UNITED STATES REPORTS

VOLUME 396

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1969

(BEGINNING OF TERM)

OCTOBER 9, 1969, THROUGH FEBRUARY 13, 1970

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS
OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1970

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $8.50 (Buckram)

Errata

270 U. S. 243, line 5 of syllabus: "June 10, 1910" should be "June 25, 1910."

340 U. S. LXXX, col. 2, line 3 from bottom: "227" should be "277."

367 U. S. 818, line 18: "miniscule" should be "minuscule."

395 U. S. 447, line 4: "omittted" should be "omitted."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.*
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
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*The Honorable Warren E. Burger, of Virginia, formerly a Judge of the United States Court of Appeals for the District of Columbia Circuit, was nominated by President Nixon to be Chief Justice of the United States on May 21, 1969; the nomination was confirmed by the Senate on June 9, 1969; he was commissioned on June 23, 1969, and took the oath and his seat on the same date. See also 395 U. S. xv.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., 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, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Thurgood Marshall, 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.

(For next previous allotment, see 389 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1969

RISTUCCIA ET UX. *v.* ADAMS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 191. Decided October 13, 1969

406 F. 2d 1257, 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.

HAGAN ET AL. *v.* REAGAN, GOVERNOR OF CALIFORNIA, ET AL.

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

No. 279. Decided October 13, 1969

Affirmed.

PER CURIAM.

The judgment is affirmed. *Williams* v. *Virginia State Board of Elections*, 393 U. S. 320.

SPALDING LAUNDRY & DRY CLEANING CO. *v.* DEPARTMENT OF REVENUE OF KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 123. Decided October 13, 1969

436 S. W. 2d 522, appeal dismissed.

T. Kennedy Helm, Jr., for appellant.

William S. Riley, Assistant Attorney General of Kentucky, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

DUFFY STORAGE & MOVING CO. ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO

No. 132. Decided October 13, 1969

— Colo. —, 450 P. 2d 339, appeal dismissed.

George Louis Creamer for appellants.

Max P. Zall for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GETTIG EQUIPMENT CORP. ET AL. *v.* BOARD OF ZONING APPEALS OF CLEVELAND ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 136. Decided October 13, 1969

Appeal dismissed and certiorari denied.

Walter L. Greene for appellants.

William T. McKnight 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.

FURMAN *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 142. Decided October 13, 1969

23 N. Y. 2d 1011, 247 N. E. 2d 281, appeal dismissed and certiorari denied.

Louis B. Scheinman for appellant.

J. Lee Rankin, Stanley Buchsbaum, and *Theodore R. Lee* 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.

IMPERIAL REFINERIES OF MINNESOTA, INC. *v.* CITY OF ROCHESTER

APPEAL FROM THE SUPREME COURT OF MINNESOTA

No. 171. Decided October 13, 1969

282 Minn. 481, 165 N. W. 2d 699, appeal dismissed.

Marshall S. Snyder for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

WHEELER *v.* VERMONT

APPEAL FROM THE SUPREME COURT OF VERMONT

No. 199. Decided October 13, 1969

— Vt. —, —, 249 A. 2d 887, 253 A. 2d 136, appeal dismissed.

James C. Cleveland for appellant.

Jerome R. Hellerstein for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

JORDAN *v.* ARIZONA EX REL. NELSON, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF ARIZONA

No. 204. Decided October 13, 1969

104 Ariz. 193, 450 P. 2d 383, appeal dismissed.

Stewart L. Udall for appellant.

Gary K. Nelson, Attorney General of Arizona, appellee, *pro se.*

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SHAPIRO, COMMISSIONER OF WELFARE OF CONNECTICUT *v.* SOLMAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 215. Decided October 13, 1969

300 F. Supp. 409, affirmed.

Robert K. Killian, Attorney General of Connecticut, and *Francis J. MacGregor,* Assistant Attorney General, for appellant.

Francis X. Dineen for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. See *King* v. *Smith,* 392 U. S. 309.

BRADESKU *v.* BRADESKU

APPEAL FROM THE SUPREME COURT OF OHIO

No. 238. Decided October 13, 1969

Appeal dismissed and certiorari denied.

A. Albert Perelman 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.

MAINE ET AL. *v.* SHONE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 261. Decided October 13, 1969

District Court judgment and 406 F. 2d 844, vacated and remanded.

James S. Erwin, Attorney General of Maine, and *John W. Benoit, Jr.,* Assistant Attorney General, for appellants.

PER CURIAM.

The motion of the appellee for leave to proceed *in forma pauperis* is granted. The judgments of the United States Court of Appeals for the First Circuit and the United States District Court for the District of Maine are vacated and the case is remanded to said United States District Court with directions to dismiss the case as moot.

INTERCO INC. *v.* RHODEN, CHAIRMAN, MISSISSIPPI TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 306. Decided October 13, 1969

220 So. 2d 290, appeal dismissed.

James Leon Young for appellant.

John E. Stone for appellee.

PER CURIAM.

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

KELLAR *v.* NEAL ET UX.

APPEAL FROM THE SUPREME COURT OF NEVADA

No. 308. Decided October 13, 1969

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.

HIYANE ET AL. *v.* HOUSE OF VISION, INC.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 320. Decided October 13, 1969

42 Ill. 2d 45, 245 N. E. 2d 468, appeal dismissed and certiorari denied.

Leonard Rose for appellants.

Lawrence J. West and *Leo Spira* 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.

SHIKARA *v.* MARYLAND CASUALTY CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 324. Decided October 13, 1969

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.

BERNARD *v.* NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM ET AL.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 177, Misc. Decided October 13, 1969

Appeal dismissed.

J. Lee Rankin and *Stanley Buchsbaum* for New York City Employees' Retirement System, and *George N. Kanoff* for Lipori, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

SELLERS *v.* UNITED STATES

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

No. 264, Misc. Decided October 13, 1969

Certiorari granted; 406 F. 2d 465, vacated and remanded to District Court.

Howard Moore, Jr., for petitioner.

Solicitor General Griswold for the United States.

PER CURIAM.

Upon consideration of the suggestion of the Solicitor General and an examination of the entire record, 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 Northern District of Georgia for further consideration in light of *Alderman* v. *United States,* 394 U. S. 165.

WHITLEY *v.* NEW YORK

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 268, Misc. Decided October 13, 1969

Appeal dismissed.

Henry B. Rothblatt and *Emma A. Rothblatt* for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

STOECKLE *v.* WISCONSIN

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 272, Misc. Decided October 13, 1969

41 Wis. 2d 378, 164 N. W. 2d 303, 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.

PURYEAR *v.* HOGAN, DISTRICT ATTORNEY OF NEW YORK COUNTY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 336, Misc. Decided October 13, 1969

24 N. Y. 2d 207, 247 N. E. 2d 260, appeal dismissed and certiorari denied.

Frank S. Hogan, pro se, and *Michael R. Juviler* for Hogan, and *Louis J. Lefkowitz,* Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus,* Assistant Attorney General, for Lefkowitz, 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.

BEACHAM *v.* BRATERMAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 404. Decided October 20, 1969

300 F. Supp. 182, affirmed.

Bruce S. Rogow for appellant.

Earl Faircloth, Attorney General of Florida, and *T. T. Turnbull* and *James McGuirk,* Assistant Attorneys 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.

WHIDDON *v.* UNITED STATES

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

No. 267, Misc. Decided October 20, 1969

Certiorari granted; vacated and remanded to District Court.

Solicitor General Griswold 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 District Court for the Eastern District of Texas for resentencing. *Prince* v. *United States,* 352 U. S. 322, and *Heflin* v. *United States,* 358 U. S. 415.

SIMPSON *v.* UNION OIL CO. OF CALIFORNIA

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

No. 419. Decided October 27, 1969

The reservation in *Simpson* v. *Union Oil Co.*, 377 U. S. 13, of the question whether there might be any equities that would warrant only prospective application in damage suits of the rule governing price fixing of nonpatented articles by the "consignment" device, announced therein, was not intended to deny the fruits of successful litigation to petitioner. The question was reserved for possible application in other cases where product distribution was structured on different considerations.

Certiorari granted; 411 F. 2d 897, reversed.

Maxwell Keith for petitioner.

Moses Lasky for respondent.

PER CURIAM.

This case represents the aftermath of our decision in *Simpson* v. *Union Oil Co.*, 377 U. S. 13, where we held that a "consignment" agreement for the sale of gasoline, required by Union Oil of lessees of its retail outlets, violated the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq.* The case was remanded for a hearing on other issues and for a determination of damages. The last sentence of the Court's opinion stated:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." *Id.*, at 24–25.

On remand, the District Court interpreted this sentence as an invitation to determine if any "equities" were

present which would warrant precluding the imposition of damages on Union Oil. Its finding was that an application of the rule announced by this Court to the damages action would be unfair, on the ground that the decision in *United States* v. *General Electric Co.*, 272 U. S. 476, gave Union Oil a reasonable basis for believing that its actions were entirely lawful. The Court of Appeals affirmed.

The petition for certiorari presents the question whether in this case the principles we announced in *Simpson* v. *Union Oil Co.* should be made prospective in the present litigation. We grant the petition on that question and deny it on the other questions tendered; and we reverse the judgment below.

We held when the case was here before that on the facts of record the use of the "consignment" device was within the prohibited ban of price fixing for nonpatented articles, 377 U. S., at 16–24, and that "on the issue of resale price maintenance under the Sherman Act there is nothing left to try, for there was an agreement for resale price maintenance, coercively employed." *Id.*, at 24.

The question we reserved was not an invitation to deny the fruits of successful litigation to this petitioner. Congress has determined the causes of action that arise from antitrust violations; and there has been an adjudication that a cause of action against respondent has been established. Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative. Since parties in other cases might be shown to have structured product distribution on quite different considerations, we reserved the question whether in some of those other situations equity might warrant the conclusion that prospective application was the only fair course.

Reversed.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I wholeheartedly concur with the decision of the Court that both courts below were in error in holding that petitioner was not entitled to any damages in this case. I dissent, however, from the Court's denial of certiorari on another question that petitioner raises, the effect of which is to leave standing that part of the District Court's judgment setting aside petitioner's jury verdict as excessive and granting respondent a new trial on the issue of damages.

The District Court's grant of a new trial did not rest upon a finding that any of the evidence on the issue of damages was improperly admitted or that the instructions to the jury were erroneous. The judge granted the new trial on the ground that the $160,000 verdict "is against the weight of the evidence, shocks the conscience, is grossly and monstrously excessive, is the result either of passion and prejudice or of consideration by the jury of factors irrelevant to the litigation, is speculative, conjectural and a miscarriage of justice." Civil No. 37,344 (D. C. N. D. Cal., filed May 23, 1967).

I do not agree that under the facts of this case the verdict should have shocked the court's conscience. Certainly the $160,000 award does not shock my conscience, nor does it seem to me monstrous or the result of passion and prejudice on the part of the jury. Petitioner's growing filling station business was destroyed by respondent through conduct that this Court held to be in violation of the antitrust laws. See *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964). At the time the cause of action arose petitioner's life expectancy was about 25 years. The jury had a right to believe that his business would have grown through those 25 years, and no one can say with any absolute assurance that the jury verdict was in excess of the immediate and long-term returns

he might have realized from his business during that period.

Antitrust damages such as those involved here are bound to be "speculative" and "conjectural" to some extent. When a person wrongfully takes government bonds worth $10,000 on the market, the damages can be precisely measured. But when as here a young man's business is wiped out root and branch by a wrongdoer, the measurement of the victim's damages is not so simple a matter. This is true because no one can infallibly predict how long that business would have continued to grow and flourish or precisely how much the business would have been worth to him in 25 years. But certainly a fair and just legal system is not required by difficulties of proof to throw up its hands in despair and leave the sufferer's damage to be borne by him while the person who did the wrong goes scot free. This Court has refused under such circumstances to hold that our system of justice is so helpless to do justice. In this very antitrust field our Court has specifically and pointedly refused to permit antitrust violators to escape liability for their wrongs on the argument that damages must not be awarded because they are uncertain and speculative. The Court in a ringing opinion by Mr. Chief Justice Stone in *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251 (1946), emphatically declined to acknowledge such judicial helplessness. There we held that the award of damages for the victim of an antitrust violation must not be denied on the spurious argument that they cannot be proved with the certainty of the value of stolen bonds. In that case this Court said:

> "[I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits

> and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Id.*, at 264.
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.*, at 265.

Bigelow and other cases* clearly establish the rule that the existence of damages in antitrust actions is a question for the jury and that the inherent uncertainty in the amount of damages is to be resolved against the wrongdoer. In my opinion the jury below did exactly what we said it was entitled to do in *Bigelow*. I would therefore require that the jury verdict be reinstated without further ado.

MR. JUSTICE STEWART would deny the petition for certiorari.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

**Perkins* v. *Standard Oil Co. of California*, 395 U. S. 642 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962).

WASHUM, DBA LOS ANGELES-YUMA FREIGHT LINES, ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 374. Decided October 27, 1969

Affirmed.

James W. Wrape and *Robert E. Joyner* for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, and *Nahum Litt* for the United States et al., and *Robert Y. Schureman* for Consolidated Copperstate Lines et al., appellees.

PER CURIAM.

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

COX, GUARDIAN *v.* TENNESSEE, BY AND THROUGH ITS ATTORNEY GENERAL, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

No. 430. Decided October 27, 1969

— Tenn. —, 439 S. W. 2d 267, appeal dismissed and certiorari denied.

Thomas F. Turley, Jr., for appellant.

Thomas E. Fox, Deputy Attorney General of Tennessee, and *C. Hayes Cooney,* Assistant Attorney General, for appellees.

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.

Syllabus

ALEXANDER ET AL. *v.* HOLMES COUNTY BOARD OF EDUCATION ET AL.

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

No. 632. Argued October 23, 1969—Decided October 29, 1969

Continued operation of racially segregated schools under the standard of "all deliberate speed" is no longer constitutionally permissible. School districts must immediately terminate dual school systems based on race and operate only unitary school systems. The Court of Appeals' order of August 28, 1969, delaying that court's earlier mandate for desegregation in certain Mississippi school districts is therefore vacated and that court is directed to enter an order, effective immediately, that the schools in those districts be operated on a unitary basis. While the schools are being thus operated, the District Court may consider any amendments of the order which may be proposed, but such amendments may become effective only with the Court of Appeals' approval.

Vacated and remanded.

Jack Greenberg argued the cause for petitioners. With him on the brief were *James M. Nabrit III, Norman C. Amaker, Melvyn Zarr,* and *Charles L. Black, Jr.*

Assistant Attorney General Leonard argued the cause for the United States. With him on the memorandum was *Solicitor General Griswold. A. F. Summer,* Attorney General of Mississippi, and *John C. Satterfield* argued the cause and filed a brief for respondents other than the United States.

Louis F. Oberdorfer argued the cause for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging reversal. With him on the brief were *John W. Douglas, Bethuel M. Webster, Cyrus R. Vance, Asa Sokolow, John Schafer, John Doar, Richard C. Dinkelspiel, Arthur H. Dean, Lloyd N. Cutler, Bruce Bromley, Berl I. Bernhard, Timothy B. Dyk,* and *Michael R. Klein.*

Richard B. Sobol and *David Rubin* filed a brief for the National Education Association as *amicus curiae* urging reversal. The Tennessee Federation for Constitutional Government filed a brief as *amicus curiae.*

PER CURIAM.

This case comes to the Court on a petition for certiorari to the Court of Appeals for the Fifth Circuit. The petition was granted on October 9, 1969, and the case set down for early argument. The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court. Against this background the Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin* v. *School Board,* 377 U. S. 218, 234 (1964); *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 438–439, 442 (1968). Accordingly,

It is hereby adjudged, ordered, and decreed:

1. The Court of Appeals' order of August 28, 1969, is vacated, and the case is remanded to that court to issue its decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color.

2. The Court of Appeals may in its discretion direct the schools here involved to accept all or any part of the August 11, 1969, recommendations of the Department of Health, Education, and Welfare, with any modifications which that court deems proper insofar as those recommendations insure a totally unitary school system for all eligible pupils without regard to race or color.

The Court of Appeals may make its determination and enter its order without further arguments or submissions.

3. While each of these school systems is being operated as a unitary system under the order of the Court of Appeals, the District Court may hear and consider objections thereto or proposed amendments thereof, provided, however, that the Court of Appeals' order shall be complied with in all respects while the District Court considers such objections or amendments, if any are made. No amendment shall become effective before being passed upon by the Court of Appeals.

4. The Court of Appeals shall retain jurisdiction to insure prompt and faithful compliance with its order, and may modify or amend the same as may be deemed necessary or desirable for the operation of a unitary school system.

5. The order of the Court of Appeals dated August 28, 1969, having been vacated and the case remanded for proceedings in conformity with this order, the judgment shall issue forthwith and the Court of Appeals is requested to give priority to the execution of this judgment as far as possible and necessary.

JOHNSON *v.* STATE BAR OF CALIFORNIA ET AL.

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

No. 434. Decided November 10, 1969

268 Cal. App. 2d 437, 74 Cal. Rptr. 11, 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.

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 451. Decided November 10, 1969

300 F. Supp. 474, affirmed.

Samuel B. Picone for appellant.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, and *Raymond M. Zimmet* for the United States et al., *Francis W. McInerny* for Midwest Coast Transport, Inc., et al., and *David Axelrod* for Little Audrey's Transportation Co., Inc., et al., appellees.

PER CURIAM.

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

NATIONAL LABOR RELATIONS BOARD *v.* CLARK'S GAMBLE CORP., DBA CLARK'S DISCOUNT DEPARTMENT STORE, ET AL.

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

No. 439. Decided November 10, 1969

Certiorari granted; 407 F. 2d 199, vacated and remanded.

Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come, and *Leonard M. Wagman* for petitioner.

Earle K. Shawe for respondent M. N. Landau Stores, Inc.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575.

MR. JUSTICE DOUGLAS dissents.

CLINTON *v.* CALIFORNIA

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 632, Misc. Decided November 10, 1969

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.

JOLLY *v.* MORGAN COUNTY JUNIOR COLLEGE DISTRICT ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO

No. 453. Decided November 10, 1969

— Colo. —, 452 P. 2d 34, appeal dismissed.

Albert W. Gebauer for appellant.

Duke W. Dunbar, Attorney General of Colorado, and *John E. Bush,* Assistant Attorney General, for appellees.

PER CURIAM.

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

KRAFFT *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 474. Decided November 10, 1969

Appeal dismissed and certiorari denied.

Sidney Greenberg 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.

MARYLAND NATIONAL INSURANCE CO. ET AL. *v.* SEVENTH JUDICIAL DISTRICT COURT OF OKLAHOMA COUNTY ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

No. 482. Decided November 10, 1969

455 P. 2d 690, appeal dismissed and certiorari denied.

O. B. Martin for appellants.

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.

STEIN *v.* ILLINOIS ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 502. Decided November 10, 1969

Appeal dismissed and certiorari denied.

Yale Stein, appellant, *pro se.*

Elmer C. Kissane 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.

KING *v.* GREENBLATT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 615, Misc. Decided November 10, 1969

Affirmed.

Robert H. Quinn, Attorney General of Massachusetts, and *John Wall* and *Edward W. Hanley III,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

ZWICKER *v.* WISCONSIN

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 686, Misc. Decided November 10, 1969

41 Wis. 2d 497, 164 N. W. 2d 512, appeal dismissed.

Anthony G. Amsterdam, Michael Meltsner, and *Melvyn Zarr* for appellant.

Robert W. Warren, Attorney General of Wisconsin, and *William A. Platz, Sverre O. Tinglum,* and *William F. Eich,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

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

BOSTON & MAINE RAILROAD ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 343. Decided November 10, 1969*

No. 343, 297 F. Supp. 615; Nos. 480 and 497, 300 F. Supp. 318, affirmed.

Carl E. Newton and *M. Lauck Walton* for appellants in No. 343. *Lee Johnson,* Attorney General of Oregon, *Richard W. Sabin,* Assistant Attorney General, and *Clarence A. H. Meyer,* Attorney General of Nebraska, for appellants in No. 480. *Howard J. Trienens, Martin M. Lucente, George L. Saunders, Jr., R. Ames, W. W. Dalton, K. A. Dobbins, J. H. Durkin, N. Melvin, T. A. Miller, A. B. Russ, Jr., R. D. Sickler, E. L. Van Dellen, R. W. Yost,* and *S. R. Brittingham, Jr.,* for appellants in No. 497.

Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Fritz R. Kahn, and *Jerome Nelson* for the United States et al. in all cases. *Hugh B. Cox* and *William H. Allen* for railroad appellees in all cases.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

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*Together with No. 480, *Arizona Corporation Commission et al.* v. *United States et al.,* and No. 497, *Union Pacific Railroad Co. et al.* v. *United States et al.,* on appeal from the United States District Court for the District of Nebraska.

DeBACKER *v.* BRAINARD, SHERIFF

APPEAL FROM THE SUPREME COURT OF NEBRASKA

No. 15. Argued October 13–14, 1969—
Decided November 12, 1969

1. Appellant juvenile's challenge in habeas corpus proceeding on ground that he was unconstitutionally deprived of his right to trial by jury is inappropriate for resolution by this Court since the hearing before a Nebraska juvenile court judge at which appellant was adjudged a delinquent was conducted before this Court's decisions in *Duncan* v. *Louisiana,* 391 U. S. 145, and *Bloom* v. *Illinois,* 391 U. S. 194, which were held in *DeStefano* v. *Woods,* 392 U. S. 631, to apply only prospectively, and appellant would therefore have had no constitutional right to a jury trial had he been tried as an adult in a criminal proceeding.
2. It is not appropriate for this Court to decide whether Nebraska law providing for proof of delinquency in a juvenile proceeding under a preponderance-of-the-evidence standard violates due process requirements where no objection to that standard was made at the hearing by appellant, who took no direct appeal, and his counsel acknowledged that the evidence was sufficient to support the delinquency finding even under a reasonable-doubt standard.
3. Because standing alone the issue could not be subject to review by an appeal, this Court declines, in view of the barrenness of the record, to exercise its certiorari jurisdiction to pass on appellant's contention that the prosecutor's assertedly unreviewable discretion under Nebraska case law whether to proceed against appellant in juvenile court rather than in ordinary criminal proceedings violated due process.

183 Neb. 461, 161 N. W. 2d 508, appeal dismissed; certiorari dismissed as improvidently granted.

William G. Line, by appointment of the Court, 394 U. S. 914, argued the cause and filed briefs for appellant.

Richard L. Kuhlman argued the cause for appellee. With him on the brief was *Melvin Kent Kammerlohr,* Assistant Attorney General of Nebraska.

Alfred L. Scanlan, by special leave of Court, argued the cause and filed a brief for the National Council of Juvenile Court Judges as *amicus curiae.*

Thomas C. Lynch, Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Gloria F. DeHart,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae.*

PER CURIAM.

After a hearing before a juvenile court judge, appellant DeBacker was found to be a "delinquent child" [1] and ordered committed to the Boys' Training School at Kearney, Nebraska.[2] DeBacker did not seek direct review of his commitment, but instead sought state habeas corpus. The Nebraska District Court dismissed appellant's petition, a divided Nebraska Supreme Court affirmed,[3] and last Term we noted probable jurisdiction over the present appeal, 393 U. S. 1076. Because we find that resolution of the constitutional issues presented by appellant would not be appropriate in the circum-

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[1] "Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." Neb. Rev. Stat. § 43–201 (4). Appellant was charged with having a forged check in his possession with the intent to utter it as genuine, an act which for an adult would be forgery under Neb. Rev. Stat. § 28–601 (2).

[2] Appellant was 17 when committed, and it appears that under Nebraska law he could be kept in the training school until his 21st birthday.

[3] Four of the seven justices of the Nebraska Supreme Court thought the Nebraska statutory provisions which require that juvenile hearings be without a jury, Neb. Rev. Stat. § 43–206.03 (2), and be based on the preponderance of the evidence, Neb. Rev. Stat. § 43–206.03 (3), were unconstitutional. The Nebraska Constitution provides, however, that: "No legislative act shall be held unconstitutional except by the concurrence of five judges." Neb. Const., Art. V, § 2.

stances of this case, the appeal is dismissed. See *Rescue Army* v. *Municipal Court,* 331 U. S. 549.

1. Appellant asks this Court to decide whether the Fourteenth and Sixth Amendments, in light of this Court's decisions in *Duncan* v. *Louisiana,* 391 U. S. 145; *Bloom* v. *Illinois,* 391 U. S. 194; and *In re Gault,* 387 U. S. 1, require a trial by jury in a state juvenile court proceeding based on an alleged act of the juvenile which, if committed by an adult, would, under the *Duncan* and *Bloom* cases, require a jury trial if requested. In *DeStefano* v. *Woods,* 392 U. S. 631, we held that *Duncan* and *Bloom* "should receive only prospective application" and stated that we would "not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in *Duncan* v. *Louisiana* and *Bloom* v. *Illinois.*" 392 U. S., at 633, 635. Because appellant's juvenile court hearing was held on March 28, 1968—prior to the date of the decisions in *Duncan* and *Bloom*—appellant would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal proceeding. It thus seems manifest that this case is not an appropriate one for considering whether the Nebraska statute which provides that juvenile hearings be "without a jury," Neb. Rev. Stat. § 43–206.03 (2), is constitutionally invalid in light of *Duncan* and *Bloom.*[4]

[4] Although a comment made by appellant's counsel at oral argument before this Court (in response to a question) suggests reliance also on the Equal Protection Clause for the claim that a jury trial was constitutionally required (Tr. 5), an examination of the record clearly reveals that this was not any part of the basis on which probable jurisdiction was noted here. Appellant made no equal protection claim before the juvenile court, in his petition for habeas corpus to the state courts, or in his jurisdictional statement or brief in this Court. The Sixth Amendment as reflected in the Fourteenth was the exclusive basis for appellant's claim that he had a right to a jury trial. (See "Questions Presented" in Jurisdictional Statement 3–4, and

2. Appellant next asks this Court to decide whether the preponderance-of-the-evidence standard for burden of proof in juvenile court proceedings, required by Neb. Rev. Stat. § 43–206.03 (3), satisfies the Due Process Clause of the Fourteenth Amendment. However, at the appellant's juvenile court hearing, his counsel neither objected to the preponderance-of-the-evidence standard, nor asked the judge to make a ruling based on proof beyond a reasonable doubt. In explaining why he did not seek a direct appeal from the juvenile court's determination that appellant had committed the act upon which rested the delinquent child finding, appellant's counsel stated at oral argument before this Court:

> "[I]t has been pointed out that I did not attack the sufficiency of the evidence.
>
> "Of course, the reason for that is obvious. The evidence is more than sufficient to sustain a conviction of what he did. An appeal on the sufficiency of the evidence would have been close to frivolous." (Tr. 41–42.)

Later in oral argument counsel acknowledged that "[n]o matter what the standard was . . . [o]ur evidence just isn't insufficient." (Tr. 47.) And when specifically asked whether "[t]he evidence was sufficient even under a reasonable doubt standard," counsel responded: "Even under a reasonable doubt standard . . . ." (Tr. 47.)

Given this commendably forthright explanation by appellant's counsel, this case is not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings.[5]

Appellant's Brief 2.) Nor has any of the Nebraska courts below passed on any equal protection claim.

[5] This Court has recently noted probable jurisdiction to consider this issue in *In re Winship* (No. 85, Misc.), probable jurisdiction noted, *post*, p. 885.

3. Appellant finally asks us to decide whether due process is denied because, as it is claimed, the Nebraska prosecutor had unreviewable discretion whether he would proceed against appellant in juvenile court rather than in ordinary criminal proceedings. The record shows (1) that appellant did not make this contention before the juvenile court judge; (2) that appellant raised the issue in his habeas corpus petition but that it was not passed on by the Nebraska District Court; (3) that appellant did not press the District Court's failure to consider this issue in his appeal to the Nebraska Supreme Court, and made only passing reference to the issue in his brief to that court; and (4) that the opinions of the Nebraska Supreme Court did not pass on the issue, or even refer to the contention. Given the barrenness of the record on this issue, in the exercise of our discretion, we decline to pass on it. So far as we have been made aware, this issue does not draw into question the validity of any Nebraska statute.[6] Therefore, it could not, standing alone, be subject to review in this Court by way of an appeal. See 28 U. S. C. § 1257 (2). "[I]nsofar as notation of probable jurisdiction may be

[6] In his petition for state habeas corpus, appellant did not allege as to this issue that any Nebraska statutory provision was invalid. Instead he claimed: "Petitioner is deprived of his liberty under the Fourteenth Amendment of the Constitution of the United States when his right to a jury trial and the protective procedures of the criminal code are left to depend on the uncontrolled discretion of the prosecutor as to whether petitioner should be proceeded against in juvenile court or should be informed against in District Court under the provisions of the code of criminal procedure." If it can be fairly said that the prosecutor's discretion under Nebraska law is "uncontrolled," or not subject to review, this is not because of any explicit statutory provision making it such, cf. Neb. Rev. Stat. § 43–205.04, but because of language in Nebraska case law. See *State* v. *McCoy*, 145 Neb. 750, 18 N. W. 2d 101 (1945); *Fugate* v. *Ronin*, 167 Neb. 70, 75, 91 N. W. 2d 240, 243–244 (1958).

regarded as a grant of the certiorari writ" as to this issue, we dismiss such writ as improvidently granted. *Mishkin* v. *New York*, 383 U. S. 502, 513.

