS *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1231, Misc. GLASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 371 F. 2d 418.

No. 1236, Misc. VILLARINO *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1238, Misc. SIMON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 406 S. W. 2d 460.

No. 1241, Misc. LAWRENCE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 368 F. 2d 294.

Rehearing denied.

No. 68. SPENCER *v.* TEXAS, 385 U. S. 554;

No. 69. BELL *v.* TEXAS, 385 U. S. 554;

No. 70. REED *v.* BETO, CORRECTIONS DIRECTOR, 385 U. S. 554;

No. 71. ZUCKERMAN ET AL. *v.* GREASON, *ante*, p. 15;

No. 747. SHERIDAN CREATIONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD, 385 U. S. 1005;

No. 820. PATTERSON ET AL. *v.* CITY OF NEWPORT NEWS ET AL., 385 U. S. 650;

No. 846. KANSAS CITY TRANSIT, INC. *v.* KANSAS CITY, MISSOURI, 385 U. S. 1036;

No. 2, Misc. GOODSPEED *v.* BETO, CORRECTIONS DIRECTOR, *ante*, p. 926;

No. 21, Misc. TAYLOR *v.* TEXAS, *ante*, p. 927;

No. 210, Misc. COLLINS *v.* WILSON, WARDEN, 385 U. S. 808;

No. 511, Misc. COLLIER *v.* UNITED STATES, 385 U. S. 1042;

No. 963, Misc. RISCH *v.* RISCH, *ante*, p. 10;

No. 1016, Misc. JACOBS *v.* UNITED STATES, *ante*, p. 920;

No. 1057, Misc. REED *v.* CALIFORNIA, *ante*, p. 923;

No. 1089, Misc. JOHNSON *v.* DEPARTMENT OF CORRECTION ET AL., *ante*, p. 924; and

No. 1118, Misc. STELL *v.* PENNSYLVANIA, *ante*, p. 925. Petitions for rehearing denied.

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No. 483. REITMAN ET AL. *v.* MULKEY ET AL. Sup. Ct. Cal. (Certiorari granted, 385 U. S. 967.)

Motion of American Civil Liberties Union of Northern California for leave to file a brief, as *amicus curiae*, granted. *Marshall W. Krause* on the motion.

Motion of United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO, Region 6, et al., for leave to file a brief, as *amici curiae*, granted. *Abe F. Levy* on the motion.

Motion of California State Central Committee of the Democratic Party for leave to file a brief, as *amicus curiae*, granted. *Gerald D. Marcus* on the motion.

No. 1360, Misc. BARCLEY *v.* KROPP, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (See also No. 823, *ante*, p. 345.)

No. 905, Misc. WHITNEY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent. Reported below: 184 So. 2d 207.

Certiorari Denied.

No. 876. KROHN *v.* RICHARDSON-MERRELL, INC. Sup. Ct. Tenn. Certiorari denied. *Lowe Watkins* and *Dan E. McGugin* for petitioner. *John K. Maddin, Jr.*, for respondent. Reported below: —— Tenn. ——, 406 S. W. 2d 166.

No. 930. AADAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 368 F. 2d 962.

No. 1010. WARDEN, MARYLAND PENITENTIARY *v.* LEDBETTER. C. A. 4th Cir. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, and *R. Randolph Victor* for petitioner. Reported below: 368 F. 2d 490.

No. 1016. FRAZIER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Charles Norman Shaffer* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 365 F. 2d 316.

No. 1023. EXCHANGE & SAVINGS BANK OF BERLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John S. McDaniel, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Robert N. Anderson* for the United States. Reported below: 368 F. 2d 334.

No. 1025. NAPLES *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. *Dan W. Duffy* for petitioner. *William B. Saxbe,* Attorney General of Ohio, *Donald M. Colasurd,* First Assistant Attorney General, and *Leo J. Conway,* Assistant Attorney General, for respondent. Reported below: 368 F. 2d 219.

No. 1031. SPIGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 369 F. 2d 686.

No. 1069. FRED OLSEN LINE ET AL. *v.* CURRY, ADMINISTRATRIX. C. A. 9th Cir. Certiorari denied. *Graydon S. Staring* for petitioners. *William A. Lahanier* for respondent. Reported below: 367 F. 2d 921.

No. 1123. KELLY, ADMINISTRATOR *v.* CHABOT. Sup. Ct. Ill. Certiorari denied.

No. 1081. VISIDOR CORP. *v.* BOROUGH OF CLIFFSIDE PARK. Sup. Ct. N. J. Certiorari denied. *Louis Eisenstein* and *Frederick L. Bernstein* for petitioner. *Paul L. Basile* for respondent. Reported below: 48 N. J. 214, 225 A. 2d 105.

No. 1013. WORLEY ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Julius Lucius Echeles* for petitioners. Reported below: 35 Ill. 2d 574, 221 N. E. 2d 267.

No. 1096. DADDONA ET AL. *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD. Sup. Ct. Conn. Certiorari denied. *Samuel Gruber* for petitioners. *Theodore Godlin* for respondent.

No. 1012. MITCHELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert L. Bobrick* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 369 F. 2d 323.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner did not report for induction as ordered, was indicted, convicted, and sentenced to five years' imprisonment and his conviction was affirmed. 369 F. 2d 323. His defense was that the "war" in Vietnam was being conducted in violation of various treaties to which we were a signatory, especially the Treaty of London of August 8, 1945, 59 Stat. 1544, which in Article 6 (a) declares that "waging of a war of aggression" is a "crime against peace" imposing "individual responsibility." Article 8 provides:

> "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Petitioner claimed that the "war" in Vietnam was a "war of aggression" within the meaning of the Treaty of London and that Article 8 makes him responsible for participating in it even though he is ordered to do so.*

Mr. Justice Jackson, the United States prosecutor at Nuremberg, stated: "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." (International Conference on Military Trials, Dept. of State Pub. No. 3080, p. 330.)

Article VI, cl. 2, of the Constitution states that "Treaties" are a part of the "supreme Law of the Land; and the Judges in every State shall be bound thereby."

There is a considerable body of opinion that our actions in Vietnam constitute the waging of an aggressive "war."

This case presents the questions:

(1) whether the Treaty of London is a treaty within the meaning of Art. VI, cl. 2;

(2) whether the question as to the waging of an aggressive "war" is in the context of this criminal prosecution a justiciable question;

(3) whether the Vietnam episode is a "war" in the sense of the Treaty;

(4) whether petitioner has standing to raise the question;

(5) whether, if he has, the Treaty may be tendered as a defense in this criminal case or in amelioration of the punishment.

These are extremely sensitive and delicate questions. But they should, I think, be answered. Even those who

*The trial court charged the jury that the Treaty of London did not interfere "in any manner in respect to this defendant fulfilling his duty under this order."

think that the Nuremberg judgments were unconstitutional by our guarantee relating to *ex post facto* laws would have to take a different view of the Treaty of London that purports to lay down a standard of future conduct for all the signatories.

I intimate no opinion on the merits. But I think the petition for certiorari should be granted. We have here a recurring question in present-day Selective Service cases.

No. 1029. CONREN, INC., DBA GREAT SCOT SUPERMARKET *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *William E. Roberts* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 368 F. 2d 173.

No. 356, Misc. ORNALES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 769, Misc. MUNICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *S. Carter McMorris* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 363 F. 2d 859.

No. 914, Misc. LOVEJOY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 364 F. 2d 586.

No. 763, Misc. STERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States.

No. 666, Misc. CORNELIO *v.* METROPOLITAN DISTRICT COUNCIL ET AL. C. A. 3d Cir. Certiorari denied. *Joseph N. Bongiovanni, Jr.*, for petitioner. *M. H. Goldstein* for respondents. Reported below: 358 F. 2d 728.

No. 1027. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Newton B. Schwartz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 96.

MR. JUSTICE DOUGLAS, dissenting.

I would grant this petition on the fourth question. It concerns the apparent practice of Internal Revenue agents in examining taxpayers and using the evidence obtained in criminal prosecutions when the taxpayers are given no warning as to their rights, including the right to have an attorney present. This is not an in-custody case, but it is a coercive examination of a taxpayer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one.

No. 933, Misc. BROOKS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *William VanDercreek* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, and *R. L. Lattimore, Howard M. Fender, Robert E. Owen* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 366 F. 2d 1.

No. 915, Misc. HARDEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1023, Misc. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 368 F. 2d 537.

No. 1120, Misc. GREENE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1152, Misc. DELTENRE *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. *Thomas F. McKenna* for petitioner. *Boston E. Witt*, Attorney General of New Mexico, and *Myles E. Flint* and *Paul J. Lacy*, Assistant Attorneys General, for respondent. Reported below: 77 N. M. 497, 424 P. 2d 782.

No. 1168, Misc. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 369 F. 2d 11.

No. 1202, Misc. DOWNEY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Joseph L. Lyle, Jr.*, for petitioner.

No. 1234, Misc. REESE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 367 F. 2d 553.

No. 1235, Misc. STURM *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1237, Misc. ROBERTS *v.* UNITED CALIFORNIA BANK ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent United States.

No. 1253, Misc. SYKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 373 F. 2d 607.

No. 1256, Misc. SCHACK *v.* HOOVER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied.

No. 1264, Misc. KNOLL ET AL. *v.* SOCONY MOBIL OIL CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. *Robert H. Reiter* for petitioners. *Emmet A. Blaes* for respondents Jones et al. Reported below: 369 F. 2d 425.

No. 1268, Misc. DEATON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 364 F. 2d 820.

No. 1301, Misc. WILLIAMS *v.* DONOVAN, DEPUTY COMMISSIONER, DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent Donovan. Reported below: 367 F. 2d 825.

No. 1327, Misc. GAITO *v.* STRAUSS ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Maurice Louik* and *Francis A. Barry* for respondents. Reported below: 368 F. 2d 787.

Rehearing Denied.

No. 703. FRED MEYER, INC., ET AL. *v.* FEDERAL TRADE COMMISSION, *ante*, p. 908;

No. 793. FEIN *v.* NEW YORK, 385 U. S. 649;

No. 862. MAGNUS *v.* UNITED STATES, *ante*, p. 909;

No. 870. CURTIS ET AL. *v.* BOEGER, WARDEN, *ante*, p. 914;

No. 871. GRAND ET AL. *v.* BOEGER, WARDEN, *ante*, p. 914;

No. 890, Misc. BENNETT *v.* NORTH CAROLINA, 385 U. S. 1018;

No. 1037, Misc. CLEMONS *v.* UNITED STATES, *ante*, p. 921;

No. 1046, Misc. MCCREARY *v.* WILSON, WARDEN, *ante*, p. 922;

No. 1093, Misc. SKOLNICK *v.* PARSONS, U. S. DISTRICT JUDGE, ET AL., *ante*, p. 903;

No. 1110, Misc. PIERSON *v.* NEW JERSEY, *ante*, p. 924; and

No. 1116, Misc. LEE *v.* KANSAS, *ante*, p. 925. Petitions for rehearing denied.