For the foregoing reasons this appeal is

Dismissed.

MR. JUSTICE BLACK, dissenting.

For the reasons set forth herein and in the dissenting opinion of my Brother DOUGLAS, I dissent and would reverse the judgment below.

In February 1968 appellant, who was then 17 years old, was charged under the laws of Nebraska with being a "delinquent child" [1] because he had a forged bank check which he intended to use for his own purposes.[2] At the hearing on this charge he asked for a jury trial, arguing that this was a right guaranteed him by the Sixth Amendment to the Constitution and that a statute prohibiting juries in "delinquency" proceedings [3] was therefore unconstitutional.

This Court in *In re Gault*, 387 U. S. 1 (1967), held that juveniles charged with being "delinquents" as a

[1] Neb. Rev. Stat. § 43–201 (4) provides that: "Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance."

[2] The State charged that appellant "unlawfully, feloniously and knowingly [had] in his possession and custody a certain false, forged and counterfeited bank check . . . with the intent . . . to utter and publish said false, forged and counterfeited bank check as true and genuine, knowing the same to be a false, forged and counterfeited bank check, and with the intent then and there and thereby to prejudice, damage and defraud . . . , well knowing the same to be falsely made, forged and counterfeited, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska." App. 1–2. It is undisputed that such acts constitute the crime of forgery under state law. Neb. Rev. Stat. § 28–601 (2).

[3] Neb. Rev. Stat. § 43–206.03 (2) provides that juvenile hearings "shall be conducted by the judge without a jury in an informal manner . . . ."

result of committing a criminal act were entitled to certain constitutional safeguards—namely, notice of the issues involved, benefit of counsel, protection against compulsory self-incrimination, and confrontation of the witnesses against them. I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world.

The Court here decides that it would not be "appropriate" to decide this issue in light of *DeStefano* v. *Woods*, 392 U. S. 631 (1968). That case held that the Sixth Amendment right to a jury trial—made applicable to the States in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968)—did not apply in state proceedings held prior to May 20, 1968. MR. JUSTICE DOUGLAS and I dissented in that case as we have in every case holding that constitutional decisions would take effect only from the day they were announced.[4] I think this doctrine of prospective-only application is nothing less than judicial amendment of the Constitution, since it results in the Constitution's meaning one thing the day prior to a particular decision and something entirely different the next day even though the language remains the same. Under our system of government such amendments cannot constitutionally be made by judges but only by the action of Congress and the people. Depriving defendants of jury trials prior to *Duncan* violated the Constitution just as much as would similar deprivations after

[4] *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965) (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966) (dissenting opinion); *Stovall* v. *Denno*, 388 U. S. 293, 302, 303 (1967) (dissenting opinions); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (dissenting opinion); *Halliday* v. *United States*, 394 U. S. 831, 835 (1969) (dissenting opinion); see also *Desist* v. *United States*, 394 U. S. 244, 254 (1969) (concurring in judgment).

that decision, yet this Court treats these equal deprivations with clearly unequal justice. I cannot agree to such refusals to apply what appear to me to be the clear commands of the Constitution.

MR. JUSTICE DOUGLAS, dissenting.

In *DeStefano* v. *Woods,* 392 U. S. 631, 635, I stated my view that the decisions in *Duncan* v. *Louisiana,* 391 U. S. 145, and *Bloom* v. *Illinois,* 391 U. S. 194, which guaranteed to adults in serious criminal cases and contempts the right to a trial by jury, should be given retroactive effect.* In light of this view, I am unable to join the Court's *per curiam* opinion in this case, holding that because appellant's juvenile court hearing was held prior to the date of the decisions in *Duncan* and *Bloom* the Court is precluded from deciding appellant's right to a jury trial.

I would reach the merits and hold that the Sixth and Fourteenth Amendments require a jury trial as a matter of right where the delinquency charged is an offense that, if the person were an adult, would be a crime triable by jury. Such is this case, for behind the façade of delinquency is the crime of forgery.

As originally conceived, the juvenile court was to be a clinic, not a court; the judge and all of the attendants were visualized as white-coated experts there to supervise, enlighten, and cure—not to punish.

These white-coated people were surrogates, so to speak, of the natural parent. As stated in one of the leading cases:

> "To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer

*This has been my position with respect to all comparable constitutional decisions. See, *e. g., Desist* v. *United States,* 394 U. S. 244, 255–256 (dissenting opinion); *DeStefano* v. *Woods,* 392 U. S. 631, 635 (dissenting opinion); and cases cited therein.

> years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved." *Commonwealth* v. *Fisher,* 213 Pa. 48, 53, 62 A. 198, 200 (1905).

This new agency—which stood in the shoes of the parent or guardian—was to draw on all the medical, psychological, and psychiatric knowledge of the day and transform the delinquent. These experts motivated by love were to transform troubled children into normal ones, saving them from criminal careers.

Many things happened that prevented this dream from becoming a widespread reality. First, municipal budgets were not equal to the task of enticing experts to enter this field in large numbers. Second, such experts as we had, notably the psychiatrists and analysts, were drawn away by the handsome fees they could receive for rehabilitating the rich. Third, the love and tenderness alone, possessed by the white-coated judge and attendants, were not sufficient to untangle the web of subcon-

scious influences that possessed the troubled youngster. Fourth, correctional institutions designed to care for these delinquents often became miniature prisons with many of the same vicious aspects as the adult models. Fifth, the secrecy of the juvenile proceedings led to some overreaching and arbitrary actions.

As Mr. Justice Fortas stated in *Kent* v. *United States,* 383 U. S. 541, 556: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."

In *Kent,* the Court held that a valid waiver of the "exclusive" jurisdiction of the Juvenile Court of the District of Columbia required "a hearing, including access by . . . counsel to the social records and probation or similar reports which presumably are considered by the court, and . . . a statement of reasons for the Juvenile Court's decision." *Id.,* at 557. Although the opinion in that case emphasized that "the basic requirements of due process and fairness" be satisfied in such proceedings, *id.,* at 553, the decision itself turned on the language of a federal statute.

The first expansive treatment of the constitutional requirements of due process in juvenile court proceedings was undertaken in *In re Gault,* 387 U. S. 1. That case involved a 15-year-old boy who had been committed by an Arizona juvenile court to the State Industrial School "for the period of his minority, unless sooner discharged by due process of law" for allegedly making lewd telephone calls. The Court in *Gault* abandoned the view that due process was a concept alien to the philosophy and work of the juvenile courts. Mr. Justice Fortas, speaking for the Court, stated: "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.,* at 28. The Court held that a juvenile is entitled to adequate and timely notice

of the charges against him, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.

Since the decision in *Gault,* lower courts have divided on the question whether there is a right to jury trial in juvenile proceedings. Those courts which have granted the right felt that it was implicit in *Gault. Nieves* v. *United States,* 280 F. Supp. 994 (D. C. S. D. N. Y. 1968); *Peyton* v. *Nord,* 78 N. M. 717, 437 P. 2d 716 (1968); *In re Rindell,* 2 BNA Cr. L. 3121 (Providence, R. I., Fam. Ct., Jan. 1968). Those who have denied the right have reasoned either that jury trial is not a fundamental right applicable to the States or that it is not consistent with the concept of a juvenile court. *People* v. *Anonymous,* 56 Misc. 2d 725, 289 N. Y. S. 2d 782 (Sup. Ct. 1968); *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 234 A. 2d 9 (1967). *Duncan* and *Bloom* have negated the former reason. Whether a jury trial is in conflict with the juvenile court's underlying philosophy is irrelevant, for the Constitution is the Supreme Law of the land.

Given the fundamental nature of the right to jury trial as expressed in *Duncan* and *Bloom,* there is, as I see it, no constitutionally sufficient reason to deprive the juvenile of this right. The balancing of the rehabilitative purpose of the juvenile proceeding with the due process requirement of a jury trial is a matter for a future Constitutional Convention.

The idea of a juvenile court certainly was not the development of a juvenile criminal court. It was to have a healthy specialized clinic, not to conduct criminal trials in evasion of the Constitution and Bill of Rights. Where there is a criminal trial charging a criminal offense, whether in conventional terms or in the language of delinquency, all of the procedural requirements of the Constitution and Bill of Rights come into play.

I would reverse this judgment.

LAWRENCE ET AL. *v.* CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 509. Decided November 17, 1969

42 Ill. 2d 461, 248 N. E. 2d 71, appeal dismissed and certiorari denied.

John M. Bowlus for appellants.

Raymond F. Simon, Marvin E. Aspen, and *John J. George* 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.

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

O'LEARY ET AL. *v.* KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 526. Decided November 17, 1969

441 S. W. 2d 150, appeal dismissed and certiorari denied.

Robert Allen Sedler for appellants.

John B. Breckinridge, Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, 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.

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

BROCKINGTON *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 31. Argued October 22, 1969—Decided November 24, 1969

Appellant, whose nominating petition bore signatures of about 1% of those in the congressional district who had voted in the last gubernatorial election (although the Ohio statute then required 7% of the voters on the nominating petition for an independent candidate for Congress), sought, as his sole relief, a writ of mandamus to compel the Board of Elections to place his name on the ballot as an independent candidate for Congress in the November 1968 election. *Held:* In view of the limited nature of the relief requested the case is now moot.

Vacated and remanded.

Benjamin B. Sheerer argued the cause for appellant. With him on the briefs was *Ralph Rudd.*

Robert D. Macklin, Assistant Attorney General of Ohio, argued the cause for appellees. On the brief were *Paul W. Brown,* Attorney General, *Charles S. Lopeman,* First Assistant Attorney General, and *Julius J. Nemeth,* Assistant Attorney General. *John T. Corrigan* and *John L. Dowling* filed a brief for appellees Cipollone et al.

PER CURIAM.

The appellant sought to run in the November 1968 election as an independent candidate for the United States House of Representatives from the Twenty-first Congressional District of Ohio. His nominating petition bore the signatures of 899 voters in the congressional district, a little over 1% of those in the district who had voted in the gubernatorial contest at the last election. The Board of Elections ruled that the appellant's petition was insufficient to put his name on the November ballot, because it did not contain the signatures of 7% of the

qualified voters, as Ohio law then required.[1] The appellant petitioned the Court of Common Pleas for a writ of mandamus, challenging the 7% requirement as "unreasonably high and excessive, . . . disproportionate when compared to the 100 signatures required for party candidates,[2] . . . arbitrary and capricious, . . . [and] an invidious discrimination without any relationship to constitutionally justified ends . . . ." He urged as the proper standard for determining the sufficiency of his nominating petition the 1% requirement that had prevailed for over 60 years until the enactment of the 7% rule in 1952. He prayed for an immediate order restraining the Board of Elections from printing the election ballots; also for a writ of mandamus commanding the Board "to certify the sufficiency of relator's nominating petition" and directing the appellees "to do all things necessary to place relator's name upon the ballot as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District in the November 5, 1968, general election . . . ." His suit did not purport to be a class action, and he sought no declaratory relief.

On August 22, 1968, the Court of Common Pleas denied the writ of mandamus. On October 1 the Court of

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[1] Ohio Rev. Code Ann. § 3513.257 (Supp. 1968) provided in pertinent part:

"The nominating petition of an independent candidate for the office of . . . district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district."

[2] Under Ohio law a candidate for the nomination of a political party to the office of United States Representative must, in order to enter the *party primary*, obtain from the party membership within the congressional district the signatures of either 100 voters or 5% of those who voted in the last gubernatorial election, whichever is less. Ohio Rev. Code Ann. § 3513.05 (Supp. 1968).

Appeals for the Eighth Judicial District affirmed that judgment, and on October 23 the Supreme Court of Ohio dismissed the appeal for want of a substantial constitutional question. The appellant then appealed to this Court pursuant to 28 U. S. C. § 1257, and we noted probable jurisdiction, 393 U. S. 1078. While the appeal was pending here, Ohio amended the controlling statute, effective October 30, 1969, reducing the signature requirement from 7% to 4%.

We do not think the recent statutory amendment has rendered this case moot. For the appellant has consistently urged the unconstitutionality of any percentage requirement in excess of the 1% that Ohio imposed prior to 1952, and he obtained the signatures of only about 1% of the voters in his district. He thus could not have won a place on the ballot even under the statute as currently written. Cf. *Hall* v. *Beals, post,* p. 45.

Rather, in view of the limited nature of the relief sought, we think the case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future election. He did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future. He did not sue for himself and others similarly situated as independent *voters,* as he might have under Ohio law. Ohio Rev. Code Ann. § 2307.21 (1953). He did not seek a declaratory judgment, although that avenue too was open to him. Ohio Rev. Code Ann. §§ 2721.01–2721.15 (1953).

Instead, he sought only a writ of mandamus to compel the appellees to place his name on the ballot as a candidate for a particular office in a particular election on November 5, 1968. In Ohio mandamus is an extraordinary remedy, available to a petitioner only on a showing of clear legal right. *State ex rel. Gerspacher* v. *Coffinberry,* 157 Ohio St. 32, 104 N. E. 2d 1; *State ex rel.*

Stanley v. *Cook,* 146 Ohio St. 348, 66 N. E. 2d 207. The writ does not lie to review the determination by a Board of Elections that a candidate is ineligible to assume the office he seeks or that his petition is invalid, in the absence of allegations of fraud, corruption, abuse of discretion, or a clear disregard of statutes or applicable legal principles. *State ex rel. Flynn* v. *Board of Elections,* 164 Ohio St. 193, 129 N. E. 2d 623; cf. *State ex rel. Hanna* v. *Milburn,* 170 Ohio St. 9, 11, 161 N. E. 2d 891, 893. In the instant suit the Court of Common Pleas ruled that the appellant "must not only establish that the act which he seeks to compel respondents to perform is one that they are constitutionally bound to perform by virtue of their offices, but also that he, the relator, has a clear right to have the duty enforced." The court, without passing on the merits of the legal issues raised by the parties, found that the appellant had not established a clear legal right to the writ on the basis of all the evidence.

It is now impossible to grant the appellant the limited, extraordinary relief he sought in the Ohio courts. Accordingly, the judgment of the Supreme Court of Ohio must be vacated, without costs in this Court, and the cause remanded for such proceedings as that court may deem appropriate.

It is so ordered.

HALL ET UX. *v.* BEALS, CLERK AND RECORDER OF EL PASO COUNTY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 39. Argued October 14, 1969—Decided November 24, 1969

Appellants, who moved to Colorado in June 1968, were refused permission to vote in the November 1968 presidential election because they could not meet Colorado's six-month statutory residency requirement. They brought this class action challenging the constitutionality of that restriction and seeking, *inter alia,* mandamus and injunctive relief. The District Court upheld the statute and dismissed the complaint. After appellants appealed to this Court, the residency period for presidential elections was reduced to two months, and appellants also challenge that requirement in this Court. *Held:*

1. The amendment of the residency statute, under which appellants could have voted in the 1968 election, has mooted this case.

2. Appellants cannot represent a class (here Colorado voters disqualified by the two-month requirement) to which they never belonged.

3. The contingencies which would have to occur before appellants could be disenfranchised in Colorado in the next presidential election are too speculative to warrant this Court's passing on the substantive issues of this case. *Moore* v. *Ogilvie,* 394 U. S. 814, distinguished.

292 F. Supp. 610, vacated and remanded.

Richard Hall argued the cause *pro se* and for other appellant.

Bernard R. Baker argued the cause for appellees. With him on the brief were *Carroll E. Multz* and *Robert L. Russel.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Leonard, Louis F. Claiborne,* and *Francis X. Beytagh, Jr.,*

for the United States; by *William F. Reynard, Melvin L. Wulf,* and *Eleanor Holmes Norton* for the American Civil Liberties Union et al.; by *Joseph L. Rauh, Jr., John Silard,* and *Elliott C. Lichtman* for the Bipartisan Committee on Absentee Voting; and by Harvey M. Burg.

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging affirmance.

PER CURIAM.

The appellants moved from California to Colorado in June 1968. They sought to register to vote in the ensuing November presidential election, but were refused permission because they would not on election day have satisfied the six-month residency requirement that Colorado then imposed for eligibility to vote in such an election.[1] The appellants then commenced the present

[1] Colo. Rev. Stat. Ann. § 49–24–1 (1963) provided:

"*Eligibility of new resident to vote.*—Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors."

The appellant Richard Hall went to the office of the appellee Beals on or about August 1, 1968, to request that his wife and he be allowed to vote in the presidential election. Upon denial of his application, he wrote to the Colorado Secretary of State to ask that his wife and he be allowed to vote despite the six-month residency requirement. On September 6 the State Election Office informed the appellants they would not be permitted to vote.

Apart from the special provision relating to the eligibility of new residents to vote in a presidential election, Colorado requires that

class action against the appellees, electoral officials of El Paso County, Colorado. Their complaint challenged the six-month residency requirement as a violation of the Equal Protection, Due Process, and Privilege and Immunities Clauses of the Constitution. For relief they sought (1) a writ of mandamus compelling the appellees to register them for the upcoming presidential election; (2) an injunction restraining the enforcement and operation of the Colorado residency laws insofar as they applied to the presidential election; and (3) a direction that the appellees register the appellants and allow them to vote "on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States and such appeal should run past the time of the National Election on November 5, 1968, . . . the relief sought by [the appellants will] not become moot." [2]

On October 30 the three-judge District Court entered judgment for the appellees and dismissed the complaint, holding that the six-month requirement was not unconstitutional. *Hall* v. *Beals,* 292 F. Supp. 610 (D. C. Colo.).[3] As a result the appellants did not vote in the 1968 presidential election. They took a direct appeal to this Court pursuant to 28 U. S. C. § 1253, and we noted

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persons desiring to vote in general, primary, and special elections must have resided in the State for one year. Colo. Rev. Stat. Ann. § 49–3–1 (1)(c) (1963).

[2] The request for relief continued:

"Should Plaintiffs win an eventual appeal, the Defendant Election Officials shall be directed to count Plaintiffs' votes as normally cast and valid ballots; should Plaintiffs lose on final appeal to the Supreme Court of the United States, Defendant Election Officials shall destroy Plaintiffs' ballots as if they had never been cast. This conditional registration is the only way Plaintiffs' sought-for relief can be preserved should an appeal by either party run past the date of the National Election in question."

[3] The opinion of the District Court was issued on November 29, 1968.

probable jurisdiction, 394 U. S. 1011. Thereafter the Colorado Legislature reduced the residency requirement for a presidential election from six months to two months.

The 1968 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court. Further, the appellants have now satisfied the six-month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. *Thorpe* v. *Housing Authority,* 393 U. S. 268, 281–282; *United States* v. *Alabama,* 362 U. S. 602, 604; *Hines* v. *Davidowitz,* 312 U. S. 52, 60; *Carpenter* v. *Wabash R. Co.,* 309 U. S. 23, 26–27; *United States* v. *Schooner Peggy,* 1 Cranch 103, 110. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. *Golden* v. *Zwickler,* 394 U. S. 103, 110; *Baker* v. *Carr,* 369 U. S. 186, 204; *Mills* v. *Green,* 159 U. S. 651, 653.

The appellants object now to the two-month residency requirement as vigorously as they did to the six-month rule in effect when they brought suit. They say that such statutes, in Colorado and elsewhere, continue to have an adverse effect upon millions of voters throughout the Nation. But the appellants' opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced. Nor does the result differ

because the appellants denominated their suit a class action on behalf of disenfranchised voters. The appellants "cannot represent a class of [which] they are not a part," *Bailey* v. *Patterson,* 369 U. S. 31, 32–33—that is, the class of voters disqualified in Colorado by virtue of the new two-month requirement, a class of which the appellants have never been members.

Nothing in *Moore* v. *Ogilvie,* 394 U. S. 814, is to the contrary. There we invalidated an Illinois statute requiring that independent candidates for presidential elector obtain signatures on their nominating petitions from voters distributed through the State. We noted that even though the 1968 election was over, "the burden . . . placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935." 394 U. S., at 816. The problem before us was " 'capable of repetition, yet evading review,' " not only because the same restriction on Moore's candidacy that had adversely affected him in 1968 could do so again in 1972, but because Illinois, far from having altered its statutory scheme for the future benefit of those situated similarly to Moore, had adhered for over 30 years to the same electoral policy with no indication of change.

Here, by contrast, the appellants will face disenfranchisement in Colorado in 1972 only in the unlikely event that they first move out of the State and then re-establish residence there within two months of the presidential election in that year. Or they may take up residence in some other State, and in 1972 face disqualification under *that* State's law. But such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide with respect

to the now-amended law of Colorado. *Golden* v. *Zwickler, supra.*

The judgment of the District Court is vacated and the case is remanded with directions to dismiss the cause as moot.

It is so ordered.

MR. JUSTICE BRENNAN, dissenting.

I dissent from the direction to dismiss this case as moot. *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), involved a challenge to the constitutionality of a statute which had been invoked to deny the appellants a place on the 1968 ballot. We were not persuaded in that case by the argument that the appeal should be dismissed since the 1968 election had been held and there was no possibility of granting any relief to appellants. Even though appellants did not allege they would seek a place on the ballot at future elections, we held that the constitutional question was one "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911), and, therefore, that mootness would not prevent our decision of its merits. In my view the present case is an even stronger one for application of that principle. At stake here is the fundamental right to vote—the right "preservative of other basic civil and political rights," *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964); see also *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 670 (1966), and the constitutional challenge of the amended Colorado statute is peculiarly evasive of review. This is because ordinarily a person's standing to make that challenge would not mature unless he had become a Colorado resident within two months prior to a presidential election. Barring resort to extraordinary expedients, that interval is obviously too short for the exhaustion of state administrative remedies and the completion of a lawsuit through filing of the

complaint in a federal district court, convening of a three-judge court, trial, and review by this Court.* True, today's virtual foreclosure of any opportunity for definitive judicial review may in some measure be prevented by resort to waiver of the requirement of exhaustion of administrative remedies, preferred calendar position, or even relaxation of the rules of ripeness to permit a person not yet a resident to challenge the statute on a showing of reasonable certainty that he would be moving to the State within the two-month period. But the difficulties which attend these expedients only buttress my conclusion that if mootness did not bar decision of the constitutional question in *Moore* v. *Ogilvie,* there is even more reason to hold that mootness does not bar decision of the constitutional question presented here.

Reaching the merits, I would reverse for the reasons stated by MR. JUSTICE MARSHALL in his dissenting opinion, which I join.

MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN joins, dissenting.

I agree with my Brother BRENNAN that this case is not moot. It involves one of those problems " 'capable of repetition, yet evading review,' " that call for relaxation of traditional concepts of mootness so that appellate review of important constitutional decisions not be permanently frustrated. *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969).

Indeed, one of the unfortunate consequences of a rigid view of mootness in cases such as this is that the state and lower federal courts may well be left as the courts of last resort for challenges of relatively short state residency requirements. Those courts may, as the District Court apparently did in this case, consider them-

*The proceedings would probably require even more time if the plaintiff sued in state court, for review in this Court would come only after one or more levels of state appellate review.

selves bound by this Court's summary *per curiam* affirmance in *Drueding* v. *Devlin,* 380 U. S. 125 (1965), aff'g 234 F. Supp. 721 (D. C. Md. 1964), which upheld a one-year residency requirement for voting in a presidential election. It seems to me clear that *Drueding* is not good law today. The difficulties of achieving review in this Court in cases of this sort, combined with this misleading precedent, lead me to indicate briefly my view of the merits of the case before us.

In *Drueding,* the District Court tested the residency requirement there challenged by the equal-protection standard applied to ordinary state regulations: that is, restrictions need bear only some rational relationship to a legitimate end. 234 F. Supp., at 724–725, citing *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961). But if it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 667 (1966); *Kramer* v. *Union School District,* 395 U. S. 621, 626–628 (1969). Close scrutiny is thus demanded of Colorado's requirement that in order to vote for President and Vice President, one must not only be a resident of that State, but one must have been a resident for a certain time before the election—six months when this suit was brought; now, two months.

In support of this requirement, it is urged that the electoral college system as embodied in the Constitution contemplates the election of the President and Vice President, not by the Nation as such, but rather by the individual States, each acting as a community. Hence, the argument goes, each State may legislate to ensure that those voting for its presidential electors are truly members of the state community.

The argument is surely correct as far as it goes, and this Court has often reaffirmed the power of the States to require their voters to be bona fide residents. *Carrington* v. *Rash,* 380 U. S. 89, 93–94 (1965); *Kramer* v. *Union School District, supra,* at 625. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residency is questioned, but because they are recent rather than longtime residents.[1]

Nor is it a justification to say that the State has certain parochial interests at stake in the election of a President, and that it may require of its voters a period of residency sufficiently lengthy to impress upon them the local viewpoint. This is precisely the sort of argument that this Court, in *Carrington* v. *Rash, supra,* found insufficient to justify Texas' exclusion from voting in state elections of servicemen who had acquired Texas residency after they had entered the service. The State argued that military men newly moved to Texas might not have local interests sufficiently at heart. This Court replied:

> "But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U. S., at 94.

Similarly here, the fact that newly arrived Coloradans may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of

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[1] *Pope* v. *Williams,* 193 U. S. 621 (1904), upheld a one-year residency requirement for voting in *state* elections. The Court specifically reserved the question of durational residency requirements as applied to voting in presidential elections. *Id.,* at 633. In any case, *Pope* was decided long before application of the "compelling interest" test to restrictions on the franchise.

the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home State.

Nor does it suffice to argue that a durational residency requirement ensures that voters have had the time to gain knowledge of local issues, as distinguished from indoctrination in local attitudes. Even if it can be assumed that new residents know less about local issues than old residents, issues of this sort play so small a part in the election of the President and Vice President today that this can hardly be considered a compelling interest sufficient to justify entirely depriving millions of Americans of any opportunity to vote for their most important leaders. Cf. *Kramer* v. *Union School District, supra,* at 633.

The appellees argue that the State's durational residency requirement is necessary to ensure the purity of its elections. The impurities feared ("dual voting" and "colonization") all involve the same evil—voting by nonresidents, either singly or in blocks. But it is difficult to see how the durational residency requirement in any way protects against nonresident voting. The qualifications of the would-be voter in Colorado are determined when he registers to vote, which he may do until 20 days before the election. Colo. Rev. Stat. Ann. § 49–4–2 (1) (Supp. 1965). At that time, he establishes his qualifications, including durational residence, by oath. Colo. Rev. Stat. Ann. § 49–4–17 (Supp. 1965.) The nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against "dual voting" or "colonization" by voters willing to lie. Insofar as appears from the Colorado election laws, and from

the record in this case, the State makes no independent attempt to go behind the voter's oath to determine his qualifications. See Colo. Rev. Stat. Ann. § 49–13 (Supp. 1965).

Moreover, even if an enforcement effort were made to prevent nonresident voting, and the exclusion of those taking up residency within two months of the election were used as a method of eliminating cases on the borderline between new residents and mere visitors, such an approach would be constitutionally overbroad. In *Carrington* v. *Rash, supra,* the State similarly argued that it was in many instances difficult to tell whether persons moving to Texas while they were in the service had the genuine intent to remain that establishes residency. Thus, the argument went, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all those in the doubtful category. The Court rejected such a "conclusive presumption" approach, noting that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." 380 U. S., at 96. Cf. *Harman* v. *Forssenius,* 380 U. S. 528, 542–543 (1965).

Similarly here, a conclusive presumption that a recently established resident is not a resident at all for voting purposes is simply an overbroad burden upon the right to vote. In most cases, it is no more difficult to determine whether one recently arrived in the community has sufficient intent to remain to qualify as a resident than it is to make a similar determination for an older inhabitant.[2] That there are borderline cases among the new

[2] For instance, the appellants in this case, before applying for their ballots, had bought a home in Colorado Springs, registered their car with the Colorado Department of Motor Vehicles, acquired Colorado drivers' licenses, and registered their eldest child in a private nursery school; further, Mr. Hall had taken permanent employment with a law firm in Colorado Springs.

arrivals is not a constitutionally sufficient reason for denying the vote to those who have settled in good faith.

Finally, appellees argue that the logistics of preparing for an election require that there be some time between the close of registration and the election itself. This period serves as a kind of residency requirement, in that persons establishing residency after the voting lists are closed are barred from voting. Yet this requirement is justified by compelling administrative needs. And, it is argued, once some period of this sort is conceded to be required, it is arbitrary for the courts to determine as a matter of constitutional law how long it may be.

But this argument is unconvincing here. Colorado has apparently judged that administrative needs require 20 days between the close of registration and election day. Colo. Rev. Stat. Ann. § 49–4–2 (2) (Supp. 1965). Appellants have not challenged this statute. What they have challenged is the separate and additional requirement that voters, all of whom register before the 20-day cutoff date, also must have been residents of the State at least six months—by recent amendment two months—before the election. Colo. Rev. Stat. Ann. § 49–24–1 (1963). For the argument from logistical need to save the durational residency requirement, the State would have to show some additional administrative need for this further burden on the right to vote. No such showing has been made. In my view the Colorado durational residency requirement for voters for President and Vice President violates the Equal Protection Clause, and appellants are entitled to reversal of the District Court judgment that upheld that requirement.

ANDERSON'S-BLACK ROCK, INC. *v.* PAVEMENT SALVAGE CO., INC.