No. 894, Misc. WILLIAMS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL., 385 U. S. 986. Motion for leave to file petition for rehearing denied.

MARCH 24, 1967.

Miscellaneous Orders.

No. 25. UNITED STATES *v.* ARNOLD, SCHWINN & CO. ET AL. D. C. N. D. Ill. Motion of counsel for appellees for postponement of argument and for extension of time for filing of appellees' briefs denied. *Harold D. Burgess* and *Robert C. Keck* for Arnold, Schwinn & Co., and *Earl E. Pollock* and *Michael M. Lyons* for Schwinn Cycle Distributors Association, on the motion. [For earlier orders herein, see 382 U. S. 936, 384 U. S. 901.]

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL.

On consideration of the motion of the United States for entry of a supplemental decree declaring that the United States is entitled to certain submerged lands of the Gulf of Mexico and enjoining the State of Texas from interfering therewith, and for a temporary restraining order and preliminary injunction to enjoin the State of Texas from leasing or otherwise interfering with said submerged lands pending determination of the title thereto; and

It appearing from said motion and attached affidavit that the State of Texas has announced its intention to offer said lands for mineral leasing on April 4, 1967, and that such leasing may violate this Court's injunction of December 12, 1960, and subject to unlawful exploitation mineral resources to which the United States makes claim under that decree,

It is hereby ordered:

(1) That within twenty days from the date hereof the State of Texas respond to the motion of the United States and show cause why a preliminary injunction should not be issued as prayed for, pending final determination of the rights of the parties in the premises; and

(2) That the State of Texas be, and it is hereby, restrained from leasing or otherwise interfering with the submerged lands described in the motion of the United States, pending the ruling of the Court on the motion of the United States for a preliminary injunction and the response of the State of Texas thereto.

THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion.

Solicitor General Marshall, Louis F. Claiborne, Roger P. Marquis and *George S. Swarth* for the United States. [For earlier actions, see, *e. g.*, 364 U. S. 502, 382 U. S. 288.]

MARCH 27, 1967.

Miscellaneous Orders.

No. 615. BERGER *v.* NEW YORK. Ct. App. N. Y. (Certiorari granted, 385 U. S. 967.) Motion of New York Civil Liberties Union for leave to participate in oral argument, as *amicus curiae,* denied. *John J. McAvoy* on the motion.

No. 987, Misc. AZZONE *v.* TAHASH, WARDEN;

No. 1332, Misc. GIFFEN *v.* CALIFORNIA; and

No. 1338, Misc. HODGE *v.* POWERS. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 846, Misc. PETERS *v.* NEW YORK. Appeal from Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted and probable jurisdiction noted. Case transferred to appellate docket and set for argument immediately following No. 1139. *Robert S. Friedman* on the motion. Reported below: 18 N. Y. 2d 238, 219 N. E. 2d 595.

Certiorari Granted. (See also No. 1260, Misc., *ante,* p. 482.)

No. 962. HARDIN, MAYOR OF TAZEWELL, ET AL. *v.* KENTUCKY UTILITIES CO.;

No. 1056. POWELL VALLEY ELECTRIC COOPERATIVE *v.* KENTUCKY UTILITIES CO.; and

No. 1063. TENNESSEE VALLEY AUTHORITY *v.* KENTUCKY UTILITIES CO. C. A. 6th Cir. Certiorari granted. Cases are consolidated and a total of two hours allotted for oral argument. *Philip P. Ardery* for petitioners in No. 962. *Clyde Y. Cridlin* for petitioner in No. 1056. *Solicitor General Marshall* and *Charles J. McCarthy* for petitioner in No. 1063. *Squire R. Ogden* for respondent in all three cases. Reported below: 375 F. 2d 403.

Certiorari Denied. (See also No. 1019, *ante,* p. 481; No. 1198, Misc., *ante,* p. 481; and No. 1246, Misc., *ante,* p. 482.)

No. 954. CBN CORP., FORMERLY COLUMBIAN CARBON CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Robert J. Casey* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Grant W. Wiprud* for the United States. Reported below: 176 Ct. Cl. 861, 364 F. 2d 393.

No. 957. WISSNER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* and *Rufus W. Peckham, Jr.,* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 176 Ct. Cl. 1372.

No. 1039. VAN NORMAN INDUSTRIES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *John F. Costelloe* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for the United States. Reported below: 176 Ct. Cl. 16, 361 F. 2d 992.

No. 1042. BUONOMO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 371 F. 2d 314.

No. 1057. CLIMAX CHEMICAL CO. *v.* C. F. BRAUN & CO. ET AL. C. A. 10th Cir. Certiorari denied. *Leroy Jeffers, C. Melvin Neal* and *Tom W. Neal* for petitioner. *J. R. Modrall* for respondent C. F. Braun & Co., *John B. Tittman* for respondents J. T. Thorpe, Inc., et al., and *David G. Housman* for respondent Heyward-Robinson Co. Reported below: 370 F. 2d 616.

No. 1043. OSTENDORFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Ernest J. Howard* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 371 F. 2d 729.

No. 1044. KRANTZ ET AL. *v.* OLIN. C. C. P. A. Certiorari denied. *W. Brown Morton, Jr.*, and *H. Hume Mathews* for petitioners. *Dexter N. Shaw* and *William M. Epes* for respondent. Reported below: 53 C. C. P. A. (Pat.) 1582, 356 F. 2d 1016.

No. 1045. SHEPPARD, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Stephen M. Feldman* and *Joseph G. Feldman* for petitioners. *Solicitor General Marshall* for the United States. Reported below: 369 F. 2d 272.

No. 1048. KEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *G. Edward Friar* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 371 F. 2d 421.

No. 1051. UNION CARBIDE CORP. *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 7th Cir. Certiorari denied. *Sidney Neuman* and *Robert L. Austin* for petitioner. *Frank F. Fowle* and *E. Manning Giles* for respondent. Reported below: 369 F. 2d 242.

No. 1066. PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *William A. Goichman, Edward Munce* and *Joseph C. Bruno* for petitioners. *Hugh B. Cox* and *Richard R. Bongartz* for respondent. Reported below: 369 F. 2d 276.

No. 1054. CHRISTOFALOS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Nathan T. Notkin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 1068. SEIFERTH ET AL. *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Louis P. Miller* for petitioners. *Ralph D. Walker* for respondent. Reported below: 368 F. 2d 153.

No. 1131. PETERS ET AL. *v.* BOUNOUGIAS. C. A. 7th Cir. Certiorari denied. *Sidney Z. Karasik* and *Charles Wolff* for petitioners. Reported below: 369 F. 2d 247.

No. 959. ALBERGO *v.* READING CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK would grant the petition for a writ of certiorari and reverse the judgment. MR. JUSTICE DOUGLAS would grant the petition for a writ of certiorari and reverse the judgment below on authority of *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500. *James E. Beasley* for petitioner. *John R. McConnell* and *William J. Taylor* for respondent. Reported below: 372 F. 2d 83.

No. 1024. DILLARD *v.* DILLARD. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George W. Mead* for petitioner. Reported below: 244 Ore. 597, 418 P. 2d 839.

No. 996, Misc. LEE ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. *Phillip A. Hubbart* for petitioners. *Earl Faircloth,* Attorney General of Florida, and *Stanley D. Kupiszewski, Jr.,* Assistant Attorney General, for respondent. Reported below: 188 So. 2d 872.

No. 1026. MOLINAS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Thomas R. Newman* for petitioner. Reported below: 370 F. 2d 601.

No. 1041. NEZ PERCE TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Donald C. Gormley* and *Charles A. Hobbs* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl* and *Roger P. Marquis* for the United States. Reported below: 176 Ct. Cl. 815.

No. 1058. HIRSHHORN *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Osmond K. Fraenkel* for petitioner. *Frank S. Hogan* for respondent.

No. 857, Misc. LUPINO *v.* TAHASH, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Douglas M. Head,* Attorney General of Minnesota, and *Gerard W. Snell,* Acting Solicitor General, for respondent.

No. 881, Misc. ALIRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 278.

No. 1051, Misc. NELSON ET AL. *v.* HANCOCK, WARDEN. C. A. 1st Cir. Certiorari denied. *Richard W. Leonard* and *Leo Patrick McGowan* for petitioners. *George S. Pappagianis,* Attorney General of New Hampshire, and *William J. O'Neil,* Deputy Attorney General, for respondent. Reported below: 363 F. 2d 249.

No. 960, Misc. COPELAND *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied. Petitioner *pro se.* *Arlen Specter* for respondent.

No. 1050, Misc. MONEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Petitioner *pro se.* *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 280 Ala. 716, 190 So. 2d 924.

No. 1068, Misc. BURKS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Petitioner *pro se.* *Robert Matthews,* Attorney General of Kentucky, and *John B. Browning,* Assistant Attorney General, for respondent. Reported below: 407 S. W. 2d 715.

No. 1167, Misc. POLISI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Harold Schwartz* for petitioners. *Solicitor General Marshall* for the United States.

No. 1190, Misc. WEST *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1239, Misc. VON ATZINGER *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 1243, Misc. KING *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1248, Misc. HAYNES *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1249, Misc. WILSON *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 368 F. 2d 843.

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No. 1252, Misc. HICKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *John R. Snively* for petitioner. Reported below: 35 Ill. 2d 390, 220 N. E. 2d 461.

No. 1255, Misc. GAERTNER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1258, Misc. MCCLINDON *v.* OLIVER ET AL. C. A. 9th Cir. Certiorari denied.

No. 1259, Misc. ORTEGA *v.* JOHNSON, JUDGE. Sup. Ct. Mich. Certiorari denied.

No. 1263, Misc. CHANDLER *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1269, Misc. MEHOLCHICK *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 371 F. 2d 1014.

No. 1270, Misc. RAMEY *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 1271, Misc. SIMON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1272, Misc. LEWIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1286, Misc. KANTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1290, Misc. KELLY, AKA SHANNON *v.* CHIEF OF POLICE, COFFEYVILLE POLICE DEPT. Sup. Ct. Kan. Certiorari denied.

No. 1273, Misc. SEYMOUR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 369 F. 2d 825.

No. 882, Misc. COMFORT *v.* CALIFORNIA. Municipal Ct. of Oakland-Piedmont, Cal., and/or App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Lloyd McMurray* for petitioner. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General, for respondent.

No. 901, Misc. MONTGOMERY *v.* MCKENDRICK, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert Welch Mullen* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, for respondent.

Rehearing Denied.

No. 95. CHAPMAN ET AL. *v.* CALIFORNIA, *ante*, p. 18;

No. 926. BETHLEHEM STEEL CO. ET AL. *v.* UNITED STATES, *ante*, p. 912;

No. 14, Misc. CAPUCHINO *v.* TEXAS, *ante*, p. 928;

No. 29, Misc. POHLABEL *v.* UNITED STATES, *ante*, p. 916;

No. 414, Misc. MILANI *v.* ILLINOIS, *ante*, p. 12;

No. 503, Misc. MACDONALD *v.* CALIFORNIA, *ante*, p. 127; and

No. 646, Misc. BOTSCH *v.* UNITED STATES, *ante*, p. 937. Petitions for rehearing denied.

No. 718, Misc. GAMEZ *v.* TEXAS, *ante*, p. 929;

No. 1074, Misc. SOOTS ET UX. *v.* ATTORNEY GENERAL OF THE UNITED STATES, *ante*, p. 905;

No. 1138, Misc. DUKES *v.* UNITED STATES, *ante*, p. 946; and

No. 1155, Misc. LEWIS, AKA EHRLICH *v.* ILLINOIS ET AL., *ante*, p. 938. Petitions for rehearing denied.

No. 103. COOPER *v.* CALIFORNIA, *ante*, p. 58. Petition for rehearing and modification of opinion denied.

APRIL 4, 1967.

Dismissal Under Rule 60.

No. 391, Misc. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Elmer B. Gower* for petitioner. Reported below: 360 F. 2d 488. [For earlier order herein, see 385 U. S. 806.]

APRIL 10, 1967.

Miscellaneous Orders.

No. 89. WALKER *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Motion to recall and amend the judgment of this Court granted. It is ordered that the certified copy of the judgment sent to the District Court be recalled and that the case be remanded to the United States Court of Appeals for the Fourth Circuit. *J. Nat Hamrick* on the motion. [For earlier actions herein, see 384 U. S. 926, 385 U. S. 196, 1020.]

No. 949. ESTATE OF STEINBERG *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. (Certiorari denied, *ante*, p. 941.) Motion to remand denied. *George T. Altman* on the motion.

No. 9. UNITED STATES *v.* SEALY, INC. Appeal from D. C. N. D. Ill. (Probable jurisdiction noted, 382 U. S. 806.) Motion of Serta Associates, Inc., et al., for leave to participate in oral argument, as *amici curiae,* denied. *Sigmund Timberg* on the motion.

No. 615. BERGER *v.* NEW YORK. Ct. App. N. Y. (Certiorari granted, 385 U. S. 967.) Motion of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America for leave to file a brief, as *amicus curiae,* granted. *Raymond W. Bergan* on the motion.

No. 9, Misc. REES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. This case is held without action on the petition for certiorari until further order of the Court.

No. 1356, Misc. FURTAK *v.* MANCUSI, WARDEN; and No. 1391, Misc. WOLL *v.* FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1396, Misc. METER *v.* NEBRASKA. Sup. Ct. Neb. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

No. 1329, Misc. SKOLNICK *v.* HOFFMAN, JUDGE; and No. 1383, Misc. WILCOX *v.* MEIER, WARDEN, ET AL. Motions for leave to file petitions for writs of mandamus and for other relief denied.

Certiorari Granted.

No. 1083. UNITED STATES *v.* RANDS ET UX. C. A. 9th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *A. Donald Mileur* for the United States. *Sidney Teiser* for respondents. Reported below: 367 F. 2d 186.

No. 1002. BRENNER, COMMISSIONER OF PATENTS *v.* HOFSTETTER. C. C. P. A. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Morton Hollander* for petitioner. *Paul N. Kokulis* and *Lawrence A. Hymo* for respondent. Reported below: 53 C. C. P. A. (Pat.) 1545, 362 F. 2d 293.

No. 1032. NASH *v.* FLORIDA INDUSTRIAL COMMISSION ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari granted. *Neal Rutledge* and *Allan Milledge* for petitioner. *Lawrence Kanzer* for Florida Industrial Commission, and *Glenn L. Greene, Jr.*, for Stanley Works et al., respondents.

No. 1036. NATIONAL LABOR RELATIONS BOARD *v.* FLEETWOOD TRAILER CO., INC. C. A. 9th Cir. Certiorari granted. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Jerome C. Byrne* for respondent. Reported below: 366 F. 2d 126.

Certiorari Denied. (See also No. 1295, Misc., *ante,* p. 546; and No. 1396, Misc., *supra.*)

No. 953. MILLER *v.* COUNTY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Harold W. Kennedy, Irvin Taplin, Jr.,* and *John D. Cahill* for respondent. Reported below: 364 F. 2d 500.

No. 1033. DANIEL *v.* SKIBS A/S HILDA KNUDSEN ET AL. C. A. 3d Cir. Certiorari denied. *Harry R. Kozart* for petitioner. *T. E. Byrne, Jr.,* for respondents. Reported below: 368 F. 2d 178.

No. 1055. DANNING, TRUSTEE IN BANKRUPTCY *v.* MINTZ. C. A. 9th Cir. Certiorari denied. *J. Ronald Trost* for petitioner. Reported below: 367 F. 2d 304.

No. 956. BENNETT, ACTING WARDEN *v.* LABAT ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion*, Attorney General of Louisiana, *William P. Schuler*, Second Assistant Attorney General, and *John E. Jackson, Jr.*, and *Dorothy D. Wolbrette*, Assistant Attorneys General, for petitioner. *Peter Hearn, William T. Coleman, Jr., Benjamin E. Smith, G. Wray Gill, Gerard H. Schreiber, Edward Bennett Williams, Melvin L. Wulf* and *Marvin M. Karpatkin* for respondents. Reported below: 365 F. 2d 698.

No. 1065. MYERSON, AKA MYERSOHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Philip J. Ryan* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 368 F. 2d 393.

No. 1071. FARMER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Raymond A. Brown* and *Irving I. Vogelman* for petitioner. *J. Norris Harding* for respondent. Reported below: 48 N. J. 145, 224 A. 2d 481.

No. 1072. BELTRAN ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Nathan T. Notkin* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 1073. COLBRESE *v.* NATIONAL FARMERS UNION PROPERTY & CASUALTY CO. C. A. 9th Cir. Certiorari denied. *Cale Crowley* for petitioner. *John M. Schiltz* for respondent. Reported below: 368 F. 2d 405.

No. 1077. MALLORY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Walter LaVon Pride* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States.

No. 1075. STICKLER *v.* TEHAN, SHERIFF. C. A. 6th Cir. Certiorari denied. *Bernard A. Berkman, Larry S. Gordon* and *Joshua J. Kancelbaum* for petitioner. *Melvin G. Rueger* and *Fred J. Cartolano* for respondent. Reported below: 365 F. 2d 199.

No. 1076. SINE ET UX. *v.* HELLAND, DIRECTOR OF HIGHWAYS, ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 18 Utah 2d 222, 418 P. 2d 979.

No. 1078. BORDEN CO. *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 3d Cir. Certiorari denied. *Earl E. Pollock* and *William P. Reiss* for petitioner. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Alan S. Rosenthal* for respondents Freeman et al., and *H. Edward Dunkelberger, Jr., Edward J. Grenier, Jr.,* and *Grover C. Richman, Jr.,* for Campbell Soup Co., intervenor below. Reported below: 369 F. 2d 404.

No. 1082. HINDES ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Reuben R. Lozano* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for the United States. Reported below: 371 F. 2d 650.

No. 1084. COLUMBIA BANK FOR COOPERATIVES *v.* LEE, TRUSTEE IN BANKRUPTCY. C. A. 4th Cir. Certiorari denied. *Edwin P. Gardner* for petitioner. *James M. Baley, Jr.,* for respondent. Reported below: 368 F. 2d 934.

No. 1086. JORDAN *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Carl Feldhamer* and *Walter L. Gerash* for petitioner. Reported below: —— Colo. ——, 419 P. 2d 656.

No. 1079. LEE ET AL. *v.* CITY OF JESUP. Sup. Ct. Ga. Certiorari denied. *Aaron Kravitch* for petitioners. Reported below: 222 Ga. 530, 150 S. E. 2d 836.

No. 1092. FRANKLIN ET AL. *v.* MCDANIEL. C. A. 7th Cir. Certiorari denied. Reported below: 371 F. 2d 544.

No. 1094. CUTLER ET AL. *v.* AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari denied. *Godfrey P. Schmidt* for petitioners. *Henry Kaiser* and *George Kaufmann* for respondents.

No. 1099. ROBINSON *v.* THE ATLANTIC STARLING ET AL. C. A. 5th Cir. Certiorari denied. *Samuel C. Gainsburgh* for petitioner. *Frank S. Normann* for respondents. Reported below: 369 F. 2d 69.

No. 1100. GOVERNMENT OF GUAM *v.* ATKINS-KROLL (GUAM), LTD. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin, Harold W. Burnett,* Attorney General of Guam, *Jack S. Levin, Harold C. Wilkenfeld, Frank J. Barry* and *Edward Weinberg* for petitioner. Reported below: 367 F. 2d 127.

No. 1121. ESDERTS, ADMINISTRATRIX *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. Sup. Ct. Ill. Certiorari denied. *James A. Dooley* for petitioner. *John M. O'Connor, Jr.,* and *Lawrence Gunnels* for respondent.

No. 3, Misc. DUNNING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Petitioner *pro se. Joe T. Patterson,* Attorney General of Mississippi, and *Delos H. Burks,* Assistant Attorney General, for respondent. Reported below: 251 Miss. 766, 171 So. 2d 315.

No. 790, Misc. WOODS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Charles Morgan, Jr.*, for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, *G. Ernest Tidwell*, Executive Assistant Attorney General, and *A. Joseph Nardone, Jr.*, Deputy Assistant Attorney General, for respondent. Reported below: 222 Ga. 321, 149 S. E. 2d 674.

No. 818, Misc. MERRILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *David R. Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 365 F. 2d 281.

No. 961, Misc. MATTHEWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas W. Hathaway* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 367 F. 2d 156.

No. 1031, Misc. O'DAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 1032, Misc. HEWITT *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Crawford C. Martin*, Attorney General of Texas, *George M. Cowden*, First Assistant Attorney General, *R. L. Lattimore* and *Gilbert J. Pena*, Assistant Attorneys General, and *A. J. Carubbi, Jr.*, for respondent.