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

No. 45. Argued November 10, 1969—Decided December 8, 1969

Respondent brought this action for infringement of a patent for "Means for Treating Bituminous Pavement." The patent sought to solve the problem of a cold joint on "blacktop" paving by combining known elements, a radiant-heat burner, a spreader, and a tamper and screed, on one chassis. The District Court, finding that all the inventor had done was to construct known elements in the prior art on a single chassis, held the patent invalid. The Court of Appeals reversed. *Held:* While the combination of old elements performed a useful and commercially successful function it added nothing to the nature and quality of the previously patented radiant burner, and to those skilled in the art the use of the old elements in combination was not an invention under the standard of 35 U. S. C. § 103. Pp. 59–63.

404 F. 2d 450, reversed.

Alan W. Borst argued the cause for petitioner. With him on the brief was *Nathaniel L. Leek.*

Walter J. Blenko, Jr., argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent brought this action against petitioner for infringement of United States Patent No. 3,055,280 covering "Means for Treating Bituminous Pavement." The patent was assigned to respondent by one Neville.

Bituminous concrete—commonly called asphalt or "blacktop"—is often laid in strips. The first strip laid usually has cooled by the time the adjoining strip is to be laid, creating what is known as a cold joint.

Because bituminous concrete is pliable and capable of being shaped only at temperatures of 250° to 290° F., the cold joint results in a poor bonding between the strips. Water and dirt enter between the strips, causing deterioration of the pavement.

Respondent's patent sought to solve the problem of the cold joint by combining on one chassis (1) a radiant-heat burner for heating the exposed edge of the cold strip of pavement; (2) a spreader for placing bituminous material against that strip; and (3) a tamper and screed, for shaping the newly placed material to the desired contour and surface.

The standard paving machine in use prior to respondent's claimed invention combined on one chassis the equipment for spreading and shaping the asphalt, and it is unquestioned that this combination alone does not result in a patentable invention. Petitioner's alleged infringement resulted from its placing of a radiant-heat burner on the front of a standard paving machine, thus allowing its machine to perform the same functions with the same basic elements as those described in respondent's patent.

The use of a radiant-heat burner in working asphalt pavement dates back to a patent issued in 1905 to one Morcom, United States Patent No. 799,014. The value of such a heater lies in the fact that it softens the asphalt without burning the surface. The radiant-heat burner on respondent's claimed invention is essentially the same as that disclosed in a patent issued in 1956 to one Schwank, United States Patent No. 2,775,294. Thus the burner, by itself, is also not patentable.

The placement of the radiant-heat burner upon the side of a standard bituminous paver is the central feature of respondent's patent. The heater is used in this way for continuous paving along a strip to prevent a cold joint, whereas previously radiant-heat burners had

been used merely for patching limited areas of asphalt. The operation of the heater is, however, in no way dependent on the operation of the other equipment on the paving machine. It is hung on the paver merely because that is a convenient place for it when heating the longitudinal joint of the pavement. A separate heater can also be used in conjunction with a standard paving machine to eliminate the cold joint, and in fact is so used for heating the transverse joints of the pavement.

Respondent claims that its patent involves a combination of prior art which produces the new and useful result of eliminating the cold joint. Its claim of unobviousness is based largely on the testimony of two individuals who are knowledgeable in the field of asphalt paving, expressing their doubts to the inventor Neville that radiant heat would solve the problem of cold joints. The District Court rejected respondent's claim of infringement, finding the patent invalid. The Court of Appeals, by a divided vote, reversed. For reasons that follow, we reverse the judgment of the Court of Appeals.

Each of the elements combined in the patent was known in the prior art. It is urged that the distinctive feature of the patent was the element of a radiant-heat burner. But it seems to be conceded that the burner, by itself, was not patentable. And so we reach the question whether the combination of the old elements created a valid combination patent.

The District Court said: "All that plaintiff [respondent] has done is to construct four elements known in the prior art on one chassis." That is relevant to commercial success, not to invention. The experts tendered by respondent testified that they had been doubtful that radiant heat would solve the problem of

the cold joint.[1] But radiant heat was old in the art. The question of invention must turn on whether the combination supplied the key requirement. We conclude that the combination was reasonably obvious to one with ordinary skill in the art.

There is uncontested evidence that the presence of the radiant-heat burner in the same machine with the other elements is not critical or essential to the functioning of the radiant-heat burner in curing the problem of the cold joint. For it appears that a radiant-heat burner operating in a tandem fashion would work as well. The combination of putting the burner together with the other elements in one machine, though perhaps a matter of great convenience, did not produce a "new or different function," *Lincoln Co.* v. *Stewart-Warner Corp.*, 303 U. S. 545, 549, within the test of validity of combination patents.

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[1] Mr. Francis C. Witkoski, an engineer, met the inventor, Charles Neville, between 1955 and 1960 while Witkoski was Director of Research for the Pennsylvania Department of Highways. Neville told Witkoski that he had invented a piece of equipment that would heat but not burn asphalt, and would thus eliminate cold joints. Witkoski replied that he did not believe that Neville had such a piece of equipment. Subsequently, Witkoski ordered from Neville some of the separate burner units and tested them. Thus the dialogue between Witkoski and Neville focused exclusively on the properties of the radiant-heat burner.

Mr. Leslie B. Crowley, also an engineer, met Neville prior to 1954. Crowley was at that time the Chief of the Pavements and Railroads Section, Director of Installations, Headquarters, United States Air Force. Neville explained the advantages of using an "infra-red" heater for the maintenance and repair of asphalt pavements. Crowley testified that his interest was insufficient at that time to motivate him to take any action with regard to the device because he did not believe it would "do the job." Thus the Crowley-Neville discussion also focused entirely on the radiant-heat burner, and not on the combination of the burner with the other elements of a bituminous paver.

A combination of elements may result in an effect greater than the sum of the several effects taken separately. No such synergistic result is argued here. It is, however, fervently argued that the combination filled a long felt want and has enjoyed commercial success. But those matters "without invention will not make patentability." *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 153.

The patent standard is basically constitutional, Article I, § 8, of the Constitution authorizing Congress "[t]o promote the Progress of . . . useful Arts" by allowing inventors monopolies for limited times. We stated in *Graham* v. *John Deere Co.*, 383 U. S. 1, 6, that under that power Congress may not "enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored."

In this case the question of patentability of the combination turns on the meaning of 35 U. S. C. § 103 [2] which

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[2] 35 U. S. C. § 103 provides:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

the Court reviewed in the *Graham* case, *supra,* at 13–17. We said:

> "We believe that this legislative history, as well as other sources, shows that the revision was not intended by Congress to change the general level of patentable invention. We conclude that the section was intended merely as a codification of judicial precedents embracing the *Hotchkiss* [3] condition, with congressional directions that inquiries into the obviousness of the subject matter sought to be patented are a prerequisite to patentability." *Id.,* at 17.

Obviousness, as an issue, is resolved as follows:

> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved." *Ibid.*

We admonished that "strict observance" of those requirements is necessary. *Id.,* at 18.

We conclude that while the combination of old elements performed a useful function,[4] it added nothing to the nature and quality of the radiant-heat burner already patented. We conclude further that to those skilled in the art the use of the old elements in com-

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[3] *Hotchkiss* v. *Greenwood,* 11 How. 248.

[4] 35 U. S. C. § 101 provides:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

Absent here is the element "new." For as we have said, the combination patent added nothing to the inherent characteristics or function of the radiant-heat burner.

bination was not an invention by the obvious-nonobvious standard. Use of the radiant-heat burner in this important field marked a successful venture. But as noted, more than that is needed for invention.

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.

BRYSON *v.* UNITED STATES

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

No. 35. Argued October 14, 1969—Decided December 8, 1969

Petitioner challenges his 1955 conviction under 18 U. S. C. § 1001 for falsely and fraudulently denying affiliation with the Communist Party in an affidavit he filed with the National Labor Relations Board (NLRB), pursuant to § 9 (h) of the National Labor Relations Act. Section 9 (h), later repealed, provided that a union could not draw upon the jurisdiction of the NLRB unless each union officer filed with the NLRB an affidavit stating "that he is not a member of the Communist Party or affiliated with such party . . . ." The District Court set aside the conviction. It distinguished *Dennis* v. *United States,* 384 U. S. 855; decided that § 9 (h), which had been upheld in *American Communications Assn.* v. *Douds,* 339 U. S. 382, could no longer be thought constitutionally valid, particularly in light of *United States* v. *Brown,* 381 U. S. 437; and concluded that the Government had no right to ask the questions which petitioner answered falsely in his affidavit. The Court of Appeals reversed since it found "no significant differences" between this case and *Dennis, supra,* and therefore thought it unnecessary to consider the constitutionality of § 9 (h). *Held:*

1. The constitutionality of § 9 (h) is legally irrelevant to the validity of petitioner's conviction under 18 U. S. C. § 1001, which punishes the making of fraudulent statements to the Government, *Dennis, supra,* because none of the elements of proof for petitioner's conviction under § 1001 has been shown to depend on the validity of § 9 (h). Pp. 68–72.

(a) The statutory term "affiliated," which petitioner claims is vague and overbroad and which he suggests he misunderstood, was narrowly defined by the trial court in an instruction later explicitly approved by this Court, and the jury's verdict reflects a determination that petitioner's false statement was knowingly and deliberately made. Pp. 69–70.

(b) Petitioner's false statement was made in a "matter within the jurisdiction" of the NLRB, as the NLRB received the affidavit pursuant to explicit statutory authority, which only a short time before had been upheld as constitutional in *Douds, supra.* Pp. 70–71.

2. *Dennis, supra,* negates any general principle that a citizen has a privilege to answer fraudulently a question that the Government should not have asked. P. 72.

3. This case is not distinguishable from *Dennis, supra,* which is followed here. Pp. 72–73.

403 F. 2d 340, affirmed.

Richard Gladstein argued the cause for petitioner. With him on the brief was *Norman Leonard.*

Francis X. Beytagh, Jr., argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner asks this Court to set aside his 1955 jury conviction under 18 U. S. C. § 1001 [1] for having falsely and fraudulently denied affiliation with the Communist Party in an affidavit he had filed with the National Labor Relations Board, pursuant to § 9 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act.[2] This collateral proceeding was

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[1] Title 18 U. S. C. § 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] Until repealed in 1959, § 9 (h) of the National Labor Relations Act, 61 Stat. 146, provided that no labor organization could draw upon the jurisdiction of the National Labor Relations Board unless each officer of such organization had filed with the Board an affidavit stating "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or

brought in the District Court for the Northern District of California in 1967, some 10 years after his original conviction was upheld over a variety of challenges on direct review.[3] The District Court distinguished *Dennis* v. *United States,* 384 U. S. 855 (1966), and decided that § 9 (h), which had been upheld in *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950), could no longer be thought constitutionally valid, particularly in light of *United States* v. *Brown,* 381 U. S. 437 (1965). Having concluded that the Government had no right to ask the questions which petitioner answered falsely in his affidavit, the District Court ruled that petitioner's conviction under § 1001 should be "without effect." It therefore set aside petitioner's conviction and discharged his parole (unreported opinion).[4]

On the Government's appeal, the Ninth Circuit reversed because it found "no significant differences" between this case and *Dennis,* and it therefore thought it unnecessary to consider the constitutionality of § 9 (h). 403 F. 2d 340 (1968). We granted certiorari, 393 U. S. 1079 (1969), and we now affirm.

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teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [§§ 286, 287, 1001, 1022, and 1023 of Title 18] shall be applicable in respect to such affidavits."

[3] See *Bryson* v. *United States,* 238 F. 2d 657 (C. A. 9th Cir. 1956), rehearing denied, 243 F. 2d 837, cert. denied, 355 U. S. 817 (1957). After direct review, but before initiating this proceeding, petitioner's application for reduction of sentence was rejected, *Bryson* v. *United States,* 265 F. 2d 9 (C. A. 9th Cir.), cert. denied, 360 U. S. 919 (1959).

[4] After his conviction, petitioner had been sentenced to five years' imprisonment and a $10,000 fine. He had served almost two years of his sentence before being paroled in December 1959. Because only $2,000 of his fine had been paid, however, petitioner had not yet been discharged from his parole status when he commenced the present proceedings in 1967.

I

Petitioner bottoms his claim to relief on asserted constitutional deficiencies of § 9 (h) of the National Labor Relations Act, enacted by Congress in 1947 out of concern that Communist Party influence on union officers created the risk of "political strikes," see *American Communications Assn.* v. *Douds,* 339 U. S., at 387–389. Under § 9 (h), a union could participate in representation proceedings conducted by the NLRB or utilize the Board's machinery to protest employer unfair labor practices only if each of the union's officers had filed a "non-Communist" affidavit. See n. 2, *supra.* Petitioner filed such an affidavit in 1951, and his subsequent conviction under § 1001 was based on a jury's determination that petitioner had knowingly and willfully lied in his affidavit by denying affiliation with the Communist Party.[5]

About one year before petitioner filed the false affidavit, this Court had upheld § 9 (h) after considering a variety of asserted constitutional deficiencies, *American Communications Assn.* v. *Douds, supra.* However, in 1959 Congress replaced § 9 (h) with a provision that simply made it a crime for one who was or had recently been a Communist Party member to be a union officer,[6] and this successor statute was subsequently held unconstitutional as a bill of attainder, *United States* v. *Brown, supra.*

Relying primarily on *Brown,* petitioner argues that § 9 (h) was also a bill of attainder, prohibited by Art. I, § 9, cl. 3, of the Constitution. Petitioner also argues that the statute abridged First Amendment rights of speech, assembly, and association, and was so vague as

[5] The jury acquitted petitioner of the separate charge that he had fraudulently denied that he was a "member" of the Communist Party.

[6] Section 504, Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U. S. C. § 504.

to offend the Due Process Clause of the Fifth Amendment. We do not decide whether § 9 (h)—now repealed for over 10 years—would today pass constitutional muster and whether *Douds* would be reaffirmed. Guided by *Dennis* v. *United States, supra,* we hold that the question of whether § 9 (h) was constitutional or not is legally irrelevant to the validity of petitioner's conviction under § 1001, the general criminal provision punishing the making of fraudulent statements to the Government.

II

In *Dennis* v. *United States,* 384 U. S. 855 (1966), the petitioners had been convicted of a conspiracy to obtain fraudulently the services of the National Labor Relations Board by filing false affidavits in purported satisfaction of the requirements of § 9 (h). Those petitioners, like the petitioner here, asked the Court to reverse *Douds* and hold § 9 (h) invalid. Deciding that "the claimed invalidity of § 9 (h) would be no defense to the crime of conspiracy charged in [the] indictment," the Court refused in *Dennis* to "reconsider *Douds.*" 384 U. S., at 867. The Court, drawing on *United States* v. *Kapp,* 302 U. S. 214 (1937), and *Kay* v. *United States,* 303 U. S. 1 (1938), stated:

> "The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional." 384 U. S., at 867.

We find the principle of *Dennis* no less applicable in the case before us. First, none of the elements of proof

necessary for petitioner's conviction under § 1001 has been shown to depend on the validity of § 9 (h). Petitioner suggests in this collateral proceeding that when he filed his affidavit he misunderstood the meaning of the statutory term "affiliated," a word which he claims is unconstitutionally vague and overbroad. But the trial court narrowly defined the term in an instruction [7] later explicitly approved by this Court in *Killian* v. *United States,* 368 U. S. 231, 254–258 (1961). Moreover, the jury's verdict reflects a determination that petitioner's false statement was knowingly and willfully made. This negates any claim that petitioner did not know the falsity of his statement at the time it was made, or that it was the product of an accident, honest inad-

[7] The instructions of the court on affiliation were:

"The verb 'affiliated,' as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"I tried to think of some analogy which would make that possibly clearer to you, and the best one I can think of—we have all in our experience probably heard of a man and woman who live together but are not married. They are husband and wife in everything but name only. You have probably heard that expression. A person to be affiliated with the Communist Party within the meaning of that term as used in the Second Count of the indictment must be a member in every sense and stand in the relationship of a member in every sense but that of the mere technicality of being a member,—in everything but name." *Bryson* v. *United States,* 238 F. 2d, at 664 n. 8.

vertence, or duress. Insofar as petitioner in this collateral proceeding attempts to suggest the contrary,[8] he is simply trying to impeach the jury's verdict, upheld after careful review on direct appeal.

As another element of the offense, § 1001 requires that the false statement be made "in any matter within the jurisdiction of any department or agency of the United States." Petitioner argues that if § 9 (h) was unconstitutional, then the affidavit requirement was not within the "jurisdiction" of the Board, and therefore the false statement was not punishable under § 1001. Because there is a valid legislative interest in protecting the integrity of official inquiries, see *United States* v. *Bramblett,* 348 U. S. 503 (1955); *United States* v. *Gilliland,* 312 U. S. 86, 93 (1941),[9] we think the term "jurisdiction" should not be given a narrow or technical meaning for purposes of § 1001, *Ogden* v. *United States,* 303 F.

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[8] Petitioner claims that he did not *know* that his relationship with the Communist Party amounted to affiliation, and that he signed the affidavit submitted to the Board after counsel had advised him that he was not at the time "affiliated." This is apparently the same claim he made in an affidavit prepared in connection with his motion to reduce his sentence. At his trial, however, petitioner did not take the stand, and his unproved allegations are not even found in the record upon which the jury found him guilty.

[9] In concluding that the Board had no jurisdiction for purposes of § 1001, the District Court reasoned that if § 9 (h) were unconstitutional, the Board was not performing one of its "authorized functions," a phrase taken from *United States* v. *Gilliland,* 312 U. S., at 93. By taking *Gilliland*'s unelaborated reference to "authorized functions" out of context, the District Court gave that phrase a meaning both unsupported by the holding and inconsistent with the spirit of that decision. The holding of *Gilliland* that there need be no "pecuniary . . . loss to the government" in order to punish fraudulent behavior was based on the Court's concern that the statute be given a broad reading in order to protect the Government "from the perversion which might result from the deceptive practices described," *ibid.*

2d 724, 742–743 (C. A. 9th Cir. 1962); *United States* v. *Adler,* 380 F. 2d 917, 921–922 (C. A. 2d Cir. 1967). A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001.[10]

In this case, the Board received petitioner's affidavit pursuant to explicit statutory authority, which only a short time before had been upheld as constitutional in *Douds.* Given that under § 9 (h) the Board's "power to act on union charges [was] conditioned on filing of the necessary affidavits," *Leedom* v. *International Union of Mine Workers,* 352 U. S. 145, 148–149 (1956), the Board certainly had the apparent authority, granted by statute, necessary for purposes of § 1001. Thus, we hold that irrespective of whether *Douds* would be reaffirmed today, petitioner made a false statement in a "matter within the jurisdiction" of the Board.[11]

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[10] We do not read previous decisions of this Court, in contexts other than prosecutions under § 1001, *e. g., Williamson* v. *United States,* 207 U. S. 425, 453–462 (1908); *United States* v. *George,* 228 U. S. 14 (1913); *Viereck* v. *United States,* 318 U. S. 236 (1943); *Christoffel* v. *United States,* 338 U. S. 84 (1949), as inconsistent with this conclusion. Petitioner has cited no cases of this Court, and we know of none, in which there existed statutory authority to require a statement but the Court nevertheless held that a prosecution for a false answer could not be maintained because the statute was later determined invalid. *Friedman* v. *United States,* 374 F. 2d 363 (C. A. 8th Cir. 1967), cited by the dissent, held that a false and fraudulent statement willfully and knowingly given to the FBI in order "to initiate a federal prosecution under the Civil Rights Laws" was not "in any matter within the jurisdiction of any department or agency" for purposes of § 1001 because the FBI "had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry." *Id.,* at 365, 368. We have no occasion in the present context either to approve or disapprove *Friedman*'s holding.

[11] We have no need to decide in this case whether jurisdiction would exist under § 1001 if at the time the request for information was made a court had already authoritatively determined that the statutory basis was invalid. Cf. *United States* v. *Kapp, supra.*

Notwithstanding the fact that the Government has proved the elements necessary for a conviction under § 1001, the petitioner would have us say that the invalidity of § 9 (h) would provide a defense to his conviction. But after *Dennis* it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions [12]—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

III

Petitioner argues, and the District Court also found, that *Dennis* is distinguishable, and that its teachings therefore have no relevance in this instance. The first distinction offered is that *Dennis* involved a conviction for conspiracy, whereas this petitioner was prosecuted under § 1001 for individually making a false statement.[13] We see nothing in that fact that makes *Dennis* less applicable in this instance. The cases are indeed very similar in that both involve the use of false affidavits "to circumvent the law and not to challenge it—

[12] For two examples of how the constitutional validity of § 9 (h) could be raised, see *American Communications Assn.* v. *Douds*, 339 U. S., at 385–387.

[13] In support of the contention that *Dennis* was meant to apply only to conspiracy charges and not simply to § 1001 violations, both the District Court and petitioner here quote the language in *Dennis* to the effect that: "It is the entire conspiracy, and not merely the filing of false affidavits, which is the gravamen of the charge." 384 U. S., at 860. That language, however, was addressed to the threshold question that the Court faced in *Dennis*, namely, whether the facts alleged in the indictment were sufficient to warrant a conspiracy charge, which requires elements additional to those necessary for a violation of § 1001.

a purported compliance with [§ 9 (h) was] designed to avoid the courts, not to invoke their jurisdiction." 384 U. S., at 865.

Petitioner also attempts to distinguish *Dennis* on the ground that the behavior involved in the present case was less culpable than that found punishable in *Dennis,* and that this petitioner, unlike the petitioners in *Dennis,* did not "flout" the law for he had "every right to believe" that he had not perjured himself. If apart from attempting to impeach the jury's verdict, see n. 8, *supra,* petitioner is suggesting that the principles of *Dennis* depend on an assessment of moral culpability beyond the jury's determination of guilt, he simply misconceives the basis of *Dennis. Dennis* can hardly be read as instructing courts to impose an extra punishment on a defendant found to have been dishonest by refusing to consider a constitutional argument that is legally relevant to his defense. *Dennis* refused to reconsider *Douds* because of the legal conclusion that the constitutionality of § 9 (h) was not relevant to the validity of the conspiracy prosecution.

Petitioner finally contends that the Court should not follow *Dennis* because "its strictures . . . have no relevance at all to postconviction proceedings." Of course, federal courts have jurisdiction to consider constitutional claims on collateral review, but a substantive defense that is not legally relevant on direct review becomes no more relevant because asserted on collateral review.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

This conviction was founded on an indictment which in the words of 18 U. S. C. § 1001 makes it a crime to file "any false, fictitious or fraudulent statements or

representations" in any matter "within the jurisdiction" of the National Labor Relations Board. Former § 9 (h) of the Labor Management Relations Act, 1947, 29 U. S. C. § 159 (h) (1958 ed.), barred a union from using the services of the Board unless and until each of the union's officers had filed his affidavit that he was neither a member of nor affiliated with the Communist Party. The basic question in this proceeding under 28 U. S. C. § 2255 is whether constitutionally speaking it was "within the jurisdiction" of the Board to require the filing of those affidavits.

Obviously the power of Congress to authorize prosecution for crimes of this character must rest on an interference with or obstruction of some "lawful" function of the agency in question. See *United States* v. *Johnson,* 383 U. S. 169, 172. Apart from constitutional problems, the question of what is "within the jurisdiction" of an agency should be construed in a restrictive, not an expansive, way. The Court of Appeals for the Eighth Circuit so held in *Friedman* v. *United States,* 374 F. 2d 363, when it ruled that telling a falsehood to the FBI in its role as "investigator" was not "within the jurisdiction" of that agency in the sense of § 1001. If it were, then telling lies to agencies would carry heavier penalties than committing perjury in court. 374 F. 2d, at 367.

The words "within the jurisdiction" must be read not only with the common-sense approach of *Friedman* but also in light of our constitutional regime. One of many mandates imposed on Congress by the Constitution is the prohibition against bills of attainder. Art. I, § 9.

It was said in *American Communications Assn.* v. *Douds,* 339 U. S. 382, that § 9 (h) was not a bill of attainder. The opinion was by Mr. Chief Justice Vinson and it was called an "opinion of the Court." It was, however, a six-man Court and the ruling on the bill of

attainder point was in Part VII of the opinion. Mr. Justice Frankfurter concurred in the opinion "except as to Part VII." *Id.*, at 415. Mr. Justice Jackson concurred in part and dissented in part. *Id.*, at 422. Section 9 (h) was vulnerable in his view because it proscribed opinion or belief which had not manifested itself "in any overt act." *Id.*, at 436. He said:

> "Attempts of the courts to fathom modern political meditations of an accused would be as futile and mischievous as the efforts in the infamous heresy trials of old to fathom religious beliefs." *Id.*, at 437.
>
> "[E]fforts to weed erroneous beliefs from the minds of men have always been supported by the argument which the Court invokes today, that beliefs are springs to action, that evil thoughts tend to become forbidden deeds. Probably so. But if power to forbid acts includes power to forbid contemplating them, then the power of government over beliefs is as unlimited as its power over conduct and the way is open to force disclosure of attitudes on all manner of social, economic, moral and political issues." *Id.*, at 438.

From this opinion I conclude that Mr. Justice Jackson did not reach the bill of attainder point in Mr. Chief Justice Vinson's opinion. And MR. JUSTICE BLACK dissented. *Id.*, at 445.

So I conclude that no more than three members of the Court (Vinson, C. J., and Reed and Burton, JJ.) ever held that § 9 (h) was constitutional against the challenge that it was a bill of attainder.

In *United States* v. *Brown*, 381 U. S. 437, we held that the successor of § 9 (h), § 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 504, was a bill of attainder. It made it a crime for a member of the Communist Party to serve as an officer or employee (except in clerical or custodial positions)

of a labor union. The Vinson opinion in *Douds* upheld § 9 (h) on the basis that it was "intended to prevent future action rather than to punish past action." 339 U. S., at 414. In *Brown,* it was likewise argued that the statute there involved was "preventive rather than retributive in purpose." 381 U. S., at 457. That view was rejected. The question, we said, was whether § 504 inflicted "punishment" which, we pointed out, "serves several purposes: retributive, rehabilitative, deterrent—and preventive." *Id.,* at 458. The dissenters—Mr. Justice Clark, MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE—concluded that *Douds* was "obviously overruled." *Id.,* at 464–465. Whatever may be said technically about any remaining vitality of the *Douds* case, it obviously belongs to a discredited regime, though, like *Plessy* v. *Ferguson,* 163 U. S. 537, it has never been officially overruled.

The rule invoked by the Court to deny petitioner the opportunity to challenge that bill of attainder in this proceeding is, as stated by MR. JUSTICE BLACK in his separate opinion in *Dennis* v. *United States,* 384 U. S. 855, 878, "a new court-made doctrine." As he pointed out in that opinion, the prior decisions of this Court relied on to deny the defense of unconstitutionality of a federal law were instances of false claims for benefits to which the complainant had "no possible right whether the statute was constitutional or unconstitutional." *Ibid.*

In this case, however, Congress installed an unconstitutional barrier to receipt of the benefits administered by the Labor Board. Since § 9 (h), in light of *Brown,* was plainly unconstitutional, petitioner's union was entitled to those services without the filing of any affidavit. Therefore, unlike prior cases, the United States had been deprived of nothing and defrauded of nothing by the filing of any affidavit or other form of claim.

I would reverse the judgment below.

UNITED STATES *v.* KNOX

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 17. Argued October 14, 1969—
Decided December 8, 1969

This is an appeal by the Government from the dismissal of two counts of an indictment charging appellee with violating 18 U. S. C. § 1001 by making false statements in wagering tax forms required by 26 U. S. C. § 4412. The District Court dismissed the indictment, reasoning that appellee could not be prosecuted for "failure to answer the wagering form correctly" since his privilege against self-incrimination would have prevented prosecution for "failure to answer the form in any respect." *Held:*

1. One who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself. *Bryson* v. *United States, ante,* p. 64. Pp. 79–80.

2. By filing false statements appellee took a course other than the one that § 4412 was designed to compel, a course that the Fifth Amendment gave him no privilege to take. Pp. 81–82.

3. Whether, as appellee argues, he gave the false information under the duress of §§ 4412 and 7203 of the Internal Revenue Code, or his false statements were not made "willfully" as required by 18 U. S. C. § 1001, must be determined initially at his trial. Pp. 82–84.

298 F. Supp. 1260, reversed.

Mervyn Hamburg argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson, Francis X. Beytagh, Jr.,* and *Beatrice Rosenberg.*

J. Edwin Smith argued the cause and filed a brief for appellee.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellee Knox has been charged with six counts of violation of federal law in connection with his wagering activities. The first four counts of the indictment charge that between July 1964 and October 1965 he engaged in the business of accepting wagers without first filing Internal Revenue Service Form 11–C, the special return and registration application required by § 4412 of the Internal Revenue Code of 1954, and without first paying the occupational tax imposed by § 4411 of the Code. Counts Five and Six charge that when Knox did file such a form on October 14, 1965, and when he filed a supplemental form the next day, he knowingly and willfully understated the number of employees accepting wagers on his behalf—in violation of 18 U. S. C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency.