No. 1035, Misc. WAKAKSAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 639.

No. 1070, Misc. CLIFTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Donald L. Hardison* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 125 U. S. App. D. C. 257, 371 F. 2d 354.

No. 1121, Misc. GENTILLE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Arthur J. England* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent. Reported below: 190 So. 2d 200.

No. 1145, Misc. BRIGHT *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, and *Paul J. Murphy,* Assistant Attorney General, for respondent.

No. 1209, Misc. PETITE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 1210, Misc. PITTMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 368 F. 2d 560.

No. 1217, Misc. FORREST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 363 F. 2d 348.

No. 538, Misc. PRITCHETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 1257, Misc. STEIN *v.* WIRTZ, SECRETARY OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent Wirtz. Reported below: 366 F. 2d 188.

No. 1075, Misc. CABALLERO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *John G. Thevos* for respondent.

No. 1223, Misc. ARNOLD *v.* MCGUINESS. C. A. 9th Cir. Certiorari denied.

No. 1228, Misc. BELVIN *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1240, Misc. FAIR *v.* DEKLE, SUPERVISOR OF VOTER REGISTRATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 2d 377.

No. 1250, Misc. BROKAW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 368 F. 2d 508.

No. 1251, Misc. LA BRASCA *v.* CALIFORNIA. Super. Ct. Cal., County of Sacramento. Certiorari denied. *S. Carter McMorris* for petitioner.

No. 1265, Misc. DAVIS *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied.

No. 1261, Misc. O'DAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1266, Misc. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *William M. Ryan* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 368 F. 2d 972.

No. 1275, Misc. BANKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 141.

No. 1280, Misc. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 369 F. 2d 401.

No. 1284, Misc. KELLER *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1287, Misc. STILTNER *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 1289, Misc. MERNEIGH *v.* DUTTON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1292, Misc. VAN GELDERN *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1291, Misc. LOUX *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *James E. Kennedy* for respondent. Reported below: 69 Wash. 2d 855, 420 P. 2d 693.

No. 1293, Misc. BEST *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. *Anthony F. Marra* for petitioner. Reported below: 365 F. 2d 832.

No. 1294, Misc. LYLE *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1297, Misc. DILLENBURG *v.* MAXWELL, REFORMATORY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1303, Misc. CASTILLO *v.* DIRECTOR OF THE DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1307, Misc. ERVING ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioners. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Melvin Kent Kammerlohr,* Assistant Attorney General, for respondent. Reported below: 180 Neb. 824, 830, 146 N. W. 2d 216, 220.

No. 1325, Misc. LEVINE ET AL. *v.* COLGATE-PALMOLIVE CO. ET AL. Sup. Ct. N. Y., New York County. Certiorari denied. Petitioners *pro se. Paul W. Williams* for respondents.

No. 1310, Misc. PRICE *v.* ALLGOOD, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 369 F. 2d 376.

No. 1306, Misc. CALLOWAY *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied.

No. 1076, Misc. BJORNSEN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner. Reported below: 364 F. 2d 489.

No. 1312, Misc. IN RE DISBARMENT OF RHODES. C. A. 8th Cir. Certiorari denied. Reported below: 370 F. 2d 411.

No. 1316, Misc. JUNG *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 32 Wis. 2d 541, 145 N. W. 2d 684.

No. 1321, Misc. WARRINER *v.* DOUG TOWER, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Ira C. Haycock* for respondents Jaensch et al.

No. 1330, Misc. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States.

No. 1331, Misc. FARMER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1593, Misc. MITCHELL *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Evander Cade Smith* and *Doris Brin Walker* for petitioner.

No. 1581, Misc. MITCHELL *v.* CALIFORNIA. Sup. Ct. Cal. Application for stay of execution presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied.

No. 235. KILGARLIN ET AL. *v.* HILL, SECRETARY OF STATE OF TEXAS, ET AL., *ante*, p. 120;

No. 791. WALLERSTEIN ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION, *ante*, p. 908; and

No. 933. CHINA UNION LINES, LTD. *v.* A. O. ANDERSEN & CO. ET AL., *ante*, p. 933. Petitions for rehearing denied.

No. 934. LAN JING-CHAU ET AL. *v.* A. O. ANDERSEN & CO. ET AL., *ante*, p. 933;

No. 945. HICKEY ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO., *ante*, p. 934;

No. 948. DUKE *v.* UNITED STATES, *ante*, p. 934;

No. 960. ALLEN, EXECUTRIX, ET AL. *v.* MATHIASEN'S TANKER INDUSTRIES, INC., ET AL., *ante*, p. 932;

No. 973. BRASCH *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, *ante*, p. 943;

No. 992. GINSBERG *v.* UNITED STATES, *ante*, p. 958;

No. 15, Misc. HILLERY *v.* CALIFORNIA, *ante*, p. 938;

No. 684, Misc. PHILLIPS ET VIR *v.* CALIFORNIA, *ante*, p. 212;

No. 1176, Misc. SANDOVAL *v.* CALIFORNIA, *ante*, p. 948;

No. 1180, Misc. NIELSEN *v.* NEBRASKA STATE BAR ASSOCIATION, *ante*, p. 266; and

No. 1231, Misc. GLASS *v.* UNITED STATES, *ante*, p. 968. Petitions for rehearing denied.

No. 868. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL., *ante*, p. 915. Motion for leave to file petition for rehearing denied.

APRIL 13, 1967.

Dismissal Under Rule 60.

No. 31. UNITED STATES *v.* NATIONAL STEEL CORP. ET AL. Appeal from D. C. S. D. Tex. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Marshall* for the United States. *Denman Moody, C. Brien Dillon* and *E. W. Barnett* for National Steel Corp. et al., and *B. J. Bradshaw* for Brown et al., appellees. Reported below: 251 F. Supp. 693. [For earlier orders herein, see 383 U. S. 905, *ante*, p. 939.]

APRIL 17, 1967.

Miscellaneous Orders.

No. ——. CADDO PARISH SCHOOL BOARD ET AL. *v.* UNITED STATES ET AL. Motion for stays of execution and enforcement of judgments of the United States District Courts for the Eastern and Western Districts of Louisiana entered pursuant to the mandates of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, *Albin P. Lassiter* and *John F. Ward, Jr.,* on the motion. *Solicitor General Marshall* and *Assistant Attorney General Doar* for the United States, and *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Charles H. Jones, Jr., Oscar Adams* and *Demetrius C. Newton* for Johnson et al., respondents, in opposition to the motion.

No. ——. ROBERTS *v.* WILSON, WARDEN. Super. Ct. Cal., City and County of S. F. Application for stay of execution of the death sentence imposed upon petitioner, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE FORTAS is of the opinion that the application for stay should be granted.

No. 30, Original. MICHIGAN *v.* OHIO. Motion for leave to file a bill of complaint granted and State of Ohio allowed sixty days to answer. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Nicholas V. Olds* and *Esther E. Newton,* Assistant Attorneys General, on the motion. *William B. Saxbe,* Attorney General of Ohio, and *Charles S. Lopeman* for defendant in opposition.

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No. 23. UNITED STATES ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. Appeal from D. C. S. D. Cal. Motion of Southern Governors' Conference et al., for leave to file a brief, as *amici curiae*, granted. *Walter R. McDonald* on the motion. [For earlier actions herein, see 383 U. S. 964, 384 U. S. 888.]

No. 1119. BANKS *v.* CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1439, Misc. SMITH *v.* WILSON, WARDEN. C. A. 9th Cir. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari denied.

No. 1313, Misc. BOLES *v.* BURNETT, CHIEF JUSTICE, SUPREME COURT OF TENNESSEE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. Petitioner *pro se*. *Clyde W. Key* for Bank of Knoxville, complainant below, in opposition to the motion.

No. 1359, Misc. SKOLNICK *v.* ROBSON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 1613, Misc. ALI, AKA CLAY, ET AL. *v.* GORDON, U. S. DISTRICT JUDGE. Application for stay and other relief, as well as petition for order staying the orders of the United States District Court for the Western District of Kentucky and for injunction pending appeal, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. Motion for leave to file petition for writ of mandamus denied. *Hayden C. Covington* on the motion.

No. 1352, Misc. JACKSON *v.* DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 668. FEDERAL TRADE COMMISSION *v.* FLOTILL PRODUCTS, INC., ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro* and *James McI. Henderson* for petitioner. *William Simon, John Bodner, Jr.,* and *Jefferson E. Peyser* for respondents. Reported below: 358 F. 2d 224.

No. 1070. BLOOM *v.* ILLINOIS. Sup. Ct. Ill. Certiorari granted. *Anthony Bradley Eben* for petitioner. *Edward J. Hladis* for respondent. Reported below: 35 Ill. 2d 255, 220 N. E. 2d 475.

No. 1141, Misc. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case transferred to appellate docket. *Paul H. Weinstein* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 125 U. S. App. D. C. 231, 370 F. 2d 477.

Certiorari Denied. (See also No. 1014, *ante,* p. 682; No. 1034, *ante,* p. 683; and No. 1439, Misc., *supra.*)

No. 1097. MOODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Lucius E. Burch, Jr.,* and *Tom Mitchell, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 371 F. 2d 688.

No. 982. COUNTY OF LOS ANGELES ET AL. *v.* MONTROSE CHEMICAL CORP. OF CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Harold W. Kennedy* and *John Geyer Tausig* for petitioners. *James J. Arditto* for respondent. *Thomas C. Lynch,* Attorney General of California, *John J. Klee, Jr.,* Deputy Attorney General, and *James E. Sabine* and *Ernest P. Goodman,* Assistant Attorneys General, for the State of California, as *amicus curiae,* in support of the petition. Reported below: 243 Cal. App. 2d 300, 52 Cal. Rptr. 209.

No. 1101. EVANSON ET AL. *v.* NORTHWEST HOLDING CO. C. A. 8th Cir. Certiorari denied. Reported below: 368 F. 2d 531.

No. 1107. RIZZO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Marshall* and *Assistant Attorney General Rogovin* for the United States.

No. 1108. CHAMBERSBURG BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. *Harry J. Daly* for petitioner. *Solicitor General Marshall* and *Henry Geller* for respondent. Reported below: 125 U. S. App. D. C. 346, 372 F. 2d 919.

No. 1111. KORN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Rufus W. Peckham, Jr.,* and *Carl L. Shipley* for petitioner. *Solicitor General Marshall* for the United States.

No. 1127. SOUTHERN BROKERAGE CO. *v.* CANNARSA. Sup. Ct. Tex. and/or Ct. Civ. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. *William F. Billings* for petitioner. *Spencer C. Relyea III* and *Frank M. Ryburn, Jr.,* for respondent. Reported below: 405 S. W. 2d 457.

No. 981. FELBER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Philip J. Ryan* for petitioner. *John G. Bonomi* for respondent.

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

Petitioner, a lawyer, was automatically disbarred in 1941 solely on the basis of a trial court's conviction for larceny and forgery. This conviction was held void and set aside by an appellate court which finally ended the criminal case. After dismissal of the criminal case, petitioner moved for reinstatement to the Bar. The matter was referred to a referee, who, relying on the same testimony which the appellate court held could not legally support petitioner's conviction, denied reinstatement. In so doing, the referee expressly noted that petitioner had the burden of proving that he was morally fit for readmission to the Bar, although the burden of proof would have been on the Bar in making an original charge against a lawyer. The Appellate Division accepted the referee's recommendation, and the Court of Appeals denied petitioner permission to appeal on the ground that the judgment lacked "finality." On three subsequent occasions petitioner again moved for reinstatement, but each time was turned down by the Appellate Division without an opinion and denied permission to appeal by the Court of Appeals on the ground of no "final judgment," although it has disbarred him for 25 years. On the last occasion petitioner presented the state courts with the constitutional issues which he now urges this Court to review and decide in his favor.

For over 25 years petitioner has been unable to pursue his vocation because of a void criminal conviction, a manifest distortion of justice. The question presented is whether the State, having disbarred petitioner auto-

matically on the basis of a conviction for crime subsequently voided, can perpetuate his disbarment on the basis of the identical evidence offered to convict him. There are at least two reasons why the State should not be allowed to do this. First, the moment petitioner's conviction was reversed, his continued disbarment was supported by absolutely no evidence. This was a clear deprivation of due process of law and made the disbarment at that time as void as the criminal conviction. *Konigsberg* v. *State Bar,* 353 U. S. 252; see *Thompson* v. *City of Louisville,* 362 U. S. 199. Second, it is no answer to suggest, as does respondent, that this denial of due process was somehow remedied when the referee, after a hearing, denied petitioner's motion for reinstatement. This shifted to petitioner the burden to prove his innocence, because in New York there is apparently a tremendous difference between defending a disbarment charge and prosecuting a motion for reinstatement to the Bar. Where the Bar prosecutes for disbarment, the burden of proof is on the Bar Association; but where, as here, the lawyer asks reinstatement, the burden of proof is on him. Moreover, when a lawyer is initially disbarred, he may appeal the Appellate Division's decision to the Court of Appeals; but when a lawyer's motion for reinstatement is denied, the Court of Appeals is without jurisdiction to hear an appeal because the denial is not a "final judgment." Thus, for 25 years (long enough one would think to be final) the Court of Appeals has refused to review the orders denying petitioner readmission to the Bar. There may be valid reasons for fastening greater procedural burdens on a disbarred lawyer seeking reinstatement than on a lawyer defending a disbarment action. But where the difference in status, as here, is solely attributable to a void conviction for crime, the difference in treatment is itself violative of equal protection and further aggravates the

initial deprivation of due process, a disbarment based on no evidence.

For these reasons I dissent from the denial of certiorari in this case.

No. 1113. BATA *v.* CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA ET AL. Sup. Ct. Pa. Certiorari denied. *Harold E. Stassen* and *A. Evans Kephart* for petitioner. *Robert MacCrate* and *Lewis H. Van Dusen, Jr.*, for respondent Bata. Reported below: 423 Pa. 373, 224 A. 2d 174.

No. 1125. TSAKONITES *v.* TRANSPACIFIC CARRIERS CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Isaac Salem* for petitioner. *John R. Sheneman* for respondents. *Arthur J. Mandell* for American Trial Lawyers Association, as *amicus curiae,* in support of the petition. Reported below: 368 F. 2d 426.

No. 1126. WASHINGTON *v.* GOLDEN STATE MUTUAL LIFE INSURANCE CO. Sup. Ct. Tex. Certiorari denied. *Robert W. Hainsworth* for petitioner. *Finis E. Cowan* for respondent. Reported below: 408 S. W. 2d 227.

No. 1145. SLIGH *v.* COLUMBIA, NEWBERRY & LAURENS RAILROAD CO. C. A. 4th Cir. Certiorari denied. *George M. Lee, Jr.*, for petitioner. *H. Simmons Tate, Jr.*, for respondent. Reported below: 370 F. 2d 979.

No. 1091. OGLETREE ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *James R. Willis* for petitioners. *John T. Corrigan* and *Lloyd O. Brown* for respondent.

The following petitions for writs of certiorari are denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted.

No. 123, Misc. NETTLES *v.* ILLINOIS. Sup. Ct. Ill. *Louis P. Yangas* for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 34 Ill. 2d 52, 213 N. E. 2d 536.

No. 158, Misc. SMITH *v.* UNITED STATES. C. A. D. C. Cir. *John W. Karr* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 123 U. S. App. D. C. 202, 358 F. 2d 833.

No. 245, Misc. WHITE *v.* NEW YORK. Ct. App. N. Y. *Gretchen White Oberman* for petitioner. *Frank S. Hogan* for respondent. Reported below: 16 N. Y. 2d 270, 213 N. E. 2d 438.

No. 275, Misc. SMITH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. *James R. Willis* for petitioner. *John T. Corrigan* and *John T. Patton* for respondent.

No. 279, Misc. CLIFTON *v.* TEXAS. Ct. Crim. App. Tex. *Robert B. Billings* for petitioner. *Henry Wade* and *Wilson Johnston* for respondent.

No. 741, Misc. ACOSTA *v.* TEXAS. Ct. Crim. App. Tex. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore, Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent. Reported below: 403 S. W. 2d 434, 438.

No. 829, Misc. FLUELLYN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Petitioner *pro se. Thomas J. Mackell* for respondent.

No. 1299, Misc. JONES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1162. MERLANDS CLUB, INC. *v.* MESSALL ET AL. Ct. App. Md. Certiorari denied. *William F. Hickey* for petitioner. Reported below: 244 Md. 18, 222 A. 2d 627.

No. 1176. LIGGETT & MYERS TOBACCO CO. *v.* PRITCHARD, ADMINISTRATRIX. C. A. 3d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Bethuel M. Webster, Donald J. Cohn, William H. Eckert, Frank L. Seamans* and *John H. Morgan* for petitioner. *James E. McLaughlin* for respondent. Reported below: 370 F. 2d 95.

No. 325, Misc. FREEMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam, Charles B. Evins* and *R. Eugene Pincham* for petitioner. Reported below: 34 Ill. 2d 362, 215 N. E. 2d 206.

No. 864, Misc. GAITO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Petitioner *pro se*. *Robert W. Duggan* for respondent.

No. 1004, Misc. JACQUEZ *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Gloria F. DeHart,* Deputy Attorney General, for respondent.

No. 1119, Misc. ROWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 368 F. 2d 957.

No. 1282, Misc. CHESTNUT ET AL. *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *Eleanor Jackson Piel* for petitioners. Reported below: 370 F. 2d 1.

No. 1105, Misc. DARMIENTO ET AL. *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Luke McKissack* for petitioners. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent. Reported below: 243 Cal. App. 2d 358, 52 Cal. Rptr. 428.

No. 1092, Misc. PEARSON *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 1163, Misc. BUCKLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States.

No. 1216, Misc. WILLIAMS *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States et al.

No. 1218, Misc. ROSADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 370 F. 2d 542.

No. 1244, Misc. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States. Reported below: 369 F. 2d 49.

No. 1302, Misc. TURNER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1314, Misc. HATTER *v.* SALE ET AL. Sup. Ct. La. and/or Ct. App. La., 2d Cir. Certiorari denied. *Johnnie A. Jones* for petitioner. Reported below: 249 La. 725, 190 So. 2d 237; 188 So. 2d 101, 104.

No. 1315, Misc. WILSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1318, Misc. LEBRUN *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Petitioner *pro se*. *Jacob B. Tanzer* for respondent. Reported below: 245 Ore. ——, 419 P. 2d 948.

No. 1323, Misc. ALLEN *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied.

No. 1324, Misc. OPPENHEIM ET AL. *v.* STERLING ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 368 F. 2d 516.

No. 1326, Misc. ZALECK *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1333, Misc. LYONS *v.* KLATTE, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1334, Misc. RUBY *v.* SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 365 F. 2d 385; 369 F. 2d 404.

No. 1336, Misc. KNOWLES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 280 Ala. 406, 194 So. 2d 562.

No. 1335, Misc. PARNESS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 368 F. 2d 327.

No. 1339, Misc. VIGIL *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1341, Misc. LYNN ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 408 S. W. 2d 639.

No. 1343, Misc. PUPPE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1349, Misc. MEIKLE *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1351, Misc. GONZALES *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1354, Misc. WRIGHT *v.* DICKSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1357, Misc. COLLINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1362, Misc. HONEA *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. *Emma Andre Monroe* for petitioner.

No. 1364, Misc. PONCE *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied. Reported below: 65 Cal. 2d 341, 420 P. 2d 224.

No. 1365, Misc. CORBIN *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied. *Gerald E. Ruth* for petitioner. Reported below: 423 Pa. 243, 223 A. 2d 738.

No. 1366, Misc. FURTAK *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1368, Misc. MCCRARY *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 249 S. C. 14, 152 S. E. 2d 235.

No. 1369, Misc. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1372, Misc. TKACZYK ET AL. *v.* GALLAGHER ET AL. C. A. 2d Cir. Certiorari denied. *Loring J. Whiteside* for petitioners.

No. 1373, Misc. EIDENMUELLER *v.* FOLLETTE, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1374, Misc. PRIDGEN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1408, Misc. CAREY *v.* GEORGE WASHINGTON UNIVERSITY. C. A. D. C. Cir. Certiorari denied.

No. 1419, Misc. JOHNSON *v.* TEXAS. C. A. 2d Cir. Certiorari denied.

No. 1247, Misc. EVERETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1378, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 1379, Misc. SCHRUDER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1417, Misc. TORRES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan* for respondent.

No. 1430, Misc. ASHBY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 167, Misc. COFFEY *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Alfred I. Rosner* and *Martin B. Rosner* for petitioner. Reported below: 356 F. 2d 460.

Rehearing Denied.