Knox moved to dismiss the indictment, asserting that this Court's decisions in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968), had held invalid [1] the provisions of the wagering tax laws that required him to file the special return. The Government in response stated that it would not pursue the first four counts but argued that Knox's objections based on the *Marchetti* and *Grosso* decisions were "largely irrelevant" to Counts Five and Six. The District Court disagreed. It dismissed all six counts, reasoning that Knox could not be prosecuted for his "failure to answer the wagering form correctly" since his Fifth Amendment privilege against self-incrimination would have prevented prosecution for "failure to answer the form in any respect." 298 F. Supp. 1260, 1261. The United States filed a direct appeal to this Court

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[1] But see nn. 3, 6, *infra.*

from the dismissal of the two counts charging violations of § 1001, and we noted probable jurisdiction, 394 U. S. 971 (1969).[2]

In *Bryson* v. *United States, ante,* p. 64, decided today, we reaffirmed the holding of *Dennis* v. *United States,* 384 U. S. 855 (1966), that one who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself. *Bryson,* like *Dennis,*

[2] Such a direct appeal is authorized by the Criminal Appeals Act, 18 U. S. C. § 3731, which provides: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The District Court sustained the claim of privilege not on the basis of facts peculiar to this case but on the basis of its conclusion that the Fifth Amendment provides a defense to any prosecution under § 1001 based on misstatements on a Form 11–C. This amounts to a holding that § 1001, as applied to this class of cases, is constitutionally invalid. The generality of the impact of the District Court's holding appears to us to render our jurisdictional holding *a fortiori* compared to analogous jurisdictional holdings in such cases as *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921); *Fleming* v. *Rhodes,* 331 U. S. 100, 102–104 (1947); *Wissner* v. *Wissner,* 338 U. S. 655 (1950); *Department of Employment* v. *United States,* 385 U. S. 355, 356–357 (1966). We prefer to rest our jurisdiction on this aspect of § 3731 rather than, as advocated by the Government, the statute's "motion in bar" provision, in light of the fact that the scope of the latter provision will be the subject of full-dress consideration, as will certain problems under the "dismissing any indictment" provision not present in this case, in *United States* v. *Sisson,* consideration of jurisdiction postponed, *post,* p. 812.

involved § 9 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 146, which was attacked as an abridgment of First Amendment freedoms and as a bill of attainder forbidden by Art. I, § 9, of the Constitution. In contrast, Knox alleges infringement of his Fifth Amendment privilege against self-incrimination. We do not think that the different constitutional source for Knox's claim removes his case from the ambit of the principle laid down in those decisions. The validity of the Government's demand for information is no more an element of a violation of § 1001 here than it was in *Bryson*.[3]

The indictment charges that the forms Knox filed with the District Director of Internal Revenue contained false, material information,[4] an accusation that con-

[3] Knox argues that his false Forms 11–C were not filed "in any matter within the jurisdiction of any department or agency of the United States," a necessary element of a violation of § 1001, because *Marchetti* and *Grosso* held that the Internal Revenue Service was not authorized to require the filing of the forms. Even if his reading of those decisions were correct, his argument would fail for the reasons explained in *Bryson*. The Internal Revenue Service has express statutory authority to require the filing, and when Knox submitted his forms this Court had held that such a requirement raised no self-incrimination problem. *United States* v. *Kahriger*, 345 U. S. 22 (1953); *Lewis* v. *United States*, 348 U. S. 419 (1955). Further, in *Marchetti* we did not hold that the Government is constitutionally forbidden to direct the filing of the form, but only that a proper assertion of the constitutional privilege bars prosecution for failure to comply with the direction. See n. 6, *infra;* see also *Grosso* v. *United States*, 390 U. S., at 69–70, n. 7.

[4] Knox claims on appeal that neither Count Five nor Count Six charges any affirmative misstatements, but only omissions. Count Five charges that the statements on the form filed on October 14, 1965, "were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated, in that the number, name, special stamp number, street address, and city and state of em-

cededly falls within the terms of § 1001. However, Knox claims that the Fifth Amendment bars punishing him for the filings because they were not voluntary but were compelled by §§ 4412 and 7203 of the Internal Revenue Code. He points out that if he had filed truthful and complete forms as required by § 4412, he would have incriminated himself under Texas wagering laws. On the other hand, if he had filed no forms at all, he would have subjected himself to criminal prosecution under § 7203.[5] In choosing the third alternative, submission of a fraudulent form, he merely opted for the least of three evils, under a form of duress that allegedly makes his choice involuntary for purposes of the Fifth Amendment.

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ployees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted . . . ." Count Six contains language identical except for an apparently inadvertent difference in punctuation. Although the wording is not entirely clear, we need not decide whether on a fair reading the indictment encompasses affirmative misstatements. The District Court read the indictment as alleging that Knox violated § 1001 "by wilfully and knowingly making a false statement" on the forms, and it was on the basis of this construction that the court dismissed Counts Five and Six. We have no jurisdiction on this direct appeal to review the construction of the indictment. *E. g., United States* v. *Harriss,* 347 U. S. 612 (1954); *United States* v. *Petrillo,* 332 U. S. 1 (1947); *United States* v. *Borden Co.,* 308 U. S. 188, 193 (1939). But see *United States* v. *CIO,* 335 U. S. 106 (1948). See also n. 2, *supra.*

[5] Title 26 U. S. C. § 7203 provides: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

For this proposition Knox relies on *United States* v. *Lookretis,* 398 F. 2d 64 (C. A. 7th Cir. 1968), where, after this Court had remanded for reconsideration in light of *Marchetti,* see 390 U. S. 338 (1968), the Court of Appeals ruled that truthful disclosures made under the compulsion of § 4412 could not be introduced against their maker in a criminal proceeding. However, the Fifth Amendment was offended in *Lookretis* precisely because the defendant *had* succumbed to the statutory compulsion by furnishing the requested incriminatory information. Knox does not claim that his prosecution is based upon any incriminatory information contained in the forms he filed, nor that he is being prosecuted for a failure to supply incriminatory information. He has taken a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take.

This is not to deny that the presence of §§ 4412 and 7203 injected an element of pressure into Knox's predicament at the time he filed the forms. At that time, this Court's decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), established that the Fifth Amendment did not bar prosecution for failure to file a form such as 11–C. But when Knox responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion. Knox's ground for complaint is not that his false information inculpated him for a prior or subsequent criminal act; rather, it is that under the compulsion of §§ 4412 and 7203 he *committed* a criminal act, that of giving false information to the Government. If the compulsion was unlawful under *Marchetti,*[6] Knox may have a defense to

[6] We stressed in *Marchetti* "that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege

this prosecution under the traditional doctrine that a person is not criminally responsible for an act committed under duress. See generally Model Penal Code §§ 2.09, 3.02 (Proposed Official Draft, 1962); *id.*, § 2.09, Comment (Tent. Draft No. 10, 1960). It is only in this sense that there is any relevance to Knox's attempted distinction of this case from *Dennis, Bryson,* and their predecessors, *United States* v. *Kapp,* 302 U. S. 214 (1937), and *Kay* v. *United States,* 303 U. S. 1 (1938), on the ground that in those cases the false statements were voluntarily filed for the purpose of obtaining benefits from the Government.

Knox argues that the criminal sanction for failure to file, coupled with the danger of incrimination if he filed truthfully, was more coercive in its effect than, for example, the prospect that the petitioners in *Dennis* would lose their jobs as union officers unless they filed non-Communist affidavits. While this may be so, the question whether Knox's predicament contains the seeds of a "duress" defense, or perhaps whether his false statement was not made "willfully" as required by § 1001, is one that must be determined initially at his trial.[7] It

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as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes." 390 U. S., at 61. Nothing before us indicates that the hazard of incrimination faced by Knox was less substantial than that faced by Marchetti, or that Knox would have been disqualified for any other reason from asserting the privilege in defense of a prosecution for failure to comply with § 4412.

[7] Rule 12 (b)(1) of the Federal Rules of Criminal Procedure, which cautions the trial judge that he may consider on a motion to dismiss the indictment only those objections that are "capable of determination without the trial of the general issue," indicates that evidentiary questions of this type should not be determined on such a motion.

is not before us on this appeal from dismissal of the indictment, and we intimate no view on the matter.

The judgment of the District Court is

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

In this case, as in *Bryson* v. *United States, ante,* p. 64, the relevant inquiry is whether "constitutionally speaking it was 'within the jurisdiction'" of a government agency to require the filing of certain information. *Id.,* at 74 (dissenting opinion). In *Marchetti* v. *United States,* 390 U. S. 39, 61, we held that the statutory requirement of filing Internal Revenue Service Form 11–C is not unconstitutional *per se.* It is clear, however, that under *Marchetti, supra,* and *Grosso* v. *United States,* 390 U. S. 62, the "jurisdiction" of the Internal Revenue Service to require this form to be filed is subject to the Fifth Amendment privilege against self-incrimination.

This is not a case where an individual, with knowledge that he has a right to refuse to provide information, nonetheless provides false information. Under the decisions in *United States* v. *Kahriger,* 345 U. S. 22, and *Lewis* v. *United States,* 348 U. S. 419, which were controlling at the time Knox filed his wagering form, Knox faced prosecution under 26 U. S. C. § 7203 for failure to file the form, despite claims of self-incrimination. The Government's requirement to file the wagering form was unconditional. The majority argues that by the terms of *Marchetti* the Government is not prohibited from requesting the form, but is only prohibited from prosecuting an individual for his failure to comply with the request. *Ante,* at 80, n. 3. The question in this case, however, is not whether the Government has the power to *request* the form to be filed, but whether it has the power to *require* the form to be filed. If Knox had

merely been requested to file the form and, with full knowledge of his right to silence under the Fifth Amendment, had done so voluntarily, we would have quite a different case. That is not this case. Under the scheme then in effect, the Government demanded unconditionally that Knox file the form, regardless of the fact that it would incriminate him. Heavy penalties were placed on a failure to file the form.

Marchetti and *Grosso* held that those in Knox's position have the Fifth Amendment right to remain silent irrespective of the statutory command that they submit forms which could incriminate them. Had Knox asserted his right of silence under the Fifth Amendment, it is clear that the Internal Revenue Service could not, consistently with *Marchetti* and *Grosso*, have required him to file the wagering form.* Thus any argument that the Internal Revenue Service did have "jurisdiction" to require the form to be filed in this case would have to rest on a theory that Knox had "waived" his Fifth Amendment right by not asserting it in lieu of filing the form. A similar claim was made in *Grosso*, where the petitioner had not asserted his Fifth Amendment right as to certain counts concerning his failure to pay the special occupational tax imposed by 26 U. S. C. § 4411. The Court there said:

> "Given the decisions of this Court in *Kahriger* and *Lewis, supra,* which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB* [382 U. S. 70], we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." 390 U. S., at 71.

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* As the majority opinion states: "Nothing before us indicates that the hazard of incrimination faced by Knox was less substantial than that faced by Marchetti, or that Knox would have been disqualified for any other reason from asserting the privilege . . . ." *Ante,* at 83 n. 6.

That reasoning is equally applicable here, for *Kahriger* and *Lewis* were still on the books at the time Knox filed his form. And see *Leary* v. *United States,* 395 U. S. 6, 27–29.

For the reasons stated in my dissent in *Bryson, ante,* p. 73, and in MR. JUSTICE BLACK's separate opinion in *Dennis* v. *United States,* 384 U. S. 855, 875, if the Internal Revenue Service had no constitutional authority to require Knox to file any wagering form at all, his filing of a form which included false information in no way prejudiced the Government and is not, in my view, a matter "within the jurisdiction" of the Internal Revenue Service.

I would affirm the judgment below.

MINOR *v.* UNITED STATES

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

No. 189. Argued October 15, 1969—
Decided December 8, 1969*

Petitioner in No. 189 was convicted of selling heroin to an undercover agent not pursuant to a written order on an official form, in violation of § 2 of the Harrison Narcotics Act, 26 U. S. C. § 4705 (a). In No. 271, petitioner was convicted of selling marihuana to an agent who did not have the official order form required by § 6 of the Marihuana Tax Act, 26 U. S. C. § 4742 (a). The Court of Appeals affirmed both convictions over objections that the statutory obligation to sell only pursuant to an official order form violated petitioners' Fifth Amendment privilege against self-incrimination. *Held:*

1. With respect to the Marihuana Tax Act, the petitioner seller's claim of violation of his privilege against self-incrimination is not substantial. Pp. 91–94.

(a) There is no real possibility that purchasers would comply with the order form requirement even if the seller insisted on selling only pursuant to the prescribed form, in view of the $100 per ounce tax on an unregistered transferee; the illegality under federal and state law; and the fact that the Fifth Amendment, as held in *Leary* v. *United States,* 395 U. S. 6, relieves unregistered buyers of any duty to pay the tax and secure the order form. P. 92.

(b) In *Leary, supra,* the statute purported to make all marihuana purchases legal from the buyer's viewpoint at his option; but to exercise that option and avoid the federal penalty, he was forced to incriminate himself under other laws. Here, compliance by selling is foreclosed as a viable option, not because the seller might incriminate himself, but because he will seldom, if ever, encounter an unregistered purchaser willing and able to secure the order form. In such a case, "full and literal" com-

*Together with No. 271, *Buie* v. *United States,* also on certiorari to the same court.

pliance by the seller with § 4742 (a) means simply that he cannot sell at all. Pp. 92–93.

(c) That there is a small number of registered marihuana dealers does not change this result, since petitioner's customer was not a registered dealer, and it is unlikely that even a registered dealer would present an order form to an unregistered seller. Pp. 93–94.

2. Petitioner seller's self-incrimination claim under the Harrison Narcotics Act is likewise insubstantial. Pp. 94–98.

(a) Petitioner's argument which assumes that an order form would be forthcoming if he refused to sell without it, is unrealistic, there being no substantial possibility that a buyer could have secured an order form to obtain heroin, virtually all dealings in which are illicit. Pp. 96–97.

(b) Since petitioner's customer was not a registered buyer, the alleged possibility of incrimination is purely hypothetical. P. 97.

(c) Even if petitioner's customer were registered, the result would probably be the same, since it is unlikely that a registered dealer would enter the name of an unregistered seller on the order form and record what would surely be an illegal sale. Pp. 97–98.

No. 189, 398 F. 2d 511, and No. 271, 407 F. 2d 905, affirmed.

Phylis Skloot Bamberger, by appointment of the Court, *post,* p. 809, argued the cause for petitioner in No. 189. With her on the briefs was *William E. Hellerstein. David A. Diamond* argued the cause and filed a brief for petitioner in No. 271.

Peter L. Strauss argued the cause for the United States in No. 189. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein. Joseph J. Connolly* argued the cause for the United States in No. 271. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Miss Rosenberg,* and *Mervyn Hamburg.*

MR. JUSTICE WHITE delivered the opinion of the Court.

These cases raise related questions about the availability of the Fifth Amendment as a defense to convictions for selling narcotic drugs and marihuana without the written order forms required by law.

James Minor, petitioner in No. 189, sold heroin on two separate occasions in 1967 to an undercover narcotics agent. Having waived trial by jury, petitioner was convicted in the United States District Court for the Southern District of New York of selling narcotics not pursuant to a written order on an official form—a violation of § 2 of the Harrison Narcotics Act, now 26 U. S. C. § 4705 (a).[1]

Michael Buie, petitioner in No. 271, sold five packages of marihuana in May 1967 to an undercover narcotics agent. The agent did not have the official order form required for such transactions by § 6 of the Marihuana Tax Act, now 26 U. S. C. § 4742 (a).[2] A jury in the United States District Court for the Southern District of New York convicted petitioner of violating § 4742 (a).

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[1] Section 4705 (a) provides:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

[2] Section 4742 (a) provides:

"It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Under 26 U. S. C. § 7237 (b), any person who violates the provisions of §§ 4705 (a) or 4742 (a) "shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000."

In separate opinions, the Court of Appeals for the Second Circuit affirmed both convictions over objections in each case that the statutory obligation to sell only in pursuance of an official order form violated petitioner's Fifth Amendment privilege against self-incrimination. *United States* v. *Minor,* 398 F. 2d 511 (1968); *United States* v. *Buie,* 407 F. 2d 905 (1969). We granted certiorari, 395 U. S. 932 and 976, to consider petitioners' Fifth Amendment claims, particularly in light of our intervening decision in *Leary* v. *United States,* 395 U. S. 6 (1969). For the reasons that follow, we affirm the judgments in both cases.

We deal first with No. 271. Under pertinent provisions of the Marihuana Tax Act, 26 U. S. C. §§ 4751–4753, every person who sells, deals in, dispenses, or gives away marihuana must register with the Internal Revenue Service and pay a special occupational tax. The Act also imposes a tax on transfers of marihuana, to be paid by the transferee; the rate for those who have registered and paid the occupational tax is $1 per ounce; for those who have not or who cannot register the rate is $100 per ounce. Under § 4742 (a) it is illegal to transfer marihuana except pursuant to a written order of the transferee on a form obtained by the latter at the time he pays the transfer tax. The order form when issued must carry the name and address of both buyer and seller and the amount of marihuana to be purchased. 26 U. S. C. § 4742 (c). Other provisions of § 4742 require the form to be issued in triplicate, one copy to be retained by the Internal Revenue Service, the other copy to be kept in the buyer's files, and the original to be delivered to the seller and retained by him. 26 U. S. C. § 4742 (d). Both original and copies are open to inspection by federal and state law enforcement officers. 26 U. S. C. §§ 4742 (d), 4773.

Buie argues that because the buyer's order must be on the form issued by the Secretary of the Treasury and

because § 4742 (c) requires the seller's name and address to be on the form before its issuance to the buyer, the seller is forced to incriminate himself: he is forced to insist on an order form linking him to an illicit transaction and in many instances must furnish one of those links himself by giving his name to the buyer so that the latter will have the data necessary to secure the form. Moreover, it is said that the very act of selling pursuant to the order form forces the seller to admit that he is the person named in the document and to acknowledge the sale of specified amounts of marihuana on a specified date; the sale also leads to the further requirement that both seller and buyer retain a copy of the form open to inspection by law enforcement officials.

We have considerable doubt that any of these arguments would withstand close scrutiny,[3] but we find it unnecessary to appraise them in detail because we have concluded that there is no real and substantial possibility that Buie's purchaser, or purchasers generally, would be willing to comply with the order form requirement even if their seller insisted on selling only pursuant to the form prescribed by law.

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[3] The obligation to furnish the necessary information is in terms placed on the buyer; while his compliance with that obligation may "inform" on the seller, it would not ordinarily be thought to result in the latter's "self-incrimination." Nor is there anything in the record to suggest that buyers cannot get a seller's name except through the seller himself, or that the simple act of selling pursuant to an order form—even assuming the act is "testimonial" for purposes of the Fifth Amendment—adds significantly to the information that the Government has already obtained from the buyer. Finally, whatever the merits of a seller's attempt to assert the privilege in a prosecution for failure to keep and exhibit the order forms, it need not follow that he can similarly dispense with the requirement that he sell only to buyers who first identify themselves, via the order form, as lawful purchasers. Cf. *Nigro* v. *United States,* 276 U. S. 332, 351 (1928); *United States* v. *Doremus,* 249 U. S. 86, 94 (1919).

The situation of the buyer is this: if he applies for the order form he must announce his intention to purchase marihuana—a transaction that, if he is unregistered, will involve a tax of $100 for each ounce of marihuana involved in the impending sale and that is illegal under both federal and state law. We have great difficulty in believing, and nothing in this record convinces us, that one who wishes to purchase marihuana will comply with a seller's request that he incriminate himself with federal and local authorities and pay $100 per ounce in taxes in order to secure the order form. The possibility is particularly unlikely in view of the fact that the Fifth Amendment relieves unregistered buyers of any duty to pay the transfer tax and secure the incriminating order form. *Leary* v. *United States,* 395 U. S. 6 (1969). Except that they are sources of marihuana, sellers have no magic power over buyers; and the characteristics of marihuana do not suggest that buyers would be driven by such urgent need that to get the drug they would incriminate themselves at the seller's behest and pay the prohibitive tax imposed on the transfer. As insistent as sellers might be, it is extremely unlikely that buyers would comply.

Buie's situation thus bears little resemblance to the situation that confronted Leary. The vice of the statute in that case—as in *Marchetti* v. *United States,* 390 U. S. 39, *Grosso* v. *United States,* 390 U. S. 62, and *Haynes* v. *United States,* 390 U. S. 85 (1968)—stemmed from the dilemma that confronted the buyer. The statute purported to make all purchases of marihuana legal from the buyer's viewpoint at his option; all he had to do to avoid the federal penalty was to secure the form and pay the tax. But to exercise that option and avoid the federal penalty, he was forced to incriminate himself under other laws. In the present case, the first horn of this dilemma does not confront the seller. In the

face of a buyer's refusal to secure the order form, the option of making a legal sale under federal law is foreclosed by the buyer's decision, and "full and literal compliance" with the law by the seller means simply that he cannot sell at all.[4] There is no real and substantial possibility that the § 4742 (a) order form requirement will in any way incriminate sellers for the simple reason that sellers will seldom, if ever, be confronted with an unregistered purchaser who is willing and able to secure the order form.

This conclusion is not affected by the fact that there is a tiny number of registered marihuana dealers—some 83 in the entire country according to government figures for 1967.[5] In order to register, dealers must show that they are in compliance with local laws[6] and, when

[4] It would have been no answer in *Leary* to suggest that the buyer avoid his dilemma by not buying. See *Marchetti* v. *United States,* 390 U. S. 39, 51–52. But the buyer in *Leary,* unlike the seller here, was presented with the possibility of both purchasing and complying with the federal law, if he would only incriminate himself. In the present case, compliance by selling is foreclosed as a viable option, not because the seller might incriminate himself, but because the buyer refuses to meet a specified condition. Nothing in the Fifth Amendment prevents Congress from restricting a seller's market to specified classes of duly licensed buyers. And although the buyer's refusal to comply with the Act's requirements may stem from his fear of incrimination, the buyer's personal privilege cannot be raised by the seller as an excuse for evading the clear statutory requirement. See *George Campbell Painting Corp.* v. *Reid,* 392 U. S. 286 (1968); *Rogers* v. *United States,* 340 U. S. 367 (1951).

[5] U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 42 (1968).

[6] The regulations, 26 CFR §§ 152.22, 152.23, which limit registration to persons whose dealings are legal under relevant state and local laws, are supported by the legislative history and represent what is by now long-established administrative practice. See *Leary* v. *United States,* 395 U. S. 6, 24 n. 38 (1969); H. R. Rep. No. 792, 75th Cong., 1st Sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st Sess., 3 (1937); Hearings on H. R. 6906 before a subcommittee of

registered, can get order forms by paying a transfer tax of only $1 per ounce. A registered dealer is thus not subject to the deterrent pressures operating on the unregistered dealer. But the possibility that a registered dealer would present an order form to an unregistered seller like Buie is itself a hypothesis more imaginary than real; any buyer who can purchase marihuana from a legitimate source is hardly likely to find it to his advantage to secure the drug instead on the illegal market. In any event, it is quite clear in this case that Buie's customer was not a registered dealer. Nor is there anything to suggest that he would have been willing or able to get an order form had he been asked.

No. 189. The same result must follow in Minor's case and for similar reasons. The Harrison Narcotics Act, 26 U. S. C. § 4701 *et seq.*, applies to various drugs, including heroin. Dealers must register and pay an occupational tax, 26 U. S. C. §§ 4721–4722; producers or importers who sell must purchase stamps and affix them to the package, 26 U. S. C. §§ 4701, 4703, 4771 (a)(1); and it is illegal to purchase or sell except from the original stamped package, 26 U. S. C. § 4704 (a). As in the case of the Marihuana Tax Act, all transfers, with exceptions not relevant here, must be made pursuant to a written order form issued by the Government. 26 U. S. C. § 4705 (a). Only dealers who are in compliance with state law may register, and only registered dealers may secure order forms. 26 U. S. C. §§ 4705 (f), (g); see 26 U. S. C. § 4721; 26 CFR § 151.24. Order forms are issued in triplicate to proper applicants and are stamped only with the name of the prospective purchaser. 26 U. S. C. § 4705 (f); 26 CFR § 151.161.

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the Senate Committee on Finance, 75th Cong., 1st Sess., 6 (1937); Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 8 (1937).

When a purchaser decides to execute a form, he fills in the exact date of the order and the number and type of drugs requested and signs his name to the form. 26 CFR §§ 151.163–151.165, 151.167. The purchaser retains the duplicate and delivers the original and the triplicate thus executed to the seller, who enters the number and size of the stamped packages furnished and the date when each item is filled. 26 CFR §§ 151.161 (a), 151.185. A regulation, 26 CFR § 151.201, requires the seller to forward the triplicate to the Internal Revenue Service at the end of the month. Section 4705 (d) of the Act requires both seller and buyer to keep their respective copies for a period of two years and to make them accessible to inspection by law enforcement officers.

The order form provisions for narcotic drugs thus differ from the marihuana provisions in three principal respects. First, the prospective seller's name does not have to be given to the Government when the order form is secured, but is filled in only when the form is subsequently executed.[7] Second, although the marihuana seller apparently does not have to add anything to the order form in making the sale, the seller of narcotics must enter the amounts sold and the dates. Finally, unlike the Marihuana Tax Act, which at least in theory permits any person to buy as long as the transfer tax is paid, the Harrison Narcotics Act explicitly forbids the sale of order forms to any but registered dealers and permits registra-

[7] It is not specified in either the statute or the regulations when the blank for the seller's name is filled in or by whom. But the form itself is addressed "to" the seller, and the form and the regulations contain provisions that enable a form "made out to" one seller, to be endorsed by him to another if the first seller cannot fill the order. See 26 CFR § 151.189. This suggests that it is the buyer who fills in the seller's name when he sends in the order. Whether or not that is the case in fact is irrelevant under the analysis in the text.

tion only by those "lawfully entitled" under the laws of their State to deal in the drug.[8]

Like Buie, Minor argues that compliance with the order form provision would compel him to give incriminating information to be preserved in his and the buyer's files and to be made readily accessible to law enforcement agents. Like Buie's argument, Minor's argument assumes that an order form would otherwise be forthcoming if he refused to sell without it [9] and founders if in reality there is no substantial possibility that the buyer would or could have secured an order form. As in Buie's case, we are convinced that this possibility is an unreal one. Prospective buyers who have either failed to register or cannot register because their dealings in the drug are illicit—and petitioner himself strenuously argues that virtually all dealings in heroin are illicit [10]—simply

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[8] The difference between the availability of order forms under the Harrison Narcotics Act and the Marihuana Tax Act was explicitly recognized by Congress when it passed the latter Act. See *Leary* v. *United States*, 395 U. S. 6, 21–22 (1969). The regulation restricting registration to those "lawfully entitled" to deal in narcotic drugs, 26 CFR § 151.24, finds specific support in the language of the Act. See 26 U. S. C. §§ 4705 (g), 4721.

[9] Even if order forms could realistically be secured, Minor's Fifth Amendment arguments are no more persuasive than Buie's. See n. 3, *supra*.

[10] See Brief for Petitioner 22–23. Convinced that "[h]eroin has no medical value that is not better served by legitimate drugs," S. Rep. No. 1997, 84th Cong., 2d Sess., 7 (1956), Congress in 1956 required the surrender of all theretofore lawfully possessed heroin, to be distributed only as approved by the Secretary for purposes of scientific research. 18 U. S. C. § 1402. The Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended, 21 U. S. C. §§ 173, 174, effectively prohibits the importation of heroin or of opium for the purpose of manufacturing heroin, and makes it a felony to traffic in drugs knowing them to have been unlawfully imported. The Narcotics Manufacturing Act of 1960, 74 Stat. 55, 21 U. S. C. § 501 *et seq.*, prohibits the manufacturing of heroin except as authorized for limited scientific purposes. Given the resulting absence of orig-

are not among the class of persons to whom sellers are permitted to sell under any condition. When dealing with buyers in this class, the seller faces no risk of incrimination by reason of § 4705 (a) since there will be and can be no order form involved. Confronted with would-be buyers in this class, "full and literal compliance" with § 4705 (a) leaves the seller only one alternative: not to sell. Since from this record it is clear that Minor's customer was not a registered buyer, the alleged possibility of incrimination is purely hypothetical.

We doubt that our conclusion would be different even if Minor's customer were registered. It is true that there were some 400,000 registered dealers under the Harrison Narcotics Act in 1967 [11] and that registered dealers can readily get order forms issued in blank. It is conceivable, of course, that a registered dealer would seek to buy heroin on the illegal market, but it is difficult to imagine that he would enter the name of an unregistered seller on the order form and make a record of what would surely be an illegal sale.[12] Such unlikely possibilities

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inal stamped packages of heroin, 26 U. S. C. § 4704 (a) effectively forbids buying, selling, dispensing, or distributing the drug. Since for all practical purposes there is thus no legitimate dealing in heroin, any attempt to use an order form to purchase the drug would almost certainly subject the buyer to prosecution under 26 U. S. C. § 4705 (g):

"It shall be unlawful for any person to obtain by means of said order forms narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

[11] See U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 22, 42 (1968).

[12] Even if the hypothetical became a reality, it is doubtful that the incriminating information would get back to the Government via the buyer, who would himself be guilty of a violation of the narcotics laws. See n. 10, *supra*. See also 26 CFR § 151.181, which provides that order forms may be filled only by registered sellers—a class to which Minor does not belong. It is significant that of the

present only "imaginary and insubstantial" hazards of incrimination, rather than the "real and appreciable" risks needed to support a Fifth Amendment claim.[13]

The judgments in both cases are affirmed.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent in No. 271.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting in No. 189.

The guilt of petitioner on this record seems plain. Two counts charge sales of heroin on two different dates in 1967 "not in pursuance of a written order . . . form." He was found guilty on each count by the District Court, a trial by jury having been waived. The basis of his

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nearly 400,000 registered dealers in 1967, only four were reported during that year for a violation of the narcotics laws. See U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 22 (1968).