No. 571. VON CLEMM ET AL. *v.* SMITH, TREASURER OF THE UNITED STATES, ET AL., 385 U. S. 975;

No. 942. ALTERMAN TRANSPORT LINES, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF TENNESSEE ET AL., *ante*, p. 262;

No. 1004. ARDEN FARMS CO. ET AL. *v.* STATE DEPARTMENT OF AGRICULTURE ET AL., *ante*, p. 350; and

No. 1198, Misc. SHANNON *v.* SEQUEECHI, SHERIFF, ET AL., *ante*, p. 481. Petitions for rehearing denied.

APRIL 24, 1967.

Dismissal Under Rule 60.

No. 1340, Misc. MYRICKS *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 370 F. 2d 901.

Miscellaneous Orders.

No. 370, Misc., October Term, 1964. WILLIAMSON ET AL. *v.* GILMER ET AL.; and

No. 598, Misc., October Term, 1964. WILLIAMSON ET AL. *v.* GILMER ET AL. Motion to recall orders of this Court and other relief denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. [For earlier orders herein, see 379 U. S. 875, 955.]

No. 744. WALDRON, EXECUTRIX *v.* CITIES SERVICE CO. C. A. 2d Cir. (Certiorari granted, 385 U. S. 1024.) Motion of respondent to require certification of additional parts of record granted. The expense of printing such additional parts of record shall initially be paid by respondent and ultimately shall abide the judgment of the Court at the conclusion of this case. *Simon Rifkind, Edward N. Costikyan* and *Jay Greenfield* on the motion.

No. 1041. NEZ PERCE TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. Motion of petitioner for clarification of order denying petition for writ of certiorari denied. *Donald C. Gormley* and *Charles A. Hobbs* on the motion. [For earlier order, see *ante,* p. 984.]

No. 1375, Misc. BRULOTTE ET AL. *v.* MERRILL ET AL., U. S. CIRCUIT JUDGES, ET AL. C. A. 9th Cir. Motion for leave to file petition for writ of mandamus denied. *Arlington C. White, Margaret E. White* and *Cutler W. Halverson* for petitioners.

No. 9, Original. UNITED STATES *v.* LOUISIANA ET AL. Motion of the United States for preliminary injunction against the State of Texas denied on representation of the Attorney General of Texas that "Texas does not intend to lease any of the controverted area pending determination of this controversy." Case will be set in due course for oral argument on the issues raised in the application of the United States for entry of a supplemental decree and reply of Texas thereto. Plaintiff is given until July 25, 1967, for filing its brief and the defendant is given until September 25, 1967, to file its reply. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. [For earlier actions herein, see, *e. g., ante,* p. 979.]

Certiorari Denied. (See also No. 1098, *ante,* p. 713; and No. 1118, *ante,* p. 713.)

No. 804. MOFFATT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Gerald G. Kelly* and *J. Patrick Whaley* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent. Reported below: 363 F. 2d 262.

No. 910. SOUTH TEXAS RICE WAREHOUSE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Homer L. Bruce* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Pugh* and *Harry Baum* for respondent. Reported below: 366 F. 2d 890.

No. 1050. HENDERSON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States. Reported below: 175 Ct. Cl. 690.

No. 1037. TAI MUI *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 371 F. 2d 772.

No. 1038. CHAN HING ET AL. *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 371 F. 2d 772.

No. 1052. RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *S. G. Lippman* and *Tim L. Bornstein* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 125 U. S. App. D. C. 63, 366 F. 2d 642.

No. 1090. WOO CHENG HWA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 371 F. 2d 772.

No. 1110. WWIZ, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. *Carl L. Shipley* for petitioner. *Solicitor General Marshall* and *Henry Geller* for respondent.

No. 1129. JANOUSEK *v.* CHATTERTON ET AL. C. A. D. C. Cir. Certiorari denied.

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No. 1005. REEF CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Homer L. Bruce* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Pugh* and *Harry Baum* for respondent. Reported below: 368 F. 2d 125.

No. 1138. BANK OF UTAH ET AL. *v.* COMMERCIAL SECURITY BANK. C. A. 10th Cir. Certiorari denied. *David S. Kunz* for petitioners. *Moses Lasky* and *Neil R. Olmstead* for respondent. Reported below: 369 F. 2d 19.

No. 1140. NATIONAL SURETY CORP. *v.* RAUSCHER, PIERCE & CO., INC. C. A. 5th Cir. Certiorari denied. *Lloyd E. Elliott* and *Ralph D. Churchill* for petitioner. *Paul Carrington* for respondent. Reported below: 369 F. 2d 572.

No. 1141. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 10th Cir. Certiorari denied. *Martin M. Lucente, George L. Saunders, Jr., Ernest Porter* and *Kenneth D. Barrows* for petitioner. *Edward J. Hickey, Jr.,* and *James L. Highsaw, Jr.,* for respondents. Reported below: 370 F. 2d 833.

No. 1203. UNITED STATES *v.* PRUDENTIAL INSURANCE CO. OF AMERICA. Ct. Cl. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin, Harold C. Wilkenfeld* and *Martin T. Goldblum* for the United States. *Francis A. Goodhue, Jr.,* for respondent. Reported below: 167 Ct. Cl. 598, 337 F. 2d 651.

No. 1300. ALI, AKA CLAY, ET AL. *v.* GORDON, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *Hayden C. Covington* for petitioners.

No. 750. GRANELLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Irving Anolik, Irwin Klein* and *Irwin Germaise* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 365 F. 2d 990.

MR. JUSTICE DOUGLAS, dissenting.

There are two issues in this case, relating to entirely separate events. The first concerns the seizure by the police of a lawyer's documents in Pennsylvania from the premises where the lawyer stored them. If we assume that the premises were unlawfully raided by the police, a client's papers seized and used against the client in a criminal prosecution, does the client have standing to move to suppress the evidence? Whether petitioners were clients and Birrell their attorney are questions not fully resolved. But I think they are entitled to a hearing on the issue and on the legality of the search. I cannot, as of now, believe that if a lawyer-client relation is shown and if the search were held to be illegal, the client is without standing to move for suppression of the evidence. The dimensions of the problem are so great, in the setting of the Fourth Amendment and our enveloping regime of police surveillance, that we should put the case down for argument. Another issue, mentioned by my Brother FORTAS, relates to electronic surveillance conducted in Florida. On that, we should at least remand the case for findings on electronic surveillance as suggested by my Brother FORTAS in whose opinion I concur—without prejudice of course to the search and seizure question.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, dissenting.

It is my opinion that certiorari should be granted and the case remanded for a hearing in the District Court with

respect to the electronic surveillance which the Solicitor General has revealed to us. According to the Solicitor General, agents of the Federal Bureau of Investigation on or about May 11, 1962, surreptitiously and by trespass installed an electronic listening device in a "commercial establishment in Florida owned by an acquaintance of petitioner Levine and in which Levine may have had a proprietary interest." The device was in operation for nearly one year. During that time a number of conversations in which Levine participated were overheard. Some of those conversations were between Levine and attorneys representing him in prosecutions for interstate transport of counterfeit securities and for stock and mail fraud, matters then pending in a federal court in Florida.

The Solicitor General represents that this violation of petitioner Levine's constitutional rights had no connection with the present case, which involves a prosecution in New York for failure to file income tax returns for 1956 and 1957. He says that it originated in connection with an FBI investigation relating to the charges for which petitioner Levine was tried and convicted in Florida. See *Rogers* v. *United States,* 334 F. 2d 83 (C. A. 5th Cir.), cert. denied, *sub nom. Levine* v. *United States,* 380 U. S. 915; *Gradsky* v. *United States,* 342 F. 2d 147 (C. A. 5th Cir.), vacated and remanded *sub nom. Levine* v. *United States,* 383 U. S. 265. The Government represents that nothing was overheard which had anything to do with the present criminal tax case, and that neither the Internal Revenue Service nor prosecuting counsel was apprised of the existence of the surveillance. The Solicitor General says that petitioner Levine will be furnished with the logs so that he may take whatever action is appropriate in the District Court in Florida relating to the convictions obtained in that court.

It is entirely possible, perhaps even probable, that the Solicitor General's representations will be validated, and

it may be that no reason will be developed for invalidating the present convictions because of the trespassory espionage or its fruits. But this is "dirty business." *Olmstead* v. *United States,* 277 U. S. 438, 470 (1928) (dissenting opinion of Mr. Justice Holmes). It is important enough for the Solicitor General to call to our attention. And an appraisal of the material and the circumstances by defense counsel may adduce facts affecting the weight to be given the unlawful operation which would never occur to the prosecutor. The prosecutorial eye is, after all, apt to yield an out-of-focus picture, as is the eye of the defense. But in our system we insist upon the perspective developed by both. See *Dennis* v. *United States,* 384 U. S. 855, 875 (1966). In any event, the facts, circumstances, yield, and fruits of the electronic surveillance should be exposed in the record of this case so that we may, at least, be sure that the Government's trespassory surveillance has not infected the trial of these petitioners. Cf. *O'Brien* v. *United States, ante,* p. 345; *Schipani* v. *United States,* 385 U. S. 372 (1966); *Black* v. *United States,* 385 U. S. 26 (1966).

No. 1144. UNITED STATES *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin, Harold C. Wilkenfeld* and *Martin T. Goldblum* for the United States. *Daniel M. Gribbon* for respondent. Reported below: 177 Ct. Cl. 55, 366 F. 2d 967.

No. 528. BAUERS *v.* HEISEL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert W. Maris, Anthony G. Amsterdam* and *Melvin Wulf* for petitioner. *Thomas J. Beetel* for respondent. Reported below: 361 F. 2d 581.

No. 911. DAVANT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Motion for leave to file supplement to petition granted. Certiorari denied. *Homer L. Bruce* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Pugh* and *Harry Baum* for respondent. Reported below: 366 F. 2d 874.

No. 1128. WARDEN, MARYLAND PENITENTIARY *v.* SMALLWOOD. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion to strike appendix "C" to petition denied. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, and *Fred Oken,* Assistant Attorney General, for petitioner. Reported below: 367 F. 2d 945.

No. 136, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondents. Reported below: 358 F. 2d 307.

No. 1288, Misc. MCCLELLAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se. Harry Friberg* for respondent.

No. 1304, Misc. MCKINNEY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1027, Misc. BASHLOR *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent. Reported below: 189 So. 2d 800.

No. 830, Misc. FOSTER, AKA ASHLEY *v.* WASHINGTON. Super. Ct. Wash., King County. Certiorari denied. Petitioner *pro se.* *John J. O'Connell,* Attorney General of Washington, and *Paul J. Murphy,* Assistant Attorney General, for respondent.

No. 1109, Misc. WELLS *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent.

No. 1139, Misc. BRYAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore, Howard M. Fender, Robert E. Owen* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent. Reported below: 406 S. W. 2d 210.

No. 1220, Misc. ALLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Kenneth K. Simon* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 369 F. 2d 968.

No. 1242, Misc. ZURITA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Max Cohen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 369 F. 2d 474.

No. 1393, Misc. KROHN *v.* CHASE MANHATTAN BANK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se.* *Roy C. Haberkern, Jr.,* for respondent.

No. 1274, Misc. DULING *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Robert E. Albright* for petitioner.

No. 1358, Misc. READO *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 408 S. W. 2d 438.

No. 1376, Misc. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 370 F. 2d 310.

No. 1377, Misc. HOBBS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 35 Ill. 2d 263, 220 N. E. 2d 469.

No. 1381, Misc. TUCKER *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Milton B. Allen* for petitioner. Reported below: 244 Md. 488, 224 A. 2d 111.

No. 1384, Misc. BARRY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1387, Misc. WATKINS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1388, Misc. ROSE *v.* GLADDEN, WARDEN. Sup. Ct. Ore. Certiorari denied. Reported below: 245 Ore. ——, 420 P. 2d 622.

No. 1398, Misc. HUFFMAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 181 Neb. 356, 148 N. W. 2d 321.

No. 1394, Misc. DURRETT ET AL. *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *William C. Erbecker* for petitioners. Reported below: —— Ind. ——, 219 N. E. 2d 814.

No. 1400, Misc. SARTAIN *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 368 F. 2d 806.

No. 1397, Misc. BAKER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1392, Misc. SIMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 374 F. 2d 993.

No. 1395, Misc. LINDSEY *v.* UNITED STATES. .C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 368 F. 2d 633.

No. 1402, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1404, Misc. COLLINS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1405, Misc. THOMAS *v.* WILSON, WARDEN. Dist. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 243 Cal. App. 2d 681, 52 Cal. Rptr. 668.

No. 1406, Misc. DECLARA *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1410, Misc. FOGGY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 101 Ariz. 459, 420 P. 2d 934.

No. 1409, Misc. ANDERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 367 F. 2d 553.

No. 1414, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1407, Misc. ROBERTS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1412, Misc. HIGGERSON *v.* UNITED STATES ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 369 F. 2d 398.

No. 1413, Misc. MENEFIELD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: See 355 F. 2d 662.

No. 1415, Misc. ROLLINS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Harry P. Friedlander* for petitioner. Reported below: 207 Va. 575, 151 S. E. 2d 622.

No. 1424, Misc. PHILLIPS *v.* CARROLL. C. A. 7th Cir. Certiorari denied.

No. 1428, Misc. SMITH *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 588, Misc. DENNIS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Michael F. Dillon* for respondent.

No. 793, Misc. PONCE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, *David N. Rakov,* Deputy Attorney General, and *William E. James,* Assistant Attorney General, for respondent.

No. 1450, Misc. CARRIER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. Alva Brumfield* and *Sylvia Roberts* for petitioners. *Solicitor General Marshall* for the United States. Reported below: 369 F. 2d 322.

No. 1445, Misc. SCHACK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 862, Misc. CHEVALLIER *v.* TEXAS. Crim. Dist. Ct. No. 4, Harris County, Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William E. Gray* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore, Howard M. Fender* and *Gilbert J. Pena,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent.

Rehearing Denied.

No. 12. NEELY *v.* MARTIN K. EBY CONSTRUCTION CO., INC., *ante,* p. 317;

No. 937. BROWN ET AL. *v.* STERLING ALUMINUM PRODUCTS CORP., *ante,* p. 957;

No. 946. WOODY ET AL. *v.* STERLING ALUMINUM PRODUCTS, INC., ET AL., *ante,* p. 957;

No. 987. PORTER ET AL. *v.* PORTER, *ante,* p. 957;

No. 1007. LOCKLIN ET AL., DBA RADIANT COLOR CO. *v.* SWITZER BROTHERS, INC., *ante,* p. 963;

No. 1031. SPIGNER *v.* UNITED STATES, *ante,* p. 971;

No. 8, Misc. LOTT *v.* TEXAS, *ante,* p. 928;

No. 1225, Misc. DANIELS *v.* UNITED STATES, *ante,* p. 968;

No. 1290, Misc. KELLY, AKA SHANNON *v.* CHIEF OF POLICE, COFFEYVILLE POLICE DEPT., *ante,* p. 986;

No. 1613, Misc. ALI, AKA CLAY, ET AL. *v.* GORDON, U. S. DISTRICT JUDGE, *ante,* p. 1002. Petitions for rehearing denied.

No. 1009. WESTERN NATURAL GAS CO. *v.* CITIES SERVICE GAS CO., *ante*, p. 964. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

APRIL 25, 1967.

Dismissal Under Rule 60.

No. 1570, Misc. HAMPSON *v.* ROBB, CLERK, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of habeas corpus dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 8, 1967.

Miscellaneous Orders.

No. 1490, Misc. BENNETT *v.* PATE, WARDEN;

No. 1571, Misc. KIRK *v.* DUNBAR, CORRECTIONS DIRECTOR;

No. 1574, Misc. JOHNSON *v.* SCHNECKLOTH, SUPERINTENDENT, ET AL.; and

No. 1578, Misc. BALLARD *v.* DUTTON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1534, Misc. MANSFIELD *v.* WILLINGHAM, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

No. 1500, Misc. CARTER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL.; and

No. 1506, Misc. WHITE *v.* CRIST, STATE HOSPITAL SUPERINTENDENT, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 30, Original. MICHIGAN *v.* OHIO.

IT IS ORDERED that the Honorable Albert B. Maris, Senior Judge of the United States Court of Appeals for the Third Circuit, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier action herein, see *ante,* p. 1001.]

No. 1156. POAFPYBITTY ET AL. *v.* SKELLY OIL CO. Sup. Ct. Okla. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1469, Misc. BIVENS *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. Motion for leave to file petition for writ of prohibition denied. Petitioner *pro se.* *Solicitor General Marshall* for respondent.

No. 1588, Misc. CATLINO *v.* TAFT ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted.

No. 730. ZSCHERNIG ET AL. *v.* MILLER, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Ore. Probable jurisdiction noted. *Peter A. Schwabe, Sr.,* for appellants. *Robert Y. Thornton,* Attorney General of Oregon, and *Wayne M. Thompson,* Assistant Attorney General, for appellee State Land Board of Oregon. *Solicitor General Marshall* filed a memorandum for the United States, by invitation of the Court, 385 U. S. 998. Reported below: 243 Ore. 567, 412 P. 2d 781, 415 P. 2d 15.

Certiorari Granted.

No. 1185. SIMON ET AL. *v.* WHARTON, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari granted. *Marvin Schwartz* for petitioners. *Arthur Hill Christy* for respondent. Reported below: 373 F. 2d 649.

Certiorari Denied. (See also No. 1103, *ante,* p. 779; No. 1114, *ante,* p. 779; No. 1459, Misc., *ante,* p. 780; and No. 1534, Misc., *supra.*)

No. 850. BURBRIDGE ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aubrey Grossman* for petitioners.

No. 1047. BRUCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Homer L. Bruce,* petitioner, *pro se. Solicitor General Marshall, Assistant Attorney General Rogovin, Grant W. Wiprud* and *Thomas L. Stapleton* for the United States. Reported below: 370 F. 2d 569.

No. 1059. SOUTHERN PACIFIC LAND CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Walter H. Stammer* and *Roy Jerome* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl* and *Roger P. Marquis* for the United States. Reported below: 367 F. 2d 161.

No. 875. BURBRIDGE ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of S. F. and/or Sup. Ct. Cal. Certiorari denied. *Seymour Farber* for petitioners. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci,* Deputy Attorney General, for respondent.

No. 1061. MCADOO ET AL. *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Stanley Faulkner* for petitioners McAdoo et al. *Frank S. Hogan* for respondent. Reported below: 51 Misc. 2d 263, 272 N. Y. S. 2d 412.

No. 1064. STOCKTON PORT DISTRICT *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. *J. Richard Townsend* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Irwin A. Seibel* and *Robert N. Katz* for respondent Federal Maritime Commission et al.; *Edward D. Ransom* for respondent Pacific Westbound Conference; and *Thomas C. Lynch,* Attorney General, and *Miriam E. Wolff,* Deputy Attorney General, for respondent State of California. Reported below: 369 F. 2d 380.

No. 1074. SOUTHERN RAILWAY CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. Graham Claytor, Jr., Henry P. Sailer* and *Charles J. Bloch* for petitioner. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Kathryn H. Baldwin* for the United States. Reported below: 364 F. 2d 86.

No. 1149. HUSSEY *v.* PETITO ET AL. Ct. App. N. Y. Certiorari denied. *Stephen L. Hoffman* for petitioner.

No. 1085. RICH *v.* ATLANTIC COAST LINE RAILROAD Co. Sup. Ct. Fla. Certiorari denied. *Lawrence V. Hastings* and *Irma Robbins Feder* for petitioner. *Reginald L. Williams* and *Frank G. Kurka* for respondent. Reported below: 192 So. 2d 2.

No. 1137. EARL LATSHA LUMBER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Louis J. Adler* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 368 F. 2d 216.

No. 1142. SMITH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Lawrence Egerton, Jr.,* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, and *Andrew A. Vanore, Jr.,* for respondent. Reported below: 268 N. C. 659, 151 S. E. 2d 596.

No. 1146. COASTAL CLUB, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Gerald D. Morgan* and *Lee I. Park* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent. Reported below: 368 F. 2d 231.

No. 1147. HALPIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 493.

No. 1148. HULBURT OIL & GREASE CO. (AN ILLINOIS CORP.) *v.* HULBURT OIL & GREASE CO. (A PENNSYLVANIA CORP.). C. A. 7th Cir. Certiorari denied. *J. Willison Smith, Jr.,* for petitioner. *Norman A. Miller* for respondent. Reported below: 371 F. 2d 251.

No. 1163. ROBBINS, WARDEN *v.* SMALL. C. A. 1st Cir. Certiorari denied. *James S. Erwin,* Attorney General of Maine, and *John W. Benoit, Jr.,* Assistant Attorney General, for petitioner. Reported below: 371 F. 2d 793.

No. 1165. CALHOUN *v.* HERTWIG, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 363 F. 2d 257.

No. 1166. JORDAN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Howard K. Berry, Jr.,* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 370 F. 2d 126.