[13] The dissent suggests that the courts should refuse to enforce § 4705 (a) as part of a revenue measure. But these very order form provisions were upheld long ago as valid revenue laws even though they operated to prevent large classes of people from obtaining order forms—and hence from acquiring drugs—at all. *United States* v. *Doremus*, 249 U. S. 86 (1919); *Webb* v. *United States*, 249 U. S. 96 (1919); see *Nigro* v. *United States*, 276 U. S. 332 (1928). A statute does not cease to be a valid tax measure because it deters the activity taxed, because the revenue obtained is negligible, or because the activity is otherwise illegal. See, *e. g.*, *Marchetti* v. *United States*, 390 U. S. 39, 44 (1968); *United States* v. *Kahriger*, 345 U. S. 22, 28 (1953); *License Tax Cases*, 5 Wall. 462 (1867).

Even viewing § 4705 (a) as little more than a flat ban on certain sales, it is sustainable under the powers granted Congress in Art. I, § 8. See *Yee Hem* v. *United States*, 268 U. S. 178, 183 (1925). *Brolan* v. *United States*, 236 U. S. 216, 222 (1915); cf. *United States* v. *Sullivan*, 332 U. S. 689 (1948); *United States* v. *Darby*, 312 U. S. 100 (1941).

attack upon his conviction in this Court is that the requirement of an order form violates his privilege against self-incrimination. But that is not the end of the matter for me. Mr. Justice Holmes used to say that one dealing with the Government should turn square corners. See *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141, 143. When the present all-powerful, all-pervasive Government moves to curtail the liberty of the person, it too should turn square corners.

The statute involved in this case, 26 U. S. C. § 4705 (a), was derived from the Anti-Narcotic Act of December 17, 1914, 38 Stat. 785, commonly called the Harrison Narcotics Act. This Act, as amended, imposes an occupational tax on registered dealers in narcotics, 26 U. S. C. §§ 4721–4722, and also imposes a commodity excise tax on narcotics sold or removed for consumption or sale, 26 U. S. C. § 4701. Under § 4705 (a), with certain exceptions not relevant here, all transfers of narcotics must be made pursuant to an official order form given to the transferor by the transferee. The order form can be obtained only by persons properly registered to deal in narcotics. It was conceded by the Government on oral argument, however, that "it is impossible to secure an order form for the purchase of heroin. . . . The order forms may only be used to purchase a lawful drug for a lawful purpose. Heroin is an unlawful drug for which there is no lawful purpose."

The Federal Government does not have plenary power to define and punish criminal acts. Its power in this regard derives from other powers specifically delegated to it by the Constitution, as the Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 4705 (a) derives from the power to "lay and collect Taxes." Art. I, § 8. Its constitutionality on this basis was sustained in *United States* v. *Doremus,* 249 U. S. 86—a five-to-four decision. It was there said that the "order form" requirement tended "to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue," and also tended "to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law." *Id.,* at 94.

As I view this case, the Government is punishing an individual for failing to do something that the Government has made it impossible for him to do—that is, obtain an order form from the prospective purchaser prior to making a sale of heroin. Petitioner did, of course, have the option not to sell the heroin, and in that sense his compliance with the statute was indeed quite possible. This argument, however, overlooks the fact that the statute does not simply outlaw all sales of heroin. The critical interest of the Government is necessarily in the collecting of the tax imposed by the Act, and it is the order form which provides the crucial link to this proper constitutional purpose. In *Nigro* v. *United States,* 276 U. S. 332, 341, Chief Justice Taft, speaking for the Court, said:

> "In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid . . . ."

Thus it is the order form—not the mere sale—that constitutes the heart of the offense for which this petitioner was convicted. I do not see how the Government can make a crime out of not receiving an order form

and at the same time allow no order forms for this category of sales.

Nor is it relevant to suggest, as does the majority opinion, *ante,* at 98 n. 13, that a statute imposing a flat ban on sales of heroin might be sustainable under the Commerce Clause. We are concerned in this case with what the Congress did, not with what it might have done or might yet do in the future. It is clear that what Congress did in § 4705 (a) was to enact a taxing measure. And the crime charged was not selling heroin, but selling it "not in pursuance of a written order . . . form," as prescribed in § 4705 (a).

I would reverse this judgment of conviction.

MORALES *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 86. Argued November 20, 1969—Decided December 8, 1969

Petitioner went to his mother's place of business after his mother told him by telephone that the police wished to talk with him. He was apprehended and taken to a police station, where within 15 minutes he confessed to a murder by stabbing. He wrote and signed a statement and later repeated the substance of the statement in response to further police questioning. A separate hearing on the voluntariness of the confessions was held, and the trial judge found them voluntary and admitted them into evidence. Petitioner was convicted and the conviction was affirmed by the Appellate Division of the New York Supreme Court. In the New York Court of Appeals, petitioner for the first time raised a Fourth Amendment issue, claiming that there was no probable cause for his arrest and that the confessions, even if voluntary, were inadmissible fruits of the illegal detention. The Court of Appeals affirmed, holding that the State could conduct brief custodial interrogation of "those persons reasonably suspected of possessing knowledge of the crime under investigation in circumstances involving crimes presenting a high degree of public concern affecting the public safety." *Held:*

1. The determination that the confessions were voluntary is not disturbed, as the trial occurred prior to *Miranda* v. *Arizona*, 384 U. S. 436, and the totality of the circumstances shows that the confessions were not coerced.

2. The question of the legality of custodial questioning on less than probable cause for a full-fledged arrest, which goes beyond *Terry* v. *Ohio*, 392 U. S. 1, and *Sibron* v. *New York*, 392 U. S. 40, is not decided in view of the absence of a record which squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises.

22 N. Y. 2d 55, 238 N. E. 2d 307, vacated and remanded.

Richard T. Farrell argued the cause and filed a brief for petitioner.

Burton B. Roberts argued the cause for respondent. With him on the brief was *Daniel J. Sullivan.*

PER CURIAM.

On October 4, 1964, a murder by stabbing took place in an elevator of an apartment building where petitioner Morales' mother lived and where Morales frequently visited. On October 13, his mother informed Morales by telephone that the police wished to talk with him; petitioner said that he would come that evening to his mother's place of business. This he did. He was apprehended by police officers and taken to the police station, arriving at 8:30 p. m. Within 15 minutes he had confessed to the crime and by 9:05 p. m. he had written and signed a statement. In response to subsequent questioning by police officers, Morales later repeated the substance of this confession. At the trial, the court held a separate hearing on the voluntariness of the confessions, found them voluntary, and admitted them over Morales' objection. Morales was convicted, the jury apparently rejecting his alibi defense that he was with his mother at the time of the murder. The Appellate Division of the New York Supreme Court affirmed without opinion. *People* v. *Morales*, 27 App. Div. 2d 904, 280 N. Y. S. 2d 520 (1967). In the New York Court of Appeals, Morales for the first time raised a Fourth Amendment issue, claiming that there was no probable cause for his detention at the time of his confessions and that the confessions, even if voluntary, were inadmissible fruits of the illegal detention. The State asserted that the issue had not been decided below and that there had hence been no opportunity to make a record of the relevant facts; moreover, the State claimed that Morales had voluntarily surrendered himself for questioning and that in any event the voluntary confessions were the result of an independent choice by Morales such that the legality of the detention was irrelevant to the admissibility of the confessions.

The Court of Appeals affirmed, accepting without discussion the trial court's finding as to the voluntariness of Morales' confessions. *People* v. *Morales,* 22 N. Y. 2d 55, 238 N. E. 2d 307 (1968). The court dealt with and rejected the Fourth Amendment claim not on the ground that there was probable cause to arrest but rather on the ground that the police conduct involved was reasonable under the circumstances of the case. Although Morales was not free to leave at the time he was apprehended and would have been restrained had he attempted to flee, the Court of Appeals stated that his detention was not a formal arrest under New York law and that had he refused to answer questions in the police station (where he was entitled to have a lawyer if he desired one) he would have been free to leave. The Court of Appeals held that the State had authority under the Fourth Amendment to conduct brief custodial interrogation of "those persons reasonably suspected of possessing knowledge of the crime under investigation in circumstances involving crimes presenting a high degree of public concern affecting the public safety." 22 N. Y. 2d, at 65, 238 N. E. 2d, at 314. We granted certiorari, 394 U. S. 972 (1969).

After considering the full record, we do not disturb the determination of the trial court, affirmed by the New York appellate courts, that Morales' confessions were voluntarily given. The trial occurred prior to *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and the totality of the circumstances surrounding the confessions shows that the confessions were voluntary, not coerced.

We should not, however, decide on the record before us whether Morales' conviction should otherwise be affirmed. The ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, is manifestly important, goes beyond

our subsequent decisions in *Terry* v. *Ohio,* 392 U. S. 1 (1968), and *Sibron* v. *New York,* 392 U. S. 40 (1968), and is claimed by petitioner to be at odds with *Davis* v. *Mississippi,* 394 U. S. 721 (1969). But we have concluded after considering the parties' briefs and hearing oral argument that there is merit in the State's position that the record does not permit a satisfactory evaluation of the facts surrounding the apprehension and detention of Morales. A lengthy hearing was held on the question of the voluntariness of the confessions, but the basis for the apprehension of Morales does not appear to have been fully explored since no challenge to the lawfulness of the apprehension was raised until the case came to the Court of Appeals. Although that court stated that "[i]t may be conceded that the apprehending detectives did not have probable cause to justify an arrest of defendant at the time they took him into custody," 22 N. Y. 2d, at 58, 238 N. E. 2d, at 310, the court later said that "[t]he checkerboard square of the police investigation, although resting upon circumstantial evidence, pointed only to defendant. . . . In fact, defendant was the only person the police could have reasonably detained for questioning based upon the instant record." 22 N. Y. 2d, at 64, 238 N. E. 2d, at 313.

Given an opportunity to develop in an evidentiary hearing the circumstances leading to the detention of Morales and his confessions, the State may be able to show that there was probable cause for an arrest or that Morales' confrontation with the police was voluntarily undertaken by him or that the confessions were not the product of illegal detention. In any event, in the absence of a record that squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises, we choose not to grapple

with the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest.

We accordingly vacate the judgment below and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK dissents and would affirm.

Per Curiam

CONWAY *v.* CALIFORNIA ADULT AUTHORITY ET AL.

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

No. 40. Argued November 12, 1969—Decided December 8, 1969

Certiorari was granted to consider petitioner's contention that his privilege against compulsory self-incrimination had been infringed by the California prison authorities. Petitioner, who was serving consecutive sentences of not less than five years each, attacked the constitutionality of his confinement pursuant to the California Indeterminate Sentence Law. He asserted that respondent Adult Authority extended his term beyond the date tentatively set for his discharge solely because he refused to admit his guilt. Respondents filed no response to the petition for habeas corpus in the District Court, and in response to the petition for certiorari merely argued that petitioner's claim was legally insubstantial. In their brief on the merits here they have presented documentary evidence that the actual facts do not present the issue for which certiorari was granted. *Held:* The writ of certiorari is dismissed as improvidently granted.

Certiorari dismissed.

Charles Stephen Ralston, by appointment of the Court, 394 U. S. 941, argued the cause and filed briefs for petitioner.

Arlo E. Smith, Chief Assistant Attorney General of California, argued the cause for respondents. With him on the brief were *Thomas C. Lynch,* Attorney General, and *George R. Nock,* Deputy Attorney General.

PER CURIAM.

The petition for habeas corpus in this case, which was filed in the District Court for the Northern District of California and which was prepared by petitioner *pro se,* attacked the constitutionality of petitioner's confinement in the state prison system pursuant to the California

Indeterminate Sentence Law.[1] Petitioner recited that he was convicted in 1952 on two counts of first-degree robbery and was given consecutive sentences of not less than five years each, with no maximum prescribed by law. California law provides that where no maximum term is set, the punishment shall be life imprisonment subject to the power of the California Adult Authority to "determine and redetermine" the length of time that a prisoner shall be required to serve. Cal. Penal Code §§ 671 (1955), 1168, 3020 (1956).

Petitioner asserted that in June 1961 he appeared before the Adult Authority for parole consideration, as he had done on a yearly basis during his confinement. According to petitioner, during that appearance the members of the Authority evinced an intention to extend his term beyond March 1962, the date that had been tentatively set for his discharge, solely because petitioner refused to admit his guilt.[2] Shortly after the appearance, the Adult Authority rescinded its earlier action scheduling petitioner for release in 1962; no new date for release was fixed, and petitioner has remained in custody continuously since that time.

The petition for habeas corpus stated flatly that the appearance before the Authority in June 1961 was for routine parole consideration; petitioner claimed that he had been free from infractions of prison rules for at least

[1] See Cal. Penal Code § 1168 (1956) and provisions there listed.

[2] Petitioner claimed that his discussion with the members of the Authority had turned to what he planned to do if released. When petitioner stated that he expected to go "to Bakersfield," one member responded: "But that is where you got into this trouble. What are you planning to do there?" Petitioner declared, "I'm going to fight my case," prompting the member to ask whether petitioner had not admitted to the Authority, two years earlier, that he was guilty. After petitioner denied the previous admission, the members raised—assertedly for the first time—the possibility of extending petitioner's term.

a year prior to the appearance. He further declared that he was given no reason for the redetermination of his sentence, and received no notice or hearing concerning any possible basis for such action. In conclusion, petitioner stated that, "obviously, the only reason for this action was to coerce petitioner to plead guilty and not challenge his conviction after being released on discharge."

Respondents filed no response to the petition in the District Court. That court denied the writ without a hearing, in a brief order stating that no federal questions had been presented. The Court of Appeals for the Ninth Circuit denied a certificate of probable cause to appeal for the reasons expressed by the District Court, and petitioner applied to this Court for a writ of certiorari. On the facts recited by petitioner, we granted certiorari to consider his contention that his privilege against compulsory self-incrimination had been infringed by the prison authorities. 393 U. S. 1062 (1969).

In its brief on the merits, respondents have brought to our attention a series of prison documents, whose accuracy has in no way been drawn into question by petitioner, that cast petitioner's detention in a light wholly different from that shed by his petition for certiorari. These documents show that in December 1960 Conway was served with a notice charging him with violation of prison rules and informing him that the violation might result in a refixing of his prison term; he attended a hearing at which he was found guilty of fighting with another prisoner and was sentenced to three days in isolation, with a recommendation that his Adult Authority appearance be postponed until June 1961. Following that appearance, as petitioner notes, the Authority rescinded its earlier action fixing a determinate sentence, thereby reinstating by operation of law his initial indeterminate sentence. Thus, it now appears respondents have documentary evidence that the actual facts simply do not

present the issue for which certiorari was granted by us.

That this imposition on this Court has been revealed only at this late stage seems to have been the result of the policy of the Attorney General of California, as explained in the respondents' brief, to make no response to habeas corpus petitions of state prisoners unless the court in which a petition is filed requests a response, as for example, so respondents say, by issuing an order to show cause why the writ should not be granted. Since no response eventuated in this instance and respondents also failed to flush the problem at the certiorari stage,[3] both this Court and the attorney appointed by the Court to represent petitioner here have unwittingly been placed in the unfortunate posture of addressing a situation that does not exist.

In this state of affairs we decline to adjudicate this case. Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court. Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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[3] In response to the petition for certiorari respondents merely locked horns with the allegations of the petition as filed, without drawing the Court's attention to the actual facts as subsequently revealed in its brief on the merits.

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL. *v.* MIDDLEWEST MOTOR FREIGHT BUREAU ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 539. Decided December 8, 1969

Appeal dismissed.

Arthur A. Arsham and *John J. C. Martin* for appellants.

Roland Rice for Middlewest Motor Freight Bureau et al., and *Solicitor General Griswold* and *Fritz Kahn* for the Interstate Commerce Commission, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction.

INTERNATIONAL NICKEL CO., INC. *v.* CITY OF BAYONNE

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 542. Decided December 8, 1969

54 N. J. 94, 253 A. 2d 545, appeal dismissed.

Prospero DeBona for appellant.

Nicholas A. Panepinto for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

AMBROSE ET AL. *v.* WELLS ET AL.

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

No. 580. Decided December 8, 1969

Appeal dismissed.

John M. Armentano for appellants.

Robert B. McKay for Wells, and *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *George D. Zuckerman,* Assistant Attorney General, for Rockefeller et al., appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

GOODING, WARDEN *v.* WILSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 582. Decided December 8, 1969

303 F. Supp. 952, appeal dismissed.

Arthur K. Bolton, Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, *Marion O. Gordon* and *Courtney Wilder Stanton,* Assistant Attorneys General, and *Franklin Pierce* for appellant.

PER CURIAM.

The motion of the appellee for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

PERK, AUDITOR OF CUYAHOGA COUNTY *v.* OHIO EX REL. CORRIGAN, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY

APPEAL FROM THE SUPREME COURT OF OHIO

No. 590. Decided December 8, 1969

19 Ohio St. 2d 1, 249 N. E. 2d 525, appeal dismissed.

Gerald A. Donahue and *Donald M. Robiner* for appellant.

John T. Corrigan, pro se, and *John L. Dowling* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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

MISSISSIPPI POWER & LIGHT CO. *v.* CAPITAL ELECTRIC POWER ASSN.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 611. Decided December 8, 1969

222 So. 2d 399, appeal dismissed.

Bernard G. Segal, Samuel D. Slade, Sherwood W. Wise, Garner W. Green, and *Joshua Green* for appellant.

T. Harvey Hedgepeth for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BALTHAZAR ET UX. *v.* MARI LTD. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 593. Decided December 8, 1969

301 F. Supp. 103, affirmed.

Marshall Patner for appellants.

Maurice P. Raizes for Mari Ltd. et al., and *Daniel P. Coman, Thomas E. Brannigan,* and *Dean H. Bilton* for Boyle, 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.

MATHIS *v.* NELSON, WARDEN

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 620, Misc. Decided December 8, 1969

70 Cal. 2d 467, 450 P. 2d 290, appeal dismissed and certiorari denied.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci,* Deputy Attorney General, 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.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 599. Decided December 8, 1969

Affirmed.

R. Emmett Kerrigan, Ralph L. Kaskell, Jr., and *George W. Wise* for appellant.

Solicitor General Griswold, Assistant Attorney General McLaren, and *Irwin A. Seibel* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

Mr. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

HUESDASH *v.* HASKINS, CORRECTIONAL SUPERINTENDENT

APPEAL FROM THE SUPREME COURT OF OHIO

No. 816, Misc. Decided December 8, 1969

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.

UNITED FUEL GAS CO. *v.* HADEN, TAX COMMISSIONER OF WEST VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 617. Decided December 8, 1969

— W. Va. —, 167 S. E. 2d 890, appeal dismissed and certiorari denied.

C. E. Goodwin for appellant.

Chauncey H. Browning, Jr., Attorney General of West Virginia, and *William F. Carroll*, Assistant Attorney General, 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.

INGRAM *v.* CALIFORNIA

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

No. 1017, Misc. Decided December 8, 1969

272 Cal. App. 2d 435, 77 Cal. Rptr. 423, 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.

FOSTER *v.* CALDWELL, INDUSTRIAL INSTITUTE SUPERINTENDENT

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 72, Misc. Decided December 8, 1969

225 Ga. 1, 165 S. E. 2d 724, appeal dismissed and certiorari denied.

Reber F. Boult, Jr., Charles Morgan, Jr., Melvin L. Wulf, and *Eleanor Holmes Norton* for appellant.

Arthur K. Bolton, Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General, 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.

McMANN, WARDEN, ET AL. *v.* ROSS ET AL.

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

No. 153. Decided December 8, 1969

409 F. 2d 1016, vacated and remanded as to respondent Ross.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen* and *Brenda Soloff,* Assistant Attorneys General, for petitioners.

Thomas D. Barr for respondent Ross.

Frank S. Hogan, pro se, and *Michael R. Juviler* for the District Attorney of New York County as *amicus curiae* urging reversal.

PER CURIAM.

Upon consideration of the suggestion of mootness by reason of the death of respondent Ross the judgment of the Court of Appeals, as to Ross, is vacated and the case as to him is remanded to the United States District Court for the Eastern District of New York with directions to dismiss the petition for writ of habeas corpus as moot.

CARLOS *v.* NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 524. Decided December 8, 1969

Certiorari granted; 24 N. Y. 2d 865, 248 N. E. 2d 924, reversed.

Herald Price Fahringer and *Eugene Gressman* for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed, *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE and MR. JUSTICE HARLAN are of the opinion that certiorari should be denied. However, the case having been taken for review, they would affirm the judgment of the state court upon the premises stated in MR. JUSTICE HARLAN'S separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496 (1957), and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455 (1966).

SHANKER ET AL. *v.* RANKIN, CORPORATION COUNSEL OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 552. Decided December 8, 1969

25 N. Y. 2d 780, 250 N. E. 2d 584, appeal dismissed.

Ralph P. Katz for appellants.

J. Lee Rankin, pro se, Frederic S. Nathan, and *Stanley Buchsbaum* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

HOUSE OF SEAGRAM, INC. *v.* STATE LIQUOR AUTHORITY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 563. Decided December 8, 1969

25 N. Y. 2d 865, 250 N. E. 2d 873, appeal dismissed and certiorari denied.

H. Gardner Ingraham and *Emanuel Becker* for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Grace K. Banoff* 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.

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

FIRST NATIONAL BANK IN PLANT CITY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL.

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

No. 19. Argued October 16, 1969—Decided December 9, 1969*

Petitioner in No. 19, a national bank in Florida, having been granted permission by the Comptroller of the Currency of the United States, operated two off-premises services. (1) The bank operated an armored car (a "mobile drive-in"), equipped with a glass window and customer's service counter and staffed by a driver-guard and teller (both bank employees). The armored car delivered cash in exchange for checks and received cash and checks at the depositors' premises, the bank insuring the funds during transit. (2) In a shopping center about a mile from the home premises the bank maintained a secured receptacle, to which customers had keys, equipped with a writing table and bank forms. Monies and night bags were left at this facility, which was serviced daily by the armored car, the teller recording deposits by the customer's number and the driver-guard verifying all items collected by the teller. For these off-premises services the bank used a "Comprehensive Dual Control Contract" and transmittal slips which specified that in transporting funds the bank acted as agent for the customer and that funds would not be deemed deposited until delivered at the bank. Under § 7 of the McFadden Act a national bank may establish and operate a "branch" only under such conditions as state law would authorize a state bank to establish and operate such a branch. The Florida Comptroller requested petitioner bank to cease both services as violative of Florida law, which prohibits branch banking altogether. Thereupon the bank brought suit in the District Court for declaratory and injunctive relief. The United States Comptroller intervened on the bank's side and several state banks intervened in support of the Florida Comptroller. The District

*Together with No. 34, *Camp, Comptroller of the Currency* v. *Dickinson, Comptroller of Florida, et al.*, also on writ of certiorari to the same court.

Court held for petitioners, concluding that the services did not constitute branching within the meaning of § 7 (f) of the McFadden Act, which as set forth in 12 U. S. C. § 36 (f) defines a "branch" as including "any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." The Court of Appeals reversed. *Held:*

1. The policy of "competitive equality" between national and state banks is firmly embedded in the statutes governing the national banking system, and under the McFadden Act a national bank may establish a "branch" within the meaning of the federal definition in 12 U. S. C. § 36 (f) only under the same conditions as state law would authorize a state bank to do so, *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252. Pp. 130–133.

2. The term "branch bank" in 12 U. S. C. § 36 (f) includes *any* place for receiving deposits apart from the chartered premises. Here (regardless of the formal arrangements between the bank and its contracting customers) at the time a customer delivers money either to the armored car or the stationary receptacle, the bank has received a deposit within the meaning of that provision, and the place of the delivery is an "additional office or . . . branch place of business . . . at which deposits are received" within the federal definition of a branch bank in the statute. Pp. 134–137.

3. Since Florida does not permit branching privileges to state banks, the congressional policy of competitive equality forecloses the Comptroller of the Currency from modifying that standard. P. 138.

400 F. 2d 548, affirmed.

Robert S. Edwards argued the cause and filed briefs for petitioner in No. 19. *Deputy Solicitor General Springer* argued the cause for petitioner in No. 34. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Robert E. Kopp.*

William Reece Smith, Jr., argued the cause for respondents in both cases. With him on the brief was *V. Carroll Webb.*

James F. Bell, by special leave of Court, argued the cause for the National Association of Supervisors of State Banks as *amicus curiae* urging affirmance in both cases. With him on the brief was *Brian C. Elmer.*

E. Barrett Prettyman, Jr., filed a brief for the First National Bank of Cornelia, Georgia, et al. as *amici curiae* urging reversal in both cases.

Briefs of *amici curiae* urging affirmance in both cases were filed by *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, *J. Robert Coleman* and *Robert J. Castellani,* Assistant Attorneys General, *Robert Morgan,* Attorney General of North Carolina, and *Millard R. Rich, Jr.,* Assistant Attorney General, for the States of Georgia and North Carolina, and by *Horace R. Hansen* for the Independent Bankers Association of America et al.

Mr. Chief Justice Burger delivered the opinion of the Court.

In these cases we are called upon to construe § 7 of the McFadden Act of 1927, 44 Stat. 1228, as amended, 12 U. S. C. § 36, as it relates to the definition of a branch bank for the purpose of determining the scope of branch banking available to a national bank in a State that prohibits branches for state banks.

12 U. S. C. § 36 (f) provides in pertinent part:

> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

Florida prohibits all branch banking by state chartered banks; by statute a Florida bank may "have only one place of doing business," and all the business of the

bank is to be carried on at that place "and not elsewhere." [1] The issue must be resolved by determining what constitutes a "branch" or "additional office"; there is a threshold question of the extent to which this is governed by federal law.

The First National Bank in Plant City, Florida, is a national banking association organized and operated pursuant to the National Bank Act, 12 U. S. C. § 21 *et seq.;* it sought and received from the United States Comptroller of the Currency permission to operate two services for the convenience of customers; one was an armored car messenger service and the other an off-premises receptacle for the receipt of packages containing

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[1] Florida Stat. § 659.06 (1)(a) (1965) provides:

"659.06 *Place of transacting business; school savings; drive-in facilities.—*

"(1)(a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. . . .

. . . . . .

"(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

"The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965."

cash or checks for deposit. The Comptroller's letter authorizing the armored car messenger service relied upon paragraph 7490 of the Comptroller's Manual for National Banks,[2] a relatively recent ruling which specifically authorizes such a service. A second letter authorizing construction of an off-premises receptacle authorized such a service "as an incident to" the bank's ordinary business. Both letters contained explicit instructions to First National designed to insure that deposits so received would not become bank liabilities until actually in the hands of the bank teller at the chartered office or regular "banking house"; and that checks cashed for customers would be deemed paid at the bank when the cash was handed to the messenger, not when the cash was delivered to the customer by the armored car teller.

Relying on these letters, First National offered an armored car service and a secured receptacle for receipt of monies intended as deposits. The bank advertised "Full Service Banking at your doorstep . . ." and a "mobile drive-in . . . where customers may be served . . . ." A more detailed examination of the services shows that customers having an account with First National could, upon signing a "Comprehensive

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[2] Comptroller's Manual for National Banks ¶ 7490.

"*Messenger Service*

"To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer."

Dual Control Contract," [3] arrange to have the armored car call at their place of business to pick up cash and checks for deposit, or to bring cash to them in exchange for checks delivered to the armored car teller. The contract provided that in each situation the bank's armored car messenger would be the agent of the customer. Additionally, proffered deposits were accompanied by a transmittal slip upon which the customer itemized the funds being deposited in the same manner as with deposits made at the chartered office of the bank. The transmittal slip contained a "Contract" which provided that in this off-premises transaction the bank was the agent of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house." [4] Sums

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[3] "*Comprehensive Dual Control Contract*

"As agent for the undersigned depositor, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

"Under the Comprehensive Dual Control Contract, all monies, transported solely in padlocked money bags furnished by bank, shall be opened only under the dual control of two bank's tellers. For this purpose, bank will retain a pass key for depositor's bag(s); a key for each bag will be furnished depositor. The depositor expressly authorizes the service described and agrees to accept the bank's count of monies as final.

"The First National Bank in Plant City maintains hazard insurance covering holdup, employee fidelity, etc., for the benefit of the depositor for all amounts delivered to bank's messenger for delivery to bank and for all amounts requisitioned by depositor for delivery from bank to depositor. Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank's messenger for monies delivered to depositor. . . ."

[4] "*Contract*

"First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit

of cash for transmission to the customer were accompanied by a charge slip indicating that the customer's account had been charged for the amount of the order.

The armored car was owned and controlled by the bank; the teller and driver-guard in the car were bank employees. The bank paid the cost of armored car operations and assumed complete responsibility for the monies, checks, and deposits during transit by means of an insurance policy bought and paid for by it to protect the customer and the bank. The armored car service operated six days per week in Plant City and the surrounding trade area in Hillsborough and Polk Counties. The armored car had a plate glass window, a sliding drawer, and a counter on one side where customers might be served. The truck bore the name of the bank and had two-way radiophone communication with the bank. All movements and routing of the armored car were directed by the bank. First National handled about $1,000,000 per week through the armored car.

The stationary off-premises receptacle for receipt of monies intended for deposit was located in a shopping center one mile from First National's banking house in a space leased by the bank. The facility consisted of a secured receptacle for monies and night bags, together

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the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

"The bank maintains hazard insurance covering holdup, employee fidelity, etc. for the protection of the Principal for all amounts and items delivered to the bank's messenger by said Principal."

with a writing table supplied with envelopes and transmittal slips identical to those used by the armored car messenger service. The envelopes recited that the funds transported were accepted in accordance with the contract printed on the transmittal slip. A sign at the receptacle recited that the messenger who collected the funds acted as agent for the customer, that funds would not be deemed to have been deposited until delivered at the bank's premises, and that insurance on the funds was provided by the bank. Customers maintaining an account with the bank who had signed the Comprehensive Dual Control Contract were issued a key to open the off-premises depository to drop off the night pouches in the receptacle. The armored car serviced the receptacle daily. The armored car teller, upon making pickups of such night pouches, promptly identified all monies and other items placed in the depository and immediately recorded them by the depositor's number. The driver-guard verified all items collected by the teller and signed the written bank record identifying the monies obtained at the stationary depository.

On September 28, 1966, the Comptroller of the State of Florida, respondent herein, addressed a letter to First National advising it that the proposed depository then under construction and the provision of an armored car messenger service would each violate the prohibition under Florida law against branch banking. The letter requested that First National cease and desist all such operations.

First National then sued in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief against respondent. The United States Comptroller intervened as plaintiff on the side of First National; several state banks intervened to support the Florida Comptroller. The District Court granted judgment for petitioners, 274 F.

Supp. 449 (D. C. N. D. Fla. 1967). The Court of Appeals reversed, 400 F. 2d 548 (C. A. 5th Cir. 1968). We affirm the Court of Appeals.

Federal Statute and Policy

The conditions under which national banks may establish branches are embodied in § 7 of the McFadden Act, 44 Stat. 1228, as amended, codified in 12 U. S. C. § 36. One such condition is that a "branch" may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch, 12 U. S. C. § 36 (c).[5] *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252 (1966).

We have noted that the State of Florida permits no branch banking under a statute providing that banks are to "have only one place of doing business"; the business of the bank may be transacted at that place "and not elsewhere."[6] The parties agree generally that the McFadden Act permits national banks to branch if and only if the host State would permit one of its own banks to branch; the Florida Bank Comptroller insists that the State of Florida unequivocally forbids off-premises bank-

[5] The National Bank Act, 44 Stat. 1228, 12 U. S. C. §§ 36 (c) (1) and (2) provides:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

[6] See n. 1, *supra*.

ing of any kind. Thus the lines are clearly drawn; the question presented is whether the activities of First National authorized by the United States Comptroller are branch banking.

At the outset we note that, while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster "competitive equality." *Walker Bank,* 385 U. S., at 261. State law has been utilized by Congress to provide certain guidelines to implement its legislative policy.

We need not review the legislative history of the McFadden Act and prior national bank legislation as it relates to this problem; that task was performed by Mr. Justice Clark in *Walker Bank, supra,* where a unanimous Court noted that the McFadden Act was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area. That Act reflects the congressional concern that neither system have advantages over the other in the use of branch banking. A House Report shows that in 1926 there was congressional concern to protect national banks from the unrestricted branch bank competition of state banks:

> "The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." H. R. Rep. No. 83, 69th Cong., 1st Sess., 7 (1926).

The bill to which this report was addressed failed to pass in the Senate. In tracing the legislative history of the bill which passed the following year, this Court in *Walker Bank, supra,* observed:

> "The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching. The Senate Report concluded that the Act should permit 'national banks to have branches in those cities where State banks are allowed to have them under State laws.' " 385 U. S., at 258, quoting from S. Rep. No. 473, 69th Cong., 1st Sess., 14 (1926).

At the time of its enactment into law, Representative McFadden stated that:

> "As a result of the passage of this act, the national bank act has been so amended that *national banks* are able to meet the needs of modern industry and commerce and *competitive equality* has been established . . . ." 68 Cong. Rec. 5815 (1927). (Emphasis supplied.)

When the economic depression of the 1930's brought on widespread bank failures, Congress responded by amending the McFadden Act with the passage of the Banking Act of 1933, which further strengthened the policy of competitive equality. Some Members argued that bank failures were due to the undercapitalization of small rural banks and sought to authorize national banks to engage in branch banking without regard to state law; but that approach was rejected. As finally passed, the Act was reported to the House by one of

the members of the Conference Committee, Representative Luce, with this statement:

> "In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking' . . . branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. *We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches.*" 385 U. S., at 260, quoting from 77 Cong. Rec. 5896 (1933). (Emphasis supplied.)

The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.

We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36 (f).[7] Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank, supra,* for in § 36 (c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Con-

[7] In their briefs before this Court, the litigants are all in agreement that federal law alone applies to resolve the threshold question whether the challenged activity falls within the definition of "branch." Reply Brief for the Comptroller of the Currency 2; Respondents' Brief 41, 44.

gress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch." On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned "the two ideas shall compete on equal terms and only where the States [allow] their own institutions [to] have branches." In short, the definition of "branch" in § 36 (f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.*[8]

Federal Definition of Branch Bank

Against this background, we turn to the question whether the off-premises business activities conducted by First National amounted to "branch" banking within the meaning of the McFadden Act. Since national banks are "necessarily subject to the paramount authority of the United States," *First National Bank in St. Louis* v. *Missouri,* 263 U. S. 640, 656 (1924), we consult that part of the McFadden Act that defines the term "branch." 12 U. S. C. § 36 (f) provides:

> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

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[8] Representative McFadden described the definitional section of the Act as providing that:

"Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch." 68 Cong. Rec. 5816 (1927).

Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that, since § 36 (f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking place. Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding. Although the District Court briefly discussed the possibility that checks were being paid, we confine ourselves to the question of whether deposits were received. Specifically, we must resolve the question whether the mobile armored car service and stationary deposit receptacle singly or together fall within the ambit of that section. As to the receiving of deposits, the functions of the two facilities are essentially the same, hence they may be considered together.

First National and the Comptroller of the Currency urge that the challenged activity does not amount to branch banking under § 36 (f). First National relies heavily, if indeed not entirely, upon carefully drawn contracts with its customers who use armored car or deposit receptacle services. The bank urges that, "deposit" being a word of art, the determination of when a deposit is made is not a casual one inasmuch as that determination fixes important legal relationships of the parties.

The bank also urges that creation of a deposit being purely a matter of intent, the issue is governed exclu-

sively by the private contract. Since these contracts must be interpreted under state law, the argument runs, no "deposit" is actually received as such until monies delivered to the armored car or the receptacle are physically delivered into the hands of a bank teller at the chartered premises. Until such time the bank may not, under the contracts, be held to account for the customer's funds.

We have no difficulty accepting the bank's argument that the debtor-creditor relationship is a creature of contract and that the parties can agree that until monies are physically delivered to the bank no deposit will be credited to the customer's account.[9] We are satisfied, however, that the contracts have no significant purpose other than to remove the possibility that the monies received will become "deposits" in the technical and legal sense until actually delivered to the chartered premises of the bank.

We do not challenge the right of the contracting parties to fix rights and risks as between themselves; nothing in the law precludes the parties from agreeing, for example, that the bank does not assume the status of bailee, with liability for loss of money in transit. But while the contracting parties are free to arrange their private rights and liabilities as they see fit, it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36 (f).

Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage

[9] 5A A. Michie on Banks and Banking §§ 4a, 5, 14, 15 and 17 (1950); 10 Am. Jur. 2d Banks § 358 (1963); 9 C. J. S. Banks and Banking § 269 (1938).

in its competition for customers. Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later.

We need not characterize the contracts as a sham or subterfuge in order to conclude that the conduct of the parties and the nature of their relations bring First National's challenged activities within the federal definition of branch banking. Here, penetrating the form of the contracts to the underlying substance of the transaction, we are satisfied that at the time a customer delivers a sum of money either to the armored truck or the stationary receptacle, the bank has, for all purposes contemplated by Congress in § 36 (f), received a deposit. The money is given and received for deposit even though the parties have agreed that its technical status as a "deposit" which may be drawn on is to remain inchoate for the brief period of time it is in transit to the chartered bank premises. The intended deposits are delivered and received as part of a large-scale continuing mode of conducting the banking business designed to bring basic bank services to the customers.

Since the putative deposits are in fact "received" by a bank facility apart from its chartered place of business, we are compelled, in construing § 36 (f), to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an "additional office, or . . . branch place of business . . . at which deposits are received." [10]

[10] We need not here try to draw fine distinctions around relatively isolated, sporadic, and inconsequential transactions where a bank employee carries cash to a customer to cash a check, or secures a signature on a note in exchange for a check delivered off premises.

Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks. The utility of the armored car service and deposit receptacle are obvious; many States permit state chartered banks to use this eminently sensible mode of operations, but Florida's policy is not open to judicial review any more than is the congressional policy of "competitive equality." Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency.[11]

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

It will come as a shock, where common sense is the guide, to learn that an armored car picking up merchants' cash boxes and checks is a branch bank. Conceivably a bank could use an armored car as a place of business by stationing it at designated places during designated hours for opening accounts, receiving deposits, making

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[11] In 1963 Comptroller Saxon, author of ¶ 7490 in the Comptroller's Manual for National Banks, *supra*, n. 2, declared that "[t]he branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual States find appropriate to meet their local needs through State-chartered banks." Saxon, Branching Powers and the Dual Banking System, 101 Comp. Currency Ann. Rep. 316, 318 (1963).

During the course of the congressional debates over what became the McFadden Act, Representative Stevenson remarked:

"[Y]ou have branches in the Federal reserve system established by the dictum of the Comptroller of the Currency, who has assumed to say that he can allow a national bank to establish as many agencies for receiving deposits and paying checks as he sees fit. . . . I will show presently that we cut that out, root and branch." 66 Cong. Rec. 1627.

loans, and the like. But no armored car was so used in these cases.

Federal law stated in the McFadden Act, 12 U. S. C. § 36 (f), defines "branch" as any facility "at which deposits are received, or checks paid, or money lent." And Congress provided that national banks may establish "branches" whenever, wherever, and however state banks may do so. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 261–262. The opinion of the Court leaves the impression that the McFadden Act created "competitive equality" between national and state banks across the board. But as we stated in the *Walker Bank* case, that Act "intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" *Id.*, at 261. (Italics added.) There was no other or additional overriding principle of "competitive equality" that limited off-premises services of national banks to those that state banks could provide.

Among those off-premises activities of national banks was the furnishing of armored car messenger services, which, we are advised by the Comptroller of the Currency, antedated by many years the 1927 McFadden Act. One can read the legislative history of the Act without finding any hint that Congress was providing "competitive equality" as respects armored car messenger services.

As stated by the District Court, "If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks." 274 F. Supp. 449, 453.

The services rendered in these cases were undertaken only after approval by the Comptroller of the Currency who attached a condition that "the messenger is the

agent of the customer rather than of the bank." [1] I thought it was elemental law that a bank deposit cannot arise without some unequivocal act whereby both parties express their consent to the creation of the status of debtor and creditor. The District Court, which is a more faithful exponent of local law than are we, so ruled. 274 F. Supp., at 454. Certainly the Comptroller, who is the supervisory agent for policing § 36, has some authority to define "deposits" as used in § 36 (f), and this case affords no excuse for disparaging him. This is not a government by administrative *fiat;* the exercise of administrative discretion is normally subject to judicial review. When it comes to an administrator's construction of a statutory term in the law that he supervises, however, we have allowed his expertise great leeway in the definition,[2] only rarely disturbing it.

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[1] Par. 7490, Comptroller's Manual for National Banks. This paragraph provides:

"To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer."

[2] See *SEC* v. *New England Electric System,* 384 U. S. 176, 185; *Udall* v. *Tallman,* 380 U. S. 1, 16; *United States* v. *Drum,* 368 U. S. 370, 374–376; *NLRB* v. *Coca-Cola Bottling Co.,* 350 U. S. 264, 269; *Unemployment Compensation Comm'n* v. *Aragon,* 329 U. S. 143, 153–154; *NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130–131; *Gray* v. *Powell,* 314 U. S. 402, 411–413; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146; Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 261 (1955); Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 Vand. L. Rev. 470, 490–491 (1950).

The Comptroller's definition of "deposits" should be honored here. For where the risk is on the customer that his cash and checks may never reach the bank, he cannot in good sense or in good law be deemed to have made a deposit while the funds are in transit.

By the standards of administrative law honored until today, the Comptroller was justified in defining "deposits" to make the armored cars messengers of the customers, not agents of the bank. So whether common sense or the law is our standard, the judgment of the Court of Appeals should be reversed. The Comptroller's authorization of these armored car activities as being permissible under the National Bank Act was an interpretation of the Act which, as MR. JUSTICE STEWART says in his dissent, cannot be said to be "not a reasonable one."

MR. JUSTICE STEWART, dissenting.

I wholly agree with the Court that federal law is to be applied in determining whether the activities of a national bank constitute branch banking under the exclusive definition contained in the National Bank Act, 12 U. S. C. § 36 (f). Whether the activities here in question constitute branch banking under that standard seems to me an extremely close question. That being so, I would defer to the determination of the Comptroller of the Currency. He is the official charged with administering these provisions of the Act, and I cannot say his determination was not a reasonable one. See *Udall* v. *Tallman,* 380 U. S. 1, 16–18.

DETROIT & TOLEDO SHORE LINE RAILROAD CO. *v.* UNITED TRANSPORTATION UNION ET AL.

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

No. 29. Argued October 20, 1969—Decided December 9, 1969

A labor dispute arose between petitioner railroad and respondent railroad union over petitioner's proposal to establish new "outlying work assignments" away from its principal yard. There was nothing in the collective-bargaining agreement that prohibited such assignments. The union filed a notice under § 6 of the Railway Labor Act of a proposed change in the agreement, and after the failure of the parties to negotiate a settlement, invoked the services of the National Mediation Board. While the Mediation Board proceedings were pending, the railroad announced the creation of the disputed work assignments, and the union threatened to strike. Petitioner brought this action to enjoin a strike and the union counterclaimed for an injunction prohibiting the establishment of the outlying assignments on the ground that § 6, which provides that "where . . . the services of the Mediation Board have been requested by either party . . . , rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board," forbids such unilateral action by the carrier. The District Court dismissed the railroad's complaint, but granted the union's request for an injunction restraining the railroad from establishing any new outlying assignments, despite the absence of a provision prohibiting such assignments in the collective-bargaining agreement. The Court of Appeals affirmed. *Held:* The status quo that is to be maintained pursuant to § 6 of the Railway Labor Act while the procedures of the Act are being exhausted consists of the actual, objective working conditions out of which the dispute arose, whether or not those conditions are covered in an existing collective-bargaining agreement. *Order of Conductors* v. *Pitney,* 326 U. S. 561, and *Williams* v. *Terminal Co.,* 315 U. S. 386, distinguished. Pp. 148–159.

401 F. 2d 368, affirmed.

Francis M. Shea argued the cause for petitioner. With him on the briefs were *Ralph J. Moore, Jr., David W. Miller, James A. Wilcox,* and *John M. Curphey.*

Richard R. Lyman argued the cause for respondents. With him on the brief was *Clarence M. Mulholland.*

Milton Kramer filed a brief for the Railway Labor Executives' Association as *amicus curiae* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises a question concerning the extent to which the Railway Labor Act of 1926 [1] imposes an obligation upon the parties to a railroad labor dispute to maintain the status quo while the "purposely long and drawn out" [2] procedures of the Act are exhausted. Petitioner, a railroad, contends that the status quo which the Act requires be maintained consists only of the working conditions specifically covered in the parties' existing collective-bargaining agreement. Respondent railroad brotherhood contends that what must be preserved as the status quo are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement. For the reasons stated below, we think that only the union's position is consistent with the language and purposes of the Railway Labor Act.

The facts involved in this case are these: The main line of the Detroit and Toledo Shore Line (Shore Line), petitioner's railroad, runs from Lang Yard in Toledo, Ohio, 50 miles north to Dearoad Yard near Detroit, Michigan. For many years prior to 1961, Lang Yard was the terminal at which all train and engine crews reported for

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[1] 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*

[2] *Railway Clerks* v. *Florida E. C. R. Co.,* 384 U. S. 238, 246 (1966).

work and from which they left at the end of the day. As the occasions arose, the Shore Line transported crews from Lang Yard to perform switching and other operations at various points to the north, assuming the costs of transportation and overtime for the crew members. On February 21, 1961, the railroad advised respondent, the Brotherhood of Locomotive Firemen and Enginemen (BLF&E),[3] of its intention to establish "outlying work assignments" [4] at Trenton, Michigan, a point on the main line about 35 miles north of Lang Yard. These new assignments would have required many employees to report for work at Trenton rather than Lang Yard where they had been reporting. The BLF&E responded to this announcement by filing a notice under § 6 of the Railway Labor Act [5] proposing an amendment to the collective-

[3] The United Transportation Union, the successor organization to the Brotherhood of Locomotive Firemen and Enginemen, was substituted as party respondent by order of the Court, March 3, 1969. Respondents also include two officers of the BLF&E named in the original complaint.

[4] The parties treat the term "outlying work assignment" as meaning a work assignment with a reporting point for going on and off duty located elsewhere than at the Shore Line's principal yard, Lang Yard in Toledo, Ohio. We adopt that usage here.

[5] 44 Stat. 582, as amended, 45 U. S. C. § 156. Section 6, in its entirety, provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been

bargaining agreement to cover the changed working conditions of the employees who would work out of Trenton. Section 6 requires both the carrier and union to give the other party a 30-day notice of an "intended change in agreements affecting rates of pay, rules, or working conditions." [6] Since the union thus invoked the "major-dispute" settlement procedures of the Railway Labor Act,[7] the dispute first went to conference and, when the parties failed to agree between themselves, then to the National Mediation Board.

While the case was pending before the National Mediation Board, the Shore Line announced two new outlying assignments at Dearoad, Michigan, at the northern end of the line. Because work crews could be taken by cab from Dearoad south to Trenton, the railroad concluded that it no longer needed to establish assignments at Trenton and so advised the Mediation Board. When the Dearoad assignments were announced, the union withdrew from the Mediation Board proceedings, and, before a Special Board of Adjustment convened under § 3 of the Act,[8] challenged the railroad's right under the parties' collective agreement to establish outlying assignments.

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finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

[6] See n. 5, *supra.*

[7] A "major dispute" is one arising out of the formation or change of collective agreements covering rates of pay, rules, or working conditions. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 722–727 (1945).

[8] 44 Stat. 578, as amended, 45 U. S. C. § 153. At this point, the BLF&E was considering the controversy as a "minor dispute," *i. e.,* a dispute arising out of the interpretation or application of collective agreements. Under § 3 of the Railway Labor Act such disputes are settled by an Adjustment Board whose interpretation of the collective agreement is binding on the parties. See *Elgin, J. & E. R. Co.* v. *Burley, supra,* at 722–727.

On November 30, 1965, the Special Board ruled that the Shore Line-BLF&E agreement did not prohibit the railroad from making the assignments.[9]

Relying in part on the ruling of the Special Board, the railroad notified the union on January 24, 1966, that it was reviving its plan for work assignments at Trenton. Again the union responded by filing a § 6 notice of a proposed change in the parties' collective agreement. This time the union sought to amend the agreement to forbid the railroad from making any outlying assignments at all. The parties were again unable to negotiate a settlement themselves, and on June 17, 1966, the union invoked the services of the National Mediation Board. While the Mediation Board proceedings were pending, the railroad posted a bulletin definitely creating the disputed work assignments at Trenton effective September 26, 1966. Faced with this unilateral change in working conditions, the union threatened a strike. The railroad then brought this action in the United States District Court to enjoin the BLF&E[10] from calling and carrying out the allegedly illegal strike. The union counterclaimed for an injunction prohibiting the Shore Line from establishing outlying assignments on the ground that the status quo provision of § 6 of the Railway Labor Act forbids a carrier from taking

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[9] The Special Board of Adjustment found:

"What took place here was not a change in the recognized terminal, but simply amounted to an outlying assignment. There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment." App. 110.

[10] The Brotherhood of Railroad Trainmen was also named a defendant, as were several officers of both unions. The causes of action against the two brotherhoods were completely different, however, and the cases were treated as distinct at trial and on appeal. The Brotherhood of Railroad Trainmen is not involved in the present litigation at this stage.

unilateral action altering "rates of pay, rules, or working conditions" while the dispute is pending before the National Mediation Board. The pertinent part of § 6 provides: [11]

> "In every case where . . . the services of the Mediation Board have been requested by either party . . . , rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board . . . ." 45 U. S. C. § 156.

The District Court dismissed the railroad's complaint, from which no appeal has been taken, but it granted the injunction sought by the union restraining the railroad from establishing any new outlying assignments at Trenton or elsewhere.[12] The United States Court of Appeals for the Sixth Circuit affirmed the issuance of the injunction against the railroad. 401 F. 2d 368 (1968). We granted certiorari, 393 U. S. 1116 (1969).

In granting the injunction the District Court held that the status quo requirement of § 6 prohibited the Shore Line from making outlying assignments even though there was nothing in the parties' collective agreement which prohibited such assignments. The Shore Line vigorously challenges this holding. It contends that the purpose of the status quo provisions of the Act is to guarantee only that existing collective agreements continue to govern the parties' rights and duties during efforts to change those agreements. Therefore, the railroad argues, what Congress intended by writing in § 6 that "rates of pay, rules, or working conditions shall

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[11] The full section is set out in n. 5, *supra.*

[12] The order of the District Court is unreported. *Detroit & Toledo Shore Line R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* No. C 66–207 (D. C. N. D. Ohio, filed Nov. 15, 1966). The opinion of the District Court on motion to vacate the judgment is reported at 267 F. Supp. 572 (1967).

not be altered" was that rates of pay, rules, or working conditions *as expressed in an agreement* shall not be altered. And since nothing in the railroad's agreement with the union precluded the railroad from altering the location of work assignments, this working condition was not "expressed in an agreement." Thus, the argument runs, the railroad could make outlying assignments without violating the status quo provision of § 6, and the judgments below must be reversed.

We note at the outset that the language of § 6 simply does not say what the railroad would have it say. Instead, the section speaks plainly of "rates of pay, rules, or working conditions" without any limitation to those obligations already embodied in collective agreements. More important, we are persuaded that the railroad's interpretation of this section is sharply at variance with the overall design and purpose of the Railway Labor Act.

The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.[13] The problem of strikes was considered to be particularly acute in the area of "major disputes," those disputes involving the formation of collective agreements and efforts to change them. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 722–726 (1945). Rather than rely upon compulsory arbitration, to which both sides were bitterly opposed, the railroad and union representatives who drafted the Act chose to leave the settlement of major disputes entirely to the processes of noncompulsory adjustment. *Id.,* at 724. To this end, the Act established rather elaborate machinery for negotiation, mediation, volun-

[13] In *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 565 (1930), the Court said: "The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.' "

tary arbitration, and conciliation. *General Committee, B. L. E.* v. *Missouri-K.-T. R. Co.,* 320 U. S. 323, 328–333 (1943). It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted.[14] *Railroad Trainmen* v. *Terminal Co.,* 394 U. S. 369, 378 (1969); *Elgin, J. & E. R. Co.* v. *Burley, supra,* at 721–731; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 565–566 (1930). A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in *Railway Clerks* v. *Florida E. C. R. Co.,* 384 U. S. 238, 246 (1966), "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."

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[14] The Act's major-dispute procedures and status quo requirement were concisely stated in an opinion by MR. JUSTICE HARLAN only last Term, *Railroad Trainmen* v. *Terminal Co.,* 394 U. S. 369, 378 (1969):

"The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo.* §§ 2 Seventh, 5 First, 6, 10."

The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

There are three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures. Section 6, the section of immediate concern in this case, provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board.[15] Section 5 First provides that for 30 days following the closing of Mediation Board proceedings "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose," unless the parties agree to arbitration or a Presidential Emergency Board is created during the 30 days.[16] Finally, § 10

[15] Section 6 is set out in its entirety in n. 5, *supra*.

[16] Section 5 First, 44 Stat. 580, as amended, 45 U. S. C. § 155 First, provides in part:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter,

provides that after the creation of an Emergency Board and for 30 days after the Board has made its report to the President, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." [17] These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by § 2 First, "to exert every reasonable effort" to settle disputes without interruption to interstate commerce.[18]

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unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

[17] Section 10, 44 Stat. 586, as amended, 45 U. S. C. § 160, provides in part:

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

[18] Section 2 First, 44 Stat. 577, as amended, 45 U. S. C. § 152 First, provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The relationship between the status quo provisions and § 2 First, was made explicit in the testimony of Donald Richberg who spoke as the unions' representative when the proposed railroad legislation was presented to Congress jointly by the railroads and the unions:

"As to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law. Their primary duty is to exert every reasonable effort to avoid

While the quoted language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day "cooling-off" period. Although these three provisions are applicable to different stages of the Act's procedures, the intent and effect of each is identical so far as defining and preserving the status quo is concerned.[19] The obligation

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interruptions of commerce through disputes. The 'reasonable efforts' are set forth here that all disputes shall be considered and decided in conference, if possible; that, second, if conference fails a certain type of disputes shall be carried to the board of adjustment; the other type of disputes, or those not decided by the board of adjustment, may be carried to the board of mediators, and it shall be the duty of the board of mediators to act." Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 92–93 (1926).

[19] This interpretation of the status quo provisions is supported by the legislative history of the Act. See, *e. g.*, the testimony of Donald Richberg set out in n. 18, *supra*. Mr. Richberg also testified:

"[T]he only thing that can provoke an arbitrary action [referring to strikes] is the power to arbitrarily change the rates of pay or rules of working conditions before the controversy is settled, and it is provided that they shall not be altered during the entire period of utilization of this law." Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 93 (1926).

Moreover, when the status quo provision of § 5 was added to that section in 1934, its purpose was to provide continuity between §§ 6 and 10 by preserving the status quo for 30 days following the end of proceedings before the Mediation Board. Joseph B. Eastman, Federal Co-ordinator of Transportation, the principal draftsman and proponent of the 1934 amendments, testified:

"As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 60 days. . . . The

of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.[20]

It is quite apparent that under our interpretation of the status quo requirement, the argument advanced by the Shore Line has little merit. The railroad contends that a party is bound to preserve the status quo in only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of §§ 5, 6, or 10 suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly

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railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole." Hearings on S. 3266 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 21 (1934).

[20] The status quo provision of § 10 was the only one discussed in any depth at the 1926 congressional hearings on the bill. Donald Richberg, n. 19, *supra,* testified as follows when questioned about the intended scope of the status quo provision:

"The thought was to include in the broadest way all the factors which contributed to what is commonly called the status quo. In other words, the conditions may depend upon the dispute, whether it is with regard to rules or with regard to wages." Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 44 (1926).

"What broader phrase could be used than 'conditions out of which the dispute arose' which comprehends all the elements affecting the controversy? It is intended to make it clear that the parties are going to wait and give the Government full opportunity to adjust the controversy." Hearings on S. 2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 88–89 (1926).

prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. Here, however, the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.[21]

The Shore Line's interpretation of the status quo requirement is also fundamentally at odds with the Act's primary objective—the prevention of strikes. This case provides a good illustration of why that is so. The goal of the BLF&E was to prevent the Shore Line from making outlying assignments, a matter not covered in their existing collective agreement. To achieve its goal, the union invoked the procedures of the Act. The railroad, however, refused to maintain the status quo and, instead, proceeded to make the disputed outlying assignments. It could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit by agreement. The union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike. Because the railroad prematurely resorted to self-help, the primary goal of the Act came very close to being defeated. The example of this case could no doubt be multiplied many times. It would be virtually impossible to include all working conditions in a col-

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

lective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others.[22] When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.[23]

We now turn to answer some of the arguments advanced by the Shore Line in support of its position. The first of these involves § 2 Seventh of the Act. That section forbids a carrier from changing "the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in section 6 of this Act."[24] (Emphasis added.) The Shore Line argues that this section is a status quo provision and that the "as embodied in agreements" restriction it contains

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[22] Brief of Railway Labor Executives' Association as *amicus curiae* 17.

[23] Respondent BLF&E has urged in its brief that we also consider the question whether the Shore Line violated a duty to bargain in good faith, citing *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203 (1964), and *NLRB* v. *Katz,* 369 U. S. 736 (1962). Deciding the case as we do under the status quo provisions of the Act, we find it unnecessary to reach this argument.

[24] Section 2 Seventh, 48 Stat. 1188, 45 U. S. C. § 152 Seventh, provides as follows:

"No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

should be read into the status quo provisions of §§ 5, 6, and 10. We find no merit in this argument. Section 2 Seventh, which was added to the Act in 1934, does not impose any status quo duties attendant upon major dispute procedures. It simply states one category of cases in which those procedures must be invoked. The purpose of § 2 Seventh is twofold: it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures. The violation of this section is a criminal offense punishable by imprisonment or fine or both.[25] Violations of the status quo provisions of §§ 5, 6, and 10 are only civil wrongs.

Second, the Shore Line contends that the interpretation of § 6 which we adopt today is at variance with the position we have taken on two previous occasions, citing *Order of Conductors* v. *Pitney,* 326 U. S. 561 (1946), and *Williams* v. *Terminal Co.,* 315 U. S. 386 (1942). Although these cases do contain statements which out of context tend to support petitioner's position, neither dealt with the question we have before us today. *Pitney* involved a suit brought by a union to enjoin the reorganization trustees of a bankrupt railroad from transferring certain job assignments to another union. The plaintiff's contention was that the disputed jobs belonged to its members by both custom and agreement. The trustees were therefore prohibited from reassigning the jobs, the union argued, since they had never filed the appropriate notice of "intended change in agreements" required by § 6. The railroad disputed that the reassignments of the jobs would require a "change in agreements" and thus put the meaning of the parties' agreements in issue. We held that the proper forum for

[25] Railway Labor Act, § 2 Tenth, 48 Stat. 1189, 45 U. S. C. § 152 Tenth.

interpreting the agreements was the Adjustment Board provided by Congress in the Railway Labor Act, § 3 First (i), for that purpose, and directed the District Court to stay its proceedings accordingly. 326 U. S., at 567–568. Thus, *Pitney*, at most, involved a question of the necessity of filing a § 6 notice and was not at all concerned with the status quo provision of that section.

The *Williams* case is equally inapposite. In that case "redcaps" brought suit through their union representative against the Dallas railroad terminal to recover wages allegedly owed them and retained by the terminal in violation of the Fair Labor Standards Act and the Railway Labor Act. The redcaps' argument under the Fair Labor Standards Act was that Congress had not intended that tips be included in their wages for purposes of satisfying minimum wage requirements. Yet, that is what the terminal had done under its "accounting and guarantee" plan from October 1938, when the F. L. S. A. became effective, until March 1940. The majority of the Court rejected the redcaps' argument, holding that the F. L. S. A. neither prohibited nor required the inclusion of tips within wages. The question was held to be one for contract between the parties. 315 U. S., at 407–408. The redcaps' claim under the Railway Labor Act was that the terminal's "accounting and guarantee" plan under which tips were considered as part of wages was put into operation unilaterally by the terminal on the effective date of the F. L. S. A., despite the fact that the redcaps had two weeks earlier asked for a conference to negotiate an agreement which would include the subject of wages. This, the redcaps argued, violated the status quo provisions of § 6 since prior to the F. L. S. A. tips had not been included in wages. The Court concluded, however, that § 6 was not applicable to the dispute between the parties. The Court reasoned that when the redcaps continued to work after being individ-

ually notified of the "accounting and guarantee" plan, new and independent contracts were formed between each redcap and the terminal. The Court held that these contracts were not affected by the pending request for collective bargaining under the Railway Labor Act. The decision rested partially on the ground that "[i]ndependent individual contracts are not affected by the Act." 315 U. S., at 399. And the Court also said more narrowly that the status quo requirements of § 6 were inapplicable since that section applies only when a "change in agreements" is involved. 315 U. S., at 400. In *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter. Without pausing to comment upon the present vitality of either of these grounds for dismissing the redcaps' Railway Labor Act claim, it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied at all. The Court in *Williams* therefore never reached the question of the scope of the status quo requirement in a dispute, such as the one before the Court today, to which that requirement concededly applies.

Finally, the Shore Line points out, quite correctly, that its position on § 6 is identical to that taken by the National Mediation Board in several of its Annual Reports.[26] However, the Mediation Board has no adjudicatory authority with regard to major disputes, nor

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[26] The 34th Annual Report of the National Mediation Board stated:

"Section 6 states that where notice of intended change in an agreement has been given, rates of pay, rules, and working conditions *as expressed in the agreement* shall not be altered by the carrier until the controversy has been finally acted upon in accordance with specified procedures." NMB, 34th Ann. Rep. 23 (fiscal year ended June 30, 1968). (Emphasis added.) See also NMB, 33d Ann. Rep. 36 (fiscal year ended June 30, 1967); NMB, 31st Ann. Rep. 25 (fiscal year ended June 30, 1965).

has it a mandate to issue regulations construing the Act generally. Certainly there is nothing in the Act which can be interpreted as giving the Mediation Board the power to change the plain, literal meaning of the statute, which would be the result were we to adopt its interpretation of § 6.

The judgment is

Affirmed.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I fully agree that the application of § 6 should not be restricted to only those terms of employment that the parties have seen fit to embody in a written agreement. Section 6 may properly, in some circumstances, be extended to "freeze" *de facto* conditions of employment. I cannot, however, accept what appears to be the majority's test for determining when a § 6 freeze is appropriate.[1] Any work practice is, in the words of the majority, an "actual, objective working condition." However, the practice of today may not be the accepted condition of yesterday, but rather a temporary expedient in which neither party acquiesces. I find it difficult to think that Congress intended that either party, by serving a § 6 notice, should be able to shackle his adversary and tie him to a condition that has been historically and consistently controverted.

Rather, what persuades me to countenance the extension of § 6 beyond the terms of a written collective-bargaining agreement is the fact, observed by the Court, that "[w]here a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement . . . ," *ante,* at 155. Taking this observation as a point of de-

[1] The majority first announces a test looking to "actual, objective working conditions," *ante,* at 153. This is later qualified by a durational requirement, but no general principle of decision is set forth.

parture, I favor a more subjective approach than the objective and mechanical one implicit in the majority's language. The question that should be asked is whether in the context of the relationship between the principals, taken as a whole, there is a basis for implying an understanding on the particular practice involved. To this end it is necessary to consider not only the duration of the practice but also all the dealings between the parties, as for example, whether the particular condition has been the subject of prior negotiations.

While I recognize, of course, that any subjective test is not easily applied, I cannot subscribe to a rule that may have the incongruous effect of perpetuating what both parties in fact view as a disputed practice, simply because neither party, for reasons of convenience, has exercised a recognized option of resorting to self-help.

Under this standard I consider that the proper disposition of the case before us is to remand to the District Court for additional findings.[2] While the District Court found that "[f]or many years prior to 1961" Lang Yard was the established terminal point for reporting to duty, that finding alone would not satisfy a subjective test in light of subsequent events that may have negatived any understanding that might have existed prior to 1961.[3] In 1961 the Shore Line advised the union of a contemplated shifting of reporting to its Trenton terminal some 30 miles north. The proposal apparently met with employee resistance and the union served a § 6

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[2] While the District Court and the Court of Appeals both properly rejected petitioner's theory, restricting § 6 to terms embodied in a written agreement, it is by no means clear to me precisely what standard they followed in concluding that the Act was applicable.

[3] The District Court, as I read its findings, does not appear to have considered the possible impact of the train of events revealed by the record in connection with 1961–1963 proceedings before the Board.

notice seeking to modify the agreement with the railroad. By 1963 the parties had exhausted the statutory mediation route without reconciling their differences and the Mediation Board recommended arbitration to break the impasse. This proposal was rejected by the company which declared the dispute moot since, by that time, it had abandoned its Trenton project. Meanwhile, the company embarked on a practice of transporting employees at its own expense and on company time from its Dearoad terminal, 11 miles north of Trenton, a practice which is the subject of a separate § 6 notice.

In my opinion a remand is called for to determine whether the company's voluntary abandonment of its Trenton project, coupled with its undertaking to transport employees from Dearoad at its own cost and the long-established practice prior to 1961, amounted to acceptance in principle of Lang Yard as the reporting location.

For that reason I respectfully dissent from the Court's affirmance of the Court of Appeals.

CITY OF CHICAGO ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 101. Argued November 20, 1969—Decided December 9, 1969*

Orders of the Interstate Commerce Commission discontinuing investigations conducted under § 13a (1) of the Interstate Commerce Act with regard to the notice of rail carriers to terminate interstate passenger services *held* judicially reviewable on the complaint of aggrieved persons. Pp. 164–167.

294 F. Supp. 1103 and 1106, reversed.

Gordon P. MacDougall argued the cause for appellants in both cases. With him on the brief were *Raymond F. Simon, Charles E. Griffith III, Robert E. Kendrick, Arthur K. Bolton, Harold N. Hill, Jr., J. Robert Coleman, Edward J. Hickey, Jr., William G. Mahoney, Bernard Rane, Mark Goldstein, Eugene W. Ward, Chester L. Rigsby, Weldon A. Cousins,* and *Leon M. Despres. Howard E. Shapiro* argued the cause for the United States et al. urging reversal in both cases. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Robert W. Ginnane.*

James W. Hoeland argued the cause for appellees Chicago & Eastern Illinois Railroad Co. et al. in both cases. With him on the brief were *Clifford T. Coomes, Joseph L. Lenihan, Harry R. Begley,* and *P. C. Mullen.*

Paul Rodgers filed a brief for the National Association of Regulatory Utility Commissioners as *amicus curiae* urging reversal in both cases.

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*Together with No. 102, *City of Chicago et al.* v. *United States et al.*, also on appeal from the same court.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in these cases is whether orders of the Interstate Commerce Commission discontinuing investigations respecting the notice of rail carriers to terminate or change the operation or services of interstate passenger trains are judicially reviewable on the complaint of aggrieved persons.

Section 13a (1) of the Interstate Commerce Act, as amended, 72 Stat. 571, 49 U. S. C. § 13a (1), provides, with details not important here, that a rail carrier may file notice of such discontinuance or change with the Commission and that within 30 days the Commission may make an investigation of the proposed discontinuance or change. Apart from interim relief, the Commission may order continuance of the operation and service for a period not to exceed one year.[1] One of the present cases involves two interstate passenger trains between Chicago and Evansville, Indiana, discontinued by the Chicago & Eastern Illinois Railroad Co., 331 I. C. C. 447, and the other involves two interstate passenger trains between New Orleans and Cincinnati discontinued by the Louisville & Nashville Railroad Co., 333 I. C. C. 720.

In each case the Commission, addressing itself to the standards in § 13a (1), found that continued operation of the trains was not required by public convenience and necessity and that continued operation would unduly burden interstate commerce. It thereupon entered in each case an order terminating its investigation of the proposed discontinuance.

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[1] Section 13a (2), applicable to discontinuance of intrastate trains, provides that where a State bars discontinuance or change in operation or service of a train, or where the state authority has not acted on a carrier's application for such discontinuance or change within 120 days, the carrier may petition the Commission for a grant of such authority.

Appellants in each case—cities, state regulatory agencies, and other interested parties—brought these suits before the same three-judge court to review the Commission's decisions. It is provided by 28 U. S. C. § 1336 (a):

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission."

The District Court held that decisions terminating investigations under § 13a (1) are not "orders" within the meaning of 28 U. S. C. § 1336 (a).[2] 294 F. Supp. 1103, 1106. The cases are here on direct appeal, 28 U. S. C. §§ 1253, 2325, and we noted probable jurisdiction. 395 U. S. 957.

As stated in *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140, we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "persuasive reason to believe" that Congress had no such purpose. Certainly under § 13a (1) the carrier, if overruled by the Commission, could obtain review. We can find no talismanic sign indicating that Congress desired to deny review to opponents of interstate discontinuances alone.

Section 13a in its present form came into the Act in 1958 and was designed to supersede the prior confused and time-consuming procedure under which the States

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[2] There is a conflict among the District Courts. *Minnesota* v. *United States,* 238 F. Supp. 107 (D. C. Minn.), and *New Hampshire* v. *Boston & Maine Corp.,* 251 F. Supp. 421 (D. C. N. H.), are in accord with the District Court in the instant cases. Opposed to that view are *Vermont* v. *Boston & Maine Corp.,* 269 F. Supp. 80 (D. C. Vt.), and *New York* v. *United States,* 299 F. Supp. 989 (D. C. N. D. N. Y.). And see *City of Williamsport* v. *United States,* 273 F. Supp. 899, 282 F. Supp. 46 (D. C. M. D. Pa.), aff'd, 392 U. S. 642.

supervised the discontinuance of passenger trains. Accordingly, Congress provided a uniform federal scheme to take the place of the former procedure.[3] A *single federal standard* was to govern train discontinuances whether interstate or intrastate, though *the procedure* of § 13a (1) for discontinuance of an interstate train was made somewhat different from the procedure for discontinuance of intrastate trains.[4] But the Commission is to have the final say in each case and "precisely the same substantive standard" now governs discontinuance of either interstate or intrastate operations. *Southern R. Co.* v. *North Carolina,* 376 U. S. 93, 103.

Whether the Commission should make an investigation of a § 13a (1) discontinuance is of course within its discretion, a matter which is not reviewable. *New Jersey* v. *United States,* 168 F. Supp. 324, aff'd, 359 U. S. 27.

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[3] "Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many such cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a railroad's financial condition resulting from prolonged loss-producing operations.

"To improve this situation, the subcommittee proposes to give the Interstate Commerce Commission jurisdiction in the field of discontinuance or change of rail services and facilities similar to the jurisdiction it now has over intrastate rates under section 13 of the Interstate Commerce Act so that when called upon to do so it may deal with such matters that impose an undue burden on interstate commerce. This, the subcommittee believes, would protect and further the broad public interest in a sound transportation system and would prevent undue importance being attached to matters of a local nature." S. Rep. No. 1647, 85th Cong., 2d Sess., 22. For a review of the legislative history of § 13a (2), see *Southern R. Co.* v. *North Carolina,* 376 U. S. 93, 100–103.

[4] See n. 1, *supra.*

But when the Commission undertakes to investigate, it is under a statutory mandate:

> "Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises . . . ." 49 U. S. C. § 14 (1).

A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency "action," while an answer saying the reverse is agency "inaction." The technical form of the order is irrelevant. In each case the Commission is deciding the merits. The present cases are kin to the "negative orders" [5] which we dealt with in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 142–143:

> "An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the

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[5] The Administrative Procedure Act, 5 U. S. C. § 551 (6) (1964 ed., Supp IV), defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 U. S. C. §§ 551 (13), 701 (b) (2), 702 (1964 ed., Supp. IV).

When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U. S. C. § 15 (7). Where the Commission finds the proposed rates lawful, its order reads: "[T]he investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers Assn.* v. *Baltimore & O. R. Co.,* 314 I. C. C. 5, 51. Such orders are reviewable. *Cooper-Jarrett, Inc.* v. *United States,* 226 F. Supp. 318, aff'd, 379 U. S. 6.

> Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. . . . We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."

The District Court reasoned that since "the statute is self-implementing," only an "order" requiring action is reviewable. 294 F. Supp., at 1106. But that theory is of the vintage we discarded in *Rochester Telephone.*

Reversed.

ZUBER ET AL. *v.* ALLEN ET AL.

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

No. 25. Argued October 16, 1969—
Decided December 9, 1969*

Respondent Vermont dairy farmers ("country" milk producers) brought this action to invalidate the so-called farm location differential provided for by order of the Secretary of Agriculture as contrary to the Agricultural Marketing Agreement Act of 1937. The effect of the order is to require milk distributors to pay milk producers situated close to milk marketing areas ("nearby" farmers) higher prices than are paid to producers located at greater distances from such areas. In the 1920's, prior to federal regulation, nearby farmers received higher prices for their milk in the Boston area than farmers at more distant points. The 1935 amendment to the Agricultural Adjustment Act, carried forward into § 8 (c) of the Agricultural Marketing Agreement Act of 1937, provides, in part, for the payment to all producers "delivering milk to all handlers of uniform prices for all milk . . . subject only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made." The Department of Agriculture regulations provide a price differential for "nearby" farmers, and a lesser differential for intermediate nearby zones. The District Court granted an injunction against further payments of the differentials, and the Court of Appeals affirmed. *Held:*

1. The statutory scheme, which was to provide uniform prices to all producers in the marketing area, subject only to specifically enumerated adjustments, contemplated that "market differentials . . . customarily applied" would be based on *cost* adjustments. Pp. 179–187.

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*Together with No. 52, *Hardin, Secretary of Agriculture* v. *Allen et al.*, also on certiorari to the same court.

(a) The particularity and specificity of the enumerated differentials negate the conclusion that Congress was thinking only in terms of historical considerations. P. 183.

(b) The other statutory differentials, for "volume," "grade or quality," "location," and "production," all compensate the producer for providing an economic service benefiting the milk handler. Pp. 183–184.

(c) In a statute whose purpose was to avoid the infirmity of the overbroad delegation of the Agricultural Adjustment Act, it would have been simple to include "nearby" payments in the list of enumerated differentials, or at least to allude to them in the draftsmen's report. P. 185.

2. The "nearby" differentials do not fall into the category of the permissible adjustments, which are limited to compensation for rendering an economic service, and neither the Secretary of Agriculture nor the "nearby" farmer petitioners have advanced any economic justifications for them that have substantial record support. Pp. 188–191.

3. This holding does not depart from the Court's precedents. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, distinguished. To the extent that *Green Valley Creamery* v. *United States*, 108 F. 2d 342, contravenes this holding, it is disapproved. Pp. 191–192.

4. While according great weight to a department's contemporaneous construction of its own enabling legislation, the Court cannot abdicate its ultimate responsibility to construe the statutory language. Pp. 192–194.

5. Although the Secretary's orders have been specifically approved by the farmers concerned in accordance with § 9 (B) (i) of the Act, such approval does not legitimize the regulation which is not authorized by statute. Pp. 195–196.

6. A reversal for trial on the merits is not warranted since the Department of Agriculture acted on a formal record, and a remand to the Secretary is inappropriate in the absence of a request by the Government, which has advanced no new theory for sustaining the regulation. Pp. 196–197.

7. The Court of Appeals' award to "nearby" farmer petitioners of the escrowed differential payments collected before the District Court entered final judgment will not be disturbed. P. 197.

131 U. S. App. D. C. 109, 402 F. 2d 660, affirmed.

Lawrence D. Hollman argued the cause for petitioners in No. 25. With him on the briefs was *Carlyle C. Ring, Jr. Daniel M. Friedman* argued the cause for petitioner in No. 52. On the briefs were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Peter L. Strauss, Alan S. Rosenthal,* and *Walter H. Fleischer.*

Charles Patrick Ryan argued the cause for respondents in both cases. With him on the brief was *Edward J. Ryan.*

Edwin H. Amidon, Jr., Assistant Attorney General, argued the cause for the State of Vermont as *amicus curiae* urging affirmance in both cases. With him on the brief was *James M. Jeffords,* Attorney General.

Robert H. Quinn, Attorney General of Massachusetts, *pro se, Walter H. Mayo III,* Assistant Attorney General, *Herbert F. DeSimone,* Attorney General of Rhode Island, *pro se, Charles G. Edwards,* Assistant Attorney General, *Robert K. Killian,* Attorney General of Connecticut, *pro se,* and *Michael J. Scanlon,* Assistant Attorney General, filed a brief for the Attorneys General of Massachusetts, Rhode Island, and Connecticut as *amici curiae* urging reversal in both cases.

C. Wayne Smyth filed a brief for Lorton Blair et al. as *amici curiae* urging affirmance in both cases.

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought by respondent Vermont dairy farmers, "country" milk producers, seeking a judgment invalidating as contrary to the Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, 7 U. S. C. § 601 *et seq.* (1964 ed. and Supp. IV), the so-called farm location differential provided for by order

of the Secretary of Agriculture.[1] The effect of that order is to require milk distributors to pay to milk producers situated at certain distances from milk marketing areas, "nearby" farmers, higher prices than are paid to producers located at greater distances from such areas. The District Court issued a preliminary injunction on January 16, 1967, against further payments and on respondents' motion for summary judgment transformed its decree into a permanent injunction on June 15, 1967. The Court of Appeals for the District of Columbia Circuit affirmed. 131 U. S. App. D. C. 109, 402 F. 2d 660 (1968). We granted certiorari to resolve the important issue of statutory construction involved in this aspect of the administration of the federal milk regulation program. 394 U. S. 958 (1969).

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[1] The Secretary has promulgated comprehensive regulations to govern the marketing of milk, 7 CFR § 1002.1 *et seq.* (1969), pursuant to the Agricultural Marketing Agreement Act. The provisions relevant to this cause are set forth in Part I of this opinion, at 178, *infra*.

The action was originally brought against the Secretary only. Petitioners Zuber et al., nearby farmers, unsuccessfully sought leave to intervene before the District Court in support of the Secretary's regulations. When judgment was rendered against the Secretary, petitioners sought leave to intervene for the purposes of appeal. Leave was granted and the Secretary also decided to take an appeal. The parties have devoted a good deal of energy to disputing what constitutes the record in this litigation. Petitioners at various times have referred us to the testimony and record compiled in an action brought in the Northern District of New York, *Cranston* v. *Freeman*, 290 F. Supp. 785 (1968). Respondents have objected, noting that the record in *Cranston* is not formally before this Court, and have included in the appendix various materials that were not of record below. The Court need not pause over the controversy since none of the materials in respondents' appendix is decisive of the action before us. As for the references to the *Cranston* record, they too are not decisive of the dispute.

I

BACKGROUND

Once again this Court must traverse the labyrinth of the federal milk marketing regulation provisions.[2] While previous decisions have outlined the operation of the statute and the pertinent regulations, a brief odyssey through the economic and regulatory background is essential perspective for focusing the issue now before the Court.

A. The Economics of the Milk Industry

The two distinctive and essential phenomena of the milk industry are a basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.

Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a premium price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and

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[2] See, *e. g., Lehigh Valley Cooperative* v. *United States,* 370 U. S. 76 (1962); *Brannan* v. *Stark,* 342 U. S. 451 (1952); *Stark* v. *Wickard,* 321 U. S. 288 (1944); *United States* v. *Rock Royal Co-op.,* 307 U. S. 533 (1939); *H. P. Hood & Sons* v. *United States,* 307 U. S. 588 (1939). The lower courts have also been plagued by the milk problem. See especially Judge Frank's lament, *Queensboro Farm Prods.* v. *Wickard,* 137 F. 2d 969 (C. A. 2d Cir. 1943); see also *Blair* v. *Freeman,* 125 U. S. App. D. C. 207, 370 F. 2d 229 (1966); *Green Valley Creamery* v. *United States,* 108 F. 2d 342 (C. A. 1st Cir. 1939).

conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months. The historical tendency prior to regulation was for milk distributors, "handlers," to take advantage of this surplus to obtain bargains during glut periods. Milk can be obtained from distant sources and handlers can afford to absorb transportation costs and still pay more to outlying farmers whose traditional outlet is the manufacturing market.[3] To maintain income farmers increase production and the disequilibrium snowballs.

To protect against market vicissitudes, farmers in the early 1920's formed cooperatives. These cooperatives were effective in eliminating the self-defeating overproduction by pooling the milk supply and refusing to deal with handlers except on a collective basis.[4] During

[3] For fluid use, milk must be transported in its natural state and as such is a bulky and highly perishable commodity. Thus cost of shipment to a consumer market is greater than transporting an equal supply to a manufacturing plant. These factors, combined with more rigid sanitary requirements for plants distributing the fluid product, see Agricultural Adjustment Administration Report, May 1933–Feb. 1934, p. 154, explain part of the disparity between the price for Class I (fluid milk) and Class II (other uses) milk. Nearby producers, given equilibrium of supply and demand, are logical fluid suppliers to the urban areas. See generally J. Cassels, A Study of Fluid Milk Prices (1937).

[4] The cooperative system amounted to a pooling arrangement wherein participating producers would bargain collectively with the handlers and threaten to withhold their milk if the handlers refused to agree to purchase a certain minimum percentage of their Class I fluid milk from the pool. Without this supply the handlers would be unable to meet their winter requirements.

Essential to this arrangement of course was a sufficiently wide membership to insure no alternative source of supply to recalcitrant handlers.

The second aspect of the arrangement was the division of the profits among the producer members of the cooperative. Frequently

the 1920's era of relative market stability the nearby farmers enjoyed premium prices for their product. These favorable prices were apparently attributable to reduced transportation costs and also the nearby farmer's historic position as a fluid supplier.[5]

B. The First Federal Program

The drop in commodity prices during the depression years destroyed the equilibrium of the 1920's and utter chaos ensued. Congress, in an effort to restore order to the market and boost the purchasing power of farmers, enacted the licensing provisions of the Agricultural Adjustment Act, 48 Stat. 31, 35. Under § 8 (3) the Secretary of Agriculture was empowered

> "[t]o issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of

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employed was a base-rating plan whereby each producer would be assigned a percentage of his milk for which he could claim payment at the Class I fluid price. For the remaining production he would be paid at the Class II rate. Apparently bases were assigned according to the anticipated participation of the producer in the fluid market. As a result, nearby producers received more favorable bases in view of their historical role as fluid suppliers in an equilibrium market. For descriptions of the cooperative systems see Cassels, *supra,* n. 3, at 56–70; J. Black, The Dairy Industry and the AAA 49–51 (1935).

[5] Because they were historically fluid suppliers the nearby producers apparently maintained at all times production sufficient to service the consumer fluid market. In addition their close proximity enabled them to deliver to small retailers. As such they were potential competitors.

> Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. . . ."

Under the licensing system base-rating plans not unlike the private arrangements that obtained in the 1920's were adopted.[6] Producers were assigned bases which fixed the percent of their output that they would be permitted to sell at the Class I price that was paid for fluid milk.[7] The viability of the licensing scheme was jeopardized, however, by judicial decisions disapproving a similarly broad delegation of power under the National Industrial Recovery Act provisions, 48 Stat. 195. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935). With its agricultural marketing program resting on quicksand, Congress moved swiftly to eliminate the defect of overbroad delegation and to shore up the void in the agricultural marketing provisions. Section 8 (3) of the 1933 Act was amended in 1935 and the pertinent language has been carried forward without significant

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[6] See Agricultural Adjustment Administration Report, *supra,* n. 3, at 159–161; G. Barnhart, The Development of the Licenses and Order Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, Nov. 3, 1933–June 1, 1946 (unpublished dissertation on file with Department of Agriculture and Harvard University).

[7] License 38 for the Boston area provided more favorable bases for the nearby producers. See Barnhart, *supra,* n. 6, at 95–96.

change into § 8c of the present Act. Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. § 608c (1964 ed. and Supp. IV).[8]

[8] "(5) Milk and its products; terms and conditions of orders.

"In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

"(B) Providing:

"(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

"subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the

C. The Present Regulatory Scheme

The present system, which differs little in substance from the scheme conceived in 1937 for regulating the Boston market,[9] provides for a uniform market price payable to all producers by all handlers.[10] Prices are established for Class I and Class II uses. The total volume of milk channeled into the market in each category is multiplied by the appropriate coefficient price and the two results are totaled and then divided by the total number of pounds sold. The result represents the average value of milk sold in the marketing area and is the basic "uniform" price. Were all producers to receive this price they would share on an equal basis

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milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year."

[9] The Boston order of 1937, 2 Fed. Reg. 1331, established uniform prices for all producers at $3.19 and $3.01 per cwt. of milk, depending on the place of delivery, with a further adjustment for transportation to the handler's plant in the marketing area. Article VIII, § 4 (1) also provided for an adjustment based on the cost of transporting milk from outlying plants to the primary Boston market. The present regulations calculate price with reference to the purchasing power of milk based on the 1958 cost-of-living index. No transportation adjustment is provided for in calculation of the uniform price under § 1001.62 of the order. Differentials to compensate for zone of delivery are retained as separate adjustments. See *infra*.

[10] The Secretary has three alternative modes of proceeding under the Act. He may establish "use" prices which all handlers must pay to all producers according to the actual amount of milk used in each category, § 8c (5) (A); individual handler pools where all producers or cooperatives selling to an individual handler shall be paid a uniform price for milk delivered to that handler; or a marketwide pool where all handlers must pay all producers a uniform price for all milk delivered irrespective of end use.

the profits of Class I marketing and assume equally the costs of disposing of the economic surplus in the Class II market. The actual price to the producer is, however, the "blended" price which is computed by adding and subtracting certain special differentials provided for by statute and order. See 7 CFR § 1001.64 (1969). The deduction for differential payments withheld for the benefit of nearby producers reduces the uniform "blended" price to those producers ineligible to collect this particular adjustment.[11] The provision is contained in § 1001.72 of the order and provides:

> "*In making the payments to producers . . . each handler shall add any applicable farm location differential specified in this section.*
>
> "(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60, 1001.62, and 1001.63 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price."

A differential of 23¢ is provided for deliveries from farms in intermediate nearby zones. § 1001.72 (b).

The foregoing provisions appear in the so-called 1964 Massachusetts-Rhode Island Order, which consolidated into one region the four sub-markets which were pre-

[11] Also included is an adjustment for delivery to a nearby plant. The location of handler plants is classified by zones. 7 CFR § 1001.62. Delivery to a plant located nearby the consumer market is, of course, advantageous to the handler and the producer is compensated for this service. The handler also saves the cost of handling and processing at his country plant in addition to saving transportation cost. Conversely, depositing milk at handlers' plants in outlying districts results in a negative adjustment.

viously regulated separately under the so-called four "New England" orders: the 1951 Boston order which carried forward the order adopted for the Boston area in 1937; the Springfield order promulgated in 1949; and the Southeastern New England order of 1958. Each order included a provision for a nearby differential payment to farmers within a stated radius of a designated market center. For example the differential under the Boston order was payable to farmers located within a 40-mile radius of the State House in Boston; a slightly lower differential was paid to farmers within an 80-mile radius. Under the 1964 order there is no central point for the computation of the radius for payment of the differential; the Secretary has retained the differential provisions as they appeared in the previous four orders. Farmers who would have been entitled to the differential under any one of the previous four marketing regulations continue to receive those payments under the present order. These nearby farmers are eligible for the differential on any shipments within the New England marketing area, even though their milk may actually be used outside the radius of their particular nearby zone.

II

THE STATUTORY SCHEME

The foundation of the statutory scheme is to provide uniform prices to all producers in the marketing area, subject only to specifically enumerated adjustments. The question before the Court, stated most simply, is whether payment of farm location differentials, set forth above, is a permissible adjustment under § 8c (5)(B) to the general requirement of uniformity of price.[12]

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[12] Section 8c (5)(B)(ii) requires all uniform prices to be paid "irrespective of the uses made of such milk by the individual handler to whom it is delivered." Respondents contend that the nearby differ-

The Secretary has in the past labeled the "nearby" differential a "location" differential and defended its inclusion in his orders on that ground. The justification and argument are now, however, pitched in a different key. The Government has apparently abandoned all but one of the numerous theories advanced below, and pressed most vigorously in the *Blair* v. *Freeman* litigation (125 U. S. App. D. C. 207, 370 F. 2d 229 (1966)), and it now stresses the provision in § 8c (5)(B) for "volume, market, and production differentials customarily applied by the handlers subject to such order."

While the proper resolution of the issue is by no means self-evident, we are persuaded that "market . . . differentials customarily applied" contemplates *cost* adjustments. The plain thrust of the federal statute was to remove ruinous and self-defeating competition among

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ential is merely a disguised payment for the nearby suppliers' greater share of fluid milk sales. Such was apparently the case in the New Jersey order invalidated by the Court of Appeals in *Blair* v. *Freeman, supra,* where the payment of the differential was explicitly linked to the percentage of nearby milk actually supplied to the fluid market. We share respondents' skepticism and our doubts are reinforced by the explicit connection of differential payments with the share of fluid milk supplied in the 1936 Boston order. Further cause for skepticism is found in the present zone differential structure which undercompensates the handlers for transportation from outlying districts and thus encourages them to buy from nearby farmers. See Kessel, Economic Effects of Federal Regulation of Milk Markets, 10 J. Law & Econ. 51, 64–65 (1967). Here, however, unlike the situation in *Blair* v. *Freeman, supra,* the producer receives the differential irrespective of the use to which his milk is ultimately put. Since the nearby differential in the present order is not directly tied to the percentage of fluid milk sales, although the order limits differential payments to 46¢ or the Class I price, whichever is higher, we accept the Government's contention that, as a matter of strict logic, the payment of differentials based on the historical position of nearby producers as fluid suppliers, is not inconsistent with the irrespective-of-end-use requirement.

the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered. The Government's proposed reading of the Act, bottomed, as it is, on the historical payment of a premium to nearby farmers during the monopolistic era of the cooperative pools, would come to perpetuate economic distortion and freeze the milk industry into the competitive structure that prevailed during the 1920's.

Without the benefit of government muscle to eliminate crippling price warfare in the summer months, neither nearby nor country producers could share in the monopoly-type profits that accrue from fluid milk sales. Absent regulation only the handlers, if anyone, would stand to benefit from the "fluid" monopoly. While we cannot project what would be the case today if a free market prevailed, we might well anticipate that the nearby producers' winter advantages would be negligible in view of reduced transportation costs and more reliable refrigeration. Thus even in winter handlers might be free to play nearby and outlying farmers against each other since handlers would be free of the leverage exercised by the nearby cooperatives during the 1920's. Nearby producers now seek the best of both worlds. Having achieved the security that comes with regulation, they seek under a regulatory umbrella to appropriate monopoly profits that were never secure in the unregulated market.

We are reluctant to attribute such intent to Congress and, simply in the name of administrative expertise, to follow a path not marked by the language of the statute. Indeed, such signposts as may be discerned from the legislative history point in a very different direction. The legislative history strongly suggests that "market differentials," as well as all the other differentials, contemplated particular understood economic adjustments. The House Report, in discussing the allowable adjust-

ments characterizes the market differential as a payment over and above the transportation costs, *i. e.*, a location differential, for delivery to the primary market.[13] Thus farmers would share with handlers the savings from by-passing country-station processing and handling the milk only at the city plant.

The significance of the legislative history emerges upon study of the subsequent administrative practice. The original Boston order obscures the market differential payment by providing in place of a labeled adjustment a two-price structure which allowed an additional 18¢ per cwt. for city-delivered milk over and above the costs of transporting the milk from the country plant. However, the testimony of Mr. Aplin for the Market Administrator erases any doubt that those responsible for administering the Act fully understood the meaning of the Committee's explanation of market differential.[14]

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[13] "The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H. R. Rep. No. 1241, 74th Cong., 1st Sess., 10 (1935).

[14] The relevant excerpts from the hearing are included in the Joint Appendix and appear at 258–259:

"Section 4 . . . provides for location differentials. . . . Now, the price which is arrived at from the calculation of the pool is a blended price for all milk f. o. b. the market *with country station allowances deducted*. Now, Paragraph 1 [of § 4] here provides that there shall be deducted from that blended price in the case of milk delivered to a plant more than 40 miles from the State House an amount equal to the carlot freight rate from that plant to Boston, so that that deduction would be different for each freight zone, and the price would be smaller by the amount of difference in freight from each zone as we go out from the market. Now, Paragraph 2 [of § 4] provides that in the case of milk delivered from a producer

Subsequent orders have combined the country station handling adjustment, properly the market differential, and the location-transportation differential into the so-called zone differential.[15]

The statute before us does not contain a mandate phrased in broad and permissive terms. Congress has spoken with particularity and provided specifically enumerated differentials, which negatives the conclusion that it was thinking only in terms of historical considerations. The prefatory discussion in the House Report emphasizes the congressional purpose to confine the boundaries of the Secretary's delegated authority.[16] In these circumstances an administrator does not have "broad dispensing power." See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617 (1944). The congressional purpose is further illumined by the character of the other statutory differentials for "volume,"

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to a plant located within forty miles of the State House there should be added 18 cents per hundredweight. That is added for the reason that in the case of country stations there is allowed the dealers on Class I milk 20 cents a hundredweight as a country station charge, and we are allowing for containers in which to ship the milk three cents in the case of milk received at city plants, instead of having a 20 cent and a three cent deduction, which would be 23 cents. There is a receiving station allowance of only five cents. The difference is 18 cents per hundredweight. We add back in here 18 cents to the producer whose milk does not pass through a country station." (Emphasis added.)

[15] See Barnhart, *supra*, n. 6, at 620.

[16] "To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter et al.* v. *United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing, and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities." H. R. Rep. No. 1241, *supra*, at 8. See *Brannan* v. *Stark*, 342 U. S. 451, 465 (1952).

"grade or quality," "location," and "production," [17] all of which compensate or reward the producer for providing an economic service of benefit to the handler.[18]

The general language of the committee report indicating that Congress intended to carry forward the basic regulatory approach adopted under the 1933 Act, following the precedent of the 1920's, is stressed by the dissent to this opinion. This committee language, it is argued, reinforces the continuity connotations of the "customarily applied" language, a thrust that is not blunted

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[17] In this connection it should be noted that the production differential authorized for maintaining an adequate supply for fluid use during the lean winter months is not, strictly speaking, a handler cost but a general cost of the market. It is, however, an essential cost that cannot be eliminated by looking to an alternative supplier. Viewed in this context, it is of course a cost to the handler; for in a nonregulated equilibrium market, a handler would be forced to pay a premium during the winter months when supply is limited and demand constant.

[18] "The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. . . . The production differential is a payment to the farmer for performing this *function in the market.*" (Emphasis supplied.) H. R. Rep. No. 1241, *supra,* at 9–10.

In *Brannan* v. *Stark, supra,* this Court invalidated regulations providing certain payments to cooperatives that had the effect of reducing the blended price to nonmember producers. The premise underlying our holding was that these payments would have to represent compensation for rendering of economic services of benefit to all producers. Even the dissenters took as a point of departure the proposition that the payments could be sustained only if justified in terms of services rendered.

by any specific language indicating a legislative purpose to treat all farmers equally.

Legislative silence is a poor beacon to follow in discerning the proper statutory route. For here the light illumines two different roads. If nearby payments had the notoriety and significance in the milk distribution industry attributed to them by the dissent, Congress could have given its blessing by carving out another specific exception to the uniform price requirement. In an Act whose very purpose was to avoid the infirmity of overbroad delegation and to set forth with particularity the details for a comprehensive regulatory scheme, it would have been a simple matter to include in a list of enumerated differentials, "nearby" payments, or at least allude to them in the report of the draftsmen. It is clear that Congress was not conferring untrammeled discretion on the Secretary and authorizing him to proceed in a vacuum. This was the very evil condemned by the courts that the 1935 amendments sought to eradicate.[19] It would be perverse to assume that congressional drafters, in eliminating ambiguity from the old Act,[20] were careless in listing their exceptions and selecting the illustrations from the committee report from which their words would ultimately derive content.[21]

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[19] See *Brannan* v. *Stark, supra.*

[20] "The proposed amendments, insofar as they relate to marketing agreements and orders, are primarily intended to implement and spell out in more detail and with greater freedom from ambiguity the powers which were provided for in the original act. The present language of the statute is, unfortunately, subject to serious misconstruction. This has given rise to obstacles in connection with the enforcement of the marketing agreements and licenses which have seriously endangered their successful operation." H. R. Rep. No. 1241, *supra,* at 7.

[21] The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently

We consider our conclusions in no way undermined by the colloquy on the floor between Senator Copeland and Senator Murphy upon which the dissent places such emphasis. A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report in this instance. There is no indication, however, that the question of nearby differentials and the meaning of "market . . . differentials customarily applied" were precisely considered in the floor dialogue. The exchange is not only brief but also inconclusive as to meaning.[22] Indeed, Senator Murphy apparently acqui-

betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). Its significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme. Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment. See, *e. g.*, *Girouard* v. *United States*, *supra*. Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone the approval discerned by the dissent.

[22] The floor exchange is reported at 79 Cong. Rec. 11139–11140.

"Mr. COPELAND. What has the Senator to say to the suggestion that in a number of communities in up-State New York there is not a sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community.

"Mr. MURPHY. If they were embraced in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of

esced in Senator Copeland's implied criticism of the statute for providing uniform prices for distant and nearby producers within the marketing region. When Senator Copeland pursued his inquiry, asking whether the Act recognized the higher cost for taxes on nearby lands, Senator Murphy merely recited the differential provisions of the Act and suggested that they "adopt the present practice of business," but conspicuously lacking is an affirmative statement that any specific differential covered these costs. This is not impressive legislative history especially in light of Senator Murphy's earlier agreement with Senator Copeland's statement that "[t]he provisions of the equalization . . . provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community," and the specific business illustrations of the House Report.

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milk. The price is greatly depressed, and has been for 5 years. The only way in which one can determine how each one of the producers included in the plan provided here shall bear his share of the cost of effecting a higher price is to divide the milk by classification uses.

. . . . . .

"Mr. COPELAND. I do not think the Senator has quite stated all the conditions. He does not take into consideration the difference in the cost of production. Taxes and values of property near the city are very much higher than in the case of property farther away from the city. The transportation differential does not compensate for the difference in cost, as I see it.

"Mr. MURPHY. If the Senator will refer to page 12, line 13, he will see that there is this qualification:

" 'Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order—'

"They adopt the present practice of business—

" '(2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.' "

III

SCOPE OF MARKET DIFFERENTIAL

While market differentials customarily applied need not be restricted to the sole illustration in the House Report, that illustration, taken in conjunction with the discussion of all the statutory differentials, suggests that the permissible adjustments are limited to compensation for rendering an economic service.[23] The challenged nearby differentials do not fall into this category.[24]

Nor has the Secretary advanced any economic justification for these differential payments. It is plain from the administrative record that the nearby differential was included in the original Boston order as a recognition of the favored position of nearby producers in the fluid market and as an inducement to nearby farmers to approve the Secretary's order. (J. A. 237.[25]) The only sense

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[23] The market differential does not, strictly speaking, compensate the producer for absorbing a cost to the handler for it may be no additional cost to the producer to deliver to a city plant. A nearby farmer, for example, would not incur additional costs by delivering to a preferred city plant as opposed to a country station. The savings to the handler are nevertheless plain and the market differential should properly be viewed as an adjustment that permits the producer to share in the handler's profits resulting from reduced costs.

[24] See Kessel, *supra,* n. 12, at 65–66 (1967). After criticizing the present undercompensation for transportation costs from faraway zones as a disguised subsidy to nearby producers, resulting in an inefficient allocation of economic resources, the author draws a comparison with the nearby differential lamenting, "However weak the case for zone differentials that fail to depict transportation costs, it is infinitely stronger than the case for location differentials."

[25] The Secretary's 1964 findings include the following: "The farm location differential provisions under the present New England orders should be continued under the Massachusetts-Rhode Island order and the Connecticut order.

"A group of nine cooperative associations, which represents principally producers whose farms are located outside any of the speci-

in which the handler may be said to gain economically is by virtue of the elimination of the nearby producer as a potential competitor. While this factor is mentioned in the findings accompanying the 1937 order, it has not

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fied farm location differential areas, proposed that farm location differentials be eliminated under the New England orders. Three other cooperative associations proposed that a producer whose farm is located within New England and who is presently eligible to receive a farm location differential . . . under any New England order be eligible to receive the same differential irrespective of the New England order under which his milk is pooled. Another cooperative association proposed that the farm location differentials be increased . . . .

. . . . . .

". . . [F]arm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

"While considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time. Although certain marketing problems in the nearby and intermediate market areas were referred to in the testimony, these problems are not the result of production increases on farms in these areas which logically might be attributable to the higher returns to producers in these areas. Such increases have not been significantly different from those on farms not eligible for the farm location differentials." (J. A. 349–351).

There is no reason to dispute the Secretary's finding that the differentials have no disruptive effect on the market. The issue, however, is whether the provisions are authorized by statute. The Secretary's order is devoid of any economic justification and relies solely on the historical factor of the nearby producer's favorable share of the fluid use market. See also Report to the Secretary of Agriculture by the Federal Milk Order Study Committee 74–75 (1962).

been emphasized in the 1964 findings and the testimony at the 1963 hearings suggests that support in the record is indeed scant. That entry of the nearbys into the distribution market would bring unwanted competition, is irrelevant if it does not jeopardize market stability. We think the analysis of the court below was correct: if there is any economic benefit here, producers should receive their compensation directly from the handlers and not out of the marketwide pool. 131 U. S. App. D. C., at 114, 402 F. 2d, at 665.

While petitioner nearby farmers do not concede so readily the absence of economic foundation for the differential, no justifications are advanced that find any substantial support in the record. The allusion to the evenness of production on nearby farms would not justify the exclusive payment of this differential to nearby farmers. If the Secretary intended a production differential, all producers who qualify would be eligible. Some *amici* and petitioners point to higher taxes on nearby lands and opportunity costs as reason for retaining the differential. These are, admittedly, additional costs of nearby production, but they are of no concern to handlers who seek only to obtain reliably milk at the cheapest price. See Kessel, Economic Effects of Federal Regulation of Milk Markets, 10 J. Law & Econ. 51 (1967). This Court has been slow to attribute to Congress an intent to compensate for inefficient allocation of economic resources. Cf. *West Ohio Gas Co.* v. *Comm'n,* 294 U. S. 63, 72 (1935). While petitioners argue that the differential is a necessary inducement to keep the nearby farmers in business, the record does not reveal that the Secretary acted out of concern that the nearby farmers would quit the market, nor is there any evidence demonstrating the present necessity for nearby producers. In an era where efficient transportation is

available this may be of nominal concern. At most this may have been an unspoken consideration in 1937.[26]

Since the Secretary made no findings to that effect, the Court need not consider whether they would justify payment of the nearby differential in view of the legislative history indicating that the statute contemplates adjustments primarily for economic costs to handlers that are absorbed or reduced by the producers. Further if the representations of respondents are correct—and they are not without support in the record—it appears that the elimination of the 40-mile zone nearby differential payments of 46¢, even with the suspension of the intermediate differential payments of 23¢, would result in a higher uniform price to those farmers now receiving the 23¢ differential.[27]

IV

PRIOR DECISIONS

Our holding does not represent a departure from this Court's precedents. No opinion of this Court has ever explicitly approved the nearby differential. Reliance on *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (1939), is misplaced. This Court's refusal to invalidate the payment of a nearby differential to farmers in certain counties named in the New York order must be taken in the context of that action which was initiated by the Government against handlers who refused to obey the regulations. That decision did not repudiate the District Court's finding that the provision was "discriminatory as between producers." *Id.*, at 567. The narrow reach of our *Rock Royal* holding was recognized in *Stark* v.

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[26] See Report to the Secretary of Agriculture by the Federal Milk Order Study Committee, *supra,* n. 25, at 75.

[27] See J. A. 455 reporting excerpts from the Secretary's decision of October 21, 1958, accompanying the order for the Southeastern New England marketing area.

Wickard, 321 U. S. 288 (1944), where we noted that *Rock Royal* held the handlers without standing "to object to the operation of the producer settlement fund," *id.,* at 308, except as it affected handlers. The Court in *Rock Royal* went on to reject Rock Royal's contention that the payments placed those *handlers* without customers in the nearby counties at a competitive disadvantage.

Our attention is also drawn to the First Circuit's decision in *Green Valley Creamery* v. *United States,* 108 F. 2d 342 (1939). As in *Rock Royal, supra,* the parties did not have standing to raise the invalidity of the nearby differential. To the extent the First Circuit's view is contrary to our present holding, we disapprove it.

V

SIGNIFICANCE OF DEPARTMENTAL CONSTRUCTION

While this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction, see *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965); *Power Reactor Co.* v. *Electricians,* 367 U. S. 396, 408 (1961); it is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings. See *Power Reactor Co.* v. *Electricians, supra; United States* v. *American Trucking Assns.,* 310 U. S. 534, 539 (1940). In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation.

See *American Power & Light Co.* v. *SEC,* 329 U. S. 90, 112–114 (1946).

The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress. Those props that serve to support a disputable administrative construction are absent here. There is no suggestion in the findings, nor have the parties explained, how the present differential contributes to the broad, general purpose of eliminating crippling competition. Nor in the present case has the Court's attention been drawn to any hearings that suggest that Congress acted with the particular administrative construction before it in either 1935 or 1937. And if those administrators who participated in drafting the 1935 Act understood market differentials to encompass the farm location differential, they obviously failed to communicate their understanding to the drafters of the committee report. It is also evident that the 1937 re-enactment of the 1935 amendments was routine and did not follow a comprehensive review of the issues that had been explored in detail by the 1935 draftsmen who wrote the committee reports.[28]

It is true that a report from the Federal Trade Commission set forth the computations employed under the 1936 Boston order which apparently provided for a

[28] Judge Frank expressed the view in *Queensboro Farm Prods.* v. *Wickard,* 137 F. 2d 969 (C. A. 2d Cir. 1943), that Congress intended to adopt the intervening administrative interpretation of the "use" language of § 8c (5) (A) by its 1937 re-enactment. The construction of the "use" provision may well have caused more concern than the interpretation of the § 8c (5) (B) differentials. In any event, Judge Frank's assumption that Congress gave "careful consideration . . . in connection with a re-enactment," 137 F. 2d, at 977, is not supported by citation to specific legislative history that would indicate that Congress had in mind specific problems in connection with the administration of the marketing provisions.

nearby differential.[29] But the stark figures, set forth in the appendix to the report without explication, can hardly be said to have given the administrative construction the "notoriety" that this Court found persuasive in *Udall* v. *Tallman,* 380 U. S., at 18. In *Udall* the Court was impressed by the fact that the Secretary's interpretation had "been a matter of public record and discussion." *Id.,* at 17. Even despite active congressional involvement in reviewing certain administrative action in connection with particular leases, the Court noted that it would not attribute ratification to Congress. *Udall* v. *Tallman, supra.* Nor can petitioners put flesh on this argument by citing § 4 of the 1937 re-enactment, 50 Stat. 249,[30] and the committee report, H. R. Rep. No. 468, 75th Cong., 1st Sess., 4 (1937), which merely states in the language of the Act that § 4 purports to ratify, legalize, and confirm all action taken pursuant to the agreement and order provisions under the 1935 statute.[31]

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[29] The 1936 order provided for payment of a uniform price subject to adjustments and with a special exception for "any producer, whose farm is located within forty (40) miles of the State House in Boston *and* who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer." (Emphasis supplied.) Art. VIII, § 1 (2).

[30] Section 4 of the Act provided:

"Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed."

[31] To the extent that Congress could be said to have acted against the background of the 1936 order, the Court must reject petitioners' argument. The 1936 order was superseded by the 1937 order which differed in approach. The provision for nearby differentials in the

VI

RELEVANCE OF PRODUCER APPROVAL

Petitioners allude to the fact that the orders in question have been specifically approved by the farmers concerned as required by §§ 8c (9)(B)(i) and (ii) of the Act.[32] While the contention is adumbrated, the argument appears to run as follows: since provision is made for approval of orders by the regulated subjects, the Secretary's discretion should be generously inter-

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1936 order was obscured by allowing a more favorable total price to nearby producers. See n. 29, *supra*. The 21¢ differential incorporated in the 1937 order for the benefit of intermediate nearby zones was not included in the 1936 order. The 21¢ differential provided in Art. VIII, § 4 (2), of the 1936 order could have been viewed as a true market differential since its payment depended on delivery to a handler within a 40-mile zone from a producer beyond a 40-mile zone. Further, as noted by the court below, § 4 is typical of statutory boilerplate traditionally included in legislative re-enactments, to avoid breaks in regulatory continuity. 131 U. S. App. D. C., at 119, 402 F. 2d, at 670.

[32] Section 8c (9) of the Act, 7 U. S. C. § 608c (9), provides that no order shall become effective until the Secretary determines:

"(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

"(i) By at least two-thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

"(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order."

preted. If provision for such approval could ever legitimize a regulation not authorized by statute, the provision has no significance in the case before us, in light of the considerations already discussed. It is the Secretary, not the farmers, who is responsible for administering the statute and initiating orders.[33]

VII

PROPRIETY OF SUMMARY JUDGMENT

Although the Secretary does not press the point, the private petitioners argue that this Court should at the very least reverse for a trial on the merits or alternatively reverse with instructions to remand to the Secretary for further consideration.

This is not a case where a department has acted without a formal record. In such instances a trial might be appropriate to afford the department an opportunity to develop those facts which underpin its action. When action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record, any more than arguments of counsel on review can substitute for an agency's failure to make findings or give reasons. A remand to the Secretary is inappropriate in the absence of a request by the Government. Counsel for the Department has advanced no new theory for sustaining the order. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92 (1943).

Unlike *Addison* v. *Holly Hill Co.*, 322 U. S. 607 (1944), we do not have before us a definition in a regulation that is necessary to give meaning and content to the admin-

[33] Lower courts have, in some circumstances, permitted an agency to rely on the approval of those affected by an action as evidence that the action is in the "public interest." Compare *Citizens for Allegan County* v. *FPC*, 134 U. S. App. D. C. 229, 414 F. 2d 1125 (1969), with *Marine Space Enclosures* v. *FMC*, 137 U. S. App. D. C. 9, 420 F. 2d 577 (1969). We need not consider what scope, if any, may be given to these principles.

istrative scheme. Nor does our decision have the effect of engrafting a definition on a particular statutory term, a function that should, in the first instance, be left to the appropriate administrative body. The 1964 order, moreover, expressly provides for severance of any provision that is found invalid. See 7 CFR § 1001.96.

VIII

DISPOSITION OF THE ESCROW FUND

Petitioner farmers' last line of retreat is their contention that they are entitled to escrow monies that have been accruing since the District Court's entry of the order granting the respondents' motion for a preliminary injunction. The court below struck an equitable balance in awarding to petitioners, nearby farmers, all escrow monies collected prior to the entry of final judgment by the District Court. This is a fair solution, and one this Court will not disturb. Petitioners have been on notice since *Blair* v. *Freeman,* 125 U. S. App. D. C. 207, 370 F. 2d 229 (1966), that nearby differentials were bottomed on a shaky statutory premise. Lest losing parties be encouraged to prolong litigation by frivolous appeals in order to reap a windfall, we think respondents deserve the fruits of their victory as of the date of final judgment at trial.

The judgment below is

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACK, with whom MR. JUSTICE WHITE joins, dissenting.

The central question in this cause is whether a provision in the Secretary of Agriculture's Boston milk market regulation which provides that farmers close to Boston

will receive a higher price for their milk than farmers farther away is valid under the Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, 7 U. S. C. § 601 *et seq.* (1964 ed. and Supp. IV). The majority concludes that this higher payment can be sustained only if it represents "compensation for rendering an economic service," *ante,* at 188, and then holds that since the Secretary has not provided such an economic justification for this payment, it is invalid. The effect of affirming the judgment below is that challenged payments which have been placed in a special fund since June 1967 and now amount to over $8,000,000 will be distributed to all farmers selling milk in the Boston market instead of only those located near Boston. This represents a drastic change in the distribution of the income from the sale of milk since only the nearby farmers have received these additional payments for at least 30 years. My study of the legislative history convinces me beyond any doubt that this result is wrong and in direct conflict with the intent of Congress as expressed in the Agricultural Marketing Agreement Act and its predecessors. In my opinion Congress intended to permit the Secretary to regulate the milk industry in accordance with the practices that had developed in that industry prior to the first federal regulation in 1933 and did not intend to eliminate the economic advantages that specific groups had enjoyed in the past. Since it is clear beyond a doubt that farmers near Boston received more for their milk than did other farmers prior to federal regulation, I would reverse the judgment below and hold this provision of the Boston milk order valid.

In order to understand the purpose of the 1937 Act, it is necessary to go back to the 1920's at a time prior to any federal regulation. As the majority correctly points out, the economics of the milk industry at that

time often led to destructive competition and chaos. Milk producers therefore formed cooperatives for their own protection and sold milk on a collective basis. All the parties in this case agree, and the record conclusively shows, that under the cooperatives at that time farmers close to marketing centers received more for their milk than did farmers farther away. This higher price resulted from many factors, including the greater proportion of milk from nearby farms that was used for fluid purposes, the possibility that those farmers would compete with handlers by selling directly to customers, smaller seasonal variation in the volume of milk produced, and higher costs—such as taxes and land values—incurred in farming close to the cities.[1] As long as economic conditions remained generally stable, the cooperatives succeeded in protecting all farmers from the dangers of overproduction and excessive competition. Then the depression set in and milk farmers, like so many other Americans, were unable to maintain stable prices by self-regulation. Congress reacted to this situation by passing the Agricultural Adjustment Act of 1933 (A. A. A.), 48 Stat. 31, under which the Secretary of Agriculture was given broad powers to regulate the farm economy through licensing. *Id.*, § 8 (3), 48 Stat. 35. Very few details or standards describing the Secretary's powers were provided in the 1933 Act, and there was no attention given to specific problems of

[1] The majority implies, *ante*, at 181, that this higher price in the 1920's was an economic "distortion." There has been no such finding by the Secretary or any of the courts below, nor was any evidence taken that was directed at this issue. This Court is poorly equipped to pass judgment on the economic validity or invalidity of this higher price, surely not as well equipped as the Secretary and the economists who advise him. It is the Secretary, not this Court, to whom Congress has delegated the task of fixing the prices producers will be paid for their milk and of making the underlying economic judgments.

nearby farmers in the milk industry. Under the provisions of that Act the Secretary issued a license for the Boston market in 1933 and this first license included provisions that effectively maintained the historical price advantage of producers close to Boston.[2] In 1935 bills were introduced in Congress to amend the A. A. A.[3] and hearings were held on those bills in February and March of that year.[4] In May 1935 this Court held in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, that provisions of the National Industrial Recovery Act, 48 Stat. 195, were unconstitutional, in part because that Act delegated powers to an administrative agency without providing adequate standards and guidelines. The congressional committees considering the amendments immediately recognized that the *Schechter* decision cast considerable doubt on the validity of the A. A. A. and they therefore reported out a completely amended bill which set forth detailed descriptions of the powers and standards that the Secretary was to employ.[5] As reported and passed by Congress, that bill contained specific provisions concerning the milk industry, and it is those provisions that are involved in the present case.[6] The committee reports accompanying that bill make it abundantly clear that a primary pur-

[2] This license adopted a somewhat complicated base-rating plan similar to that used by the milk cooperatives. See n. 4, *ante,* at 173–174. There is general agreement among the parties that these licenses effectively resulted in higher milk prices to nearby farmers, and the Court of Appeals recognized this fact. 131 U. S. App. D. C. 109, 113–114, 402 F. 2d 660, 664–665.

[3] H. R. 5585, S. 1807, 74th Cong., 1st Sess.

[4] Hearing on H. R. 5585 before the House Committee on Agriculture, 74th Cong., 1st Sess.; Hearings on S. 1807 before the Senate Committee on Agriculture and Forestry, 74th Cong., 1st Sess.

[5] H. R. 8492, 74th Cong., 1st Sess.

[6] These provisions of the 1935 amendments have been carried forward, virtually without change, into the present statute.

pose of the bill was to "eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter* . . . ." [7] There is no indication that when Congress passed those amendments it intended to cut back on or limit the authority the Secretary had actually exercised in regulating milk under the 1933 Act, but rather the purpose was to avoid judicial invalidation resulting from the absence of constitutionally sufficient standards. History and the legislative record make it quite clear that Congress in 1935 was concerned, not about limiting an excessively aggressive Secretary, but about overcoming the limitations imposed by a Court that was frustrating the congressional purpose by holding laws unconstitutional. Pursuant to the 1935 Act, the Secretary issued a new order in 1936 for the Boston market which, like the 1933 order, contained provisions for additional payments to nearby farmers. In issuing this order he explicitly relied on the historical, economic factors which justified these additional payments