No. 1170. LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL–CIO) *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for National Labor Relations Board, and *John F. Lane, Jerome Powell, Robert M. Scott* and *Charles L. Bucy* for Pocahontas Steamship Co., respondents. Reported below: 368 F. 2d 107.

No. 1171. NOLLA, GALIB & CO. *v.* LEBRON ET AL. Sup. Ct. P. R. Certiorari denied. *Jorge Souss* for petitioner. Reported below: —— P. R. R. ——.

No. 1177. GRAY ET AL. *v.* MORGAN, COMMISSIONER OF TAXATION OF WISCONSIN. C. A. 7th Cir. Certiorari denied. *Adeline J. Geo-Karis* for petitioners. *Bronson C. La Follette,* Attorney General of Wisconsin, for respondent. Reported below: 371 F. 2d 172.

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No. 1179. BURRUP ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *William Hurt Erickson* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 371 F. 2d 556.

No. 1181. MAYTAG ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Stephen H. Hart* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 370 F. 2d 914.

No. 1183. URBANO *v.* SONDERN, EXECUTRIX, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Thomas F. Daly* for Sondern, and *Thomas A. Diskin* for Fawcett Publications, Inc., respondents. Reported below: 370 F. 2d 13, 14.

No. 1188. SHADID ET AL. *v.* CITY OF OKLAHOMA CITY. Sup. Ct. Okla. Certiorari denied. *Charles Hill Johns* for petitioners. *Roy H. Semtner* for respondent.

No. 1189. LUROS ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Stanley Fleishman* for petitioners.

No. 1191. NOVARRO *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. *John N. Frolich* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent. Reported below: 368 F. 2d 803.

No. 1221. DISTRICT OF COLUMBIA *v.* DAVIS. C. A. D. C. Cir. Certiorari denied. *Charles T. Duncan* and *Henry E. Wixon* for petitioner. Reported below: 125 U. S. App. D. C. 311, 371 F. 2d 964.

No. 1193. WISCONSIN EX REL. RIZZO *v.* COUNTY COURT OF KENOSHA COUNTY. Sup. Ct. Wis. Certiorari denied. *Dominic H. Frinzi* for petitioner. *Bronson C. La Follette,* Attorney General of Wisconsin, for respondent. Reported below: 32 Wis. 2d 642, 146 N. W. 2d 499.

No. 1195. CARLISLE & JACQUELIN ET AL. *v.* EISEN. C. A. 2d Cir. Certiorari denied. *Louis Lee Stanton, Jr., Francis S. Bensel* and *William Eldred Jackson* for petitioners. *William E. Haudek* and *Robert Zicklin* for respondent. Reported below: 370 F. 2d 119.

No. 1223. WELLS *v.* CIVIL SERVICE COMMISSION OF PHILADELPHIA ET AL. Sup. Ct. Pa. Certiorari denied. *Seymour Kanter* for petitioner. Reported below: 423 Pa. 602, 225 A. 2d 554.

No. 1246. THARAUD ET UX. *v.* CHAUNCEY REAL ESTATE CO., LTD., ET AL. Ct. App. N. Y. Certiorari denied. *Clayton L. Burwell* for petitioners. *Robert Moers* for respondents.

No. 1258. POWELL *v.* COMMITTEE ON ADMISSIONS AND GRIEVANCES ET AL. C. A. D. C. Cir. Certiorari denied. *Diana Kearny Powell,* petitioner, *pro se. Edmund L. Jones, Francis W. Hill, Jr.,* and *Roger Robb* for respondents.

No. 1284. FORCELLA *v.* WARDEN, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. *Lee A. Holley* and *Frank A. Paglianite* for petitioner. Reported below: 371 F. 2d 37.

No. 30, Misc. CRAGAN *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. C. A. 1st Cir. Certiorari denied. *Bernard Kaplan* for petitioner. *Noel W. Deering* for respondents. Reported below: 352 F. 2d 463.

No. 30. PINKOWSKI *v.* COGLAY, DBA MOHAWK EQUIPMENT CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *John G. Phillips* for petitioner. *Herbert C. Brook* for respondent. Reported below: 347 F. 2d 411.

No. 500. FENIX & SCISSON, INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Harry P. Thomson, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for the United States. Reported below: 360 F. 2d 260.

No. 211. BROWN *v.* GENERAL MOTORS CORP. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Wm. Clarence Kluttz* and *Lewis P. Hamlin, Jr.,* for petitioner. *Bynum M. Hunter* for respondent. Reported below: 355 F. 2d 814.

No. 262. KUBERSKI *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted and the judgment reversed. *Fenton F. Harrison* for petitioner. *Gerald H. Henley* for respondent. Reported below: 359 F. 2d 90.

No. 360. MITSUBISHI SHIPPING CO. *v.* MILLS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed. *Leroy Denman Moody* for petitioner. *Warner F. Brock* for respondent. Reported below: 358 F. 2d 609.

No. 915. MUNCY ET VIR *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Franklin Jones* for petitioners. *Leon Jaworski* and *Sam H. Hood* for respondent. Reported below: 367 F. 2d 493.

No. 1143. MADISON *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing petition granted. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 174 Ct. Cl. 985.

No. 1178. MUTH, ADMINISTRATRIX, ET AL. *v.* ATLASS ET AL. C. A. 7th Cir. Motion of respondents to use record in Nos. 709 and 733, October Term, 1965, granted. Certiorari denied. *G. Kent Yowell, Harold A. Liebenson* and *Edward G. Raszus* for petitioners. *Edward B. Hayes* for respondents. Reported below: 375 F. 2d 122.

No. 1081, Misc. AH CHIU PANG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Gerald I. Roth* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 368 F. 2d 637.

No. 1345, Misc. ENGLISH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se*. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 411 S. W. 2d 702.

No. 1380, Misc. PETERSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1382, Misc. BODDIE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 1385, Misc. WILLIAMS *v.* UNITED STATES; and

No. 1390, Misc. GITLITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se* in No. 1385, Misc., and *Leon B. Polsky* for petitioner in No. 1390, Misc. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 368 F. 2d 501.

No. 1422, Misc. MOORE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 407 S. W. 2d 136.

No. 1423, Misc. WILLIAMS ET AL. *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 1425, Misc. MACON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 221 N. E. 2d 428.

No. 1426, Misc. FOSTER *v.* UNITED STATES CIVIL SERVICE COMMISSIONERS ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents. Reported below: 369 F. 2d 399.

No. 1433, Misc. CABRAL *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1435, Misc. WILSON *v.* WEBER, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied.

No. 1436, Misc. HANSEN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 33 Wis. 2d 648, 148 N. W. 2d 4.

No. 1449, Misc. THOMASTON *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 369 F. 2d 693.

No. 1440, Misc. RANDALL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1441, Misc. WHITE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Aaron Kravitch* for petitioner.

No. 1443, Misc. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 874.

No. 1444, Misc. COOK *v.* MAXWELL, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 1446, Misc. NANCE *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. *Thomas F. McKenna* for petitioner. *Boston E. Witt,* Attorney General of New Mexico, and *Myles E. Flint,* Assistant Attorney General, for respondent. Reported below: 77 N. M. 39, 419 P. 2d 242.

No. 1447, Misc. NELSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Petitioner *pro se*. *Joe Purcell,* Attorney General of Arkansas, for respondent. Reported below: 241 Ark. 136, 406 S. W. 2d 383.

No. 1453, Misc. MADDOX *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 1454, Misc. FURTAK *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1455, Misc. HAYES *v.* BOSLOW, INSTITUTION DIRECTOR. C. A. 4th Cir. Certiorari denied.

No. 1461, Misc. SHAW *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1462, Misc. COUTURE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1472, Misc. MERRILL *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 423 P. 2d 686.

No. 1475, Misc. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 371 F. 2d 35.

No. 1480, Misc. WEBSTER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1481, Misc. DAVIS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 368 F. 2d 999.

No. 1482, Misc. MYERS *v.* CITY COURT OF SALT LAKE CITY. Sup. Ct. Utah. Certiorari denied.

No. 1484, Misc. SYMONS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 372 F. 2d 47.

No. 1488, Misc. LORENZANA *v.* PUERTO RICO. Sup. Ct. P. R. Certiorari denied. *Stanley L. Feldstein* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, for respondent. Reported below: —— P. R. R. ——.

No. 1483, Misc. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1491, Misc. LAUGHLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 368 F. 2d 558.

No. 1492. MOORE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1493, Misc. PINKNEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1494, Misc. HENDRICKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1510, Misc. HOLLAND *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1512, Misc. POSTELL *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1558, Misc. WOOD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Henry Mark Holzer* and *Phyllis Tate Holzer* for petitioner. *Solicitor General Marshall* for the United States.

No. 365, Misc. GRASS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 1503, Misc. LOUIE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 68 Wash. 2d 304, 413 P. 2d 7.

No. 1514, Misc. FINN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1515, Misc. ALEXANDER *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 1551, Misc. CHROMIAK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1564, Misc. SANDS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 942, Misc. SCHACK *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this petition.

No. 1277, Misc. SCHACK *v.* CLARK, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this petition.

Rehearing Denied.

No. 464, October Term, 1965. LLOYD A. FRY ROOFING CO. *v.* VOLASCO PRODUCTS CO., 382 U. S. 904;

No. 159. MCCRAY *v.* ILLINOIS, *ante,* p. 300;

No. 998. ROGERS ET AL. *v.* CITY AND COUNTY OF DENVER ET AL., *ante,* p. 480;

No. 1012. MITCHELL *v.* UNITED STATES, *ante,* p. 972; and

No. 1013. WORLEY ET AL. *v.* ILLINOIS, *ante,* p. 972. Petitions for rehearing denied.

No. 1044. KRANTZ ET AL. *v.* OLIN, *ante,* p. 982;

No. 1066. PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. *v.* PENNSYLVANIA RAILROAD CO., *ante,* p. 982;

No. 857, Misc. LUPINO *v.* TAHASH, WARDEN, *ante,* p. 984;

No. 987, Misc. AZZONE *v.* TAHASH, WARDEN, *ante,* p. 980;

No. 933, Misc. BROOKS *v.* BETO, CORRECTIONS DIRECTOR, *ante,* p. 975;

No. 1120, Misc. GREENE *v.* UNITED STATES, *ante,* p. 976;

No. 1190, Misc. WEST *v.* MCMANN, WARDEN, *ante,* p. 985; and

No. 1264, Misc. KNOLL ET AL. *v.* SOCONY MOBIL OIL CO., INC., ET AL., *ante,* p. 977. Petitions for rehearing denied.

No. 878. RAWDON *v.* UNITED STATES, *ante,* p. 909. Motion for leave to file petition for rehearing denied.

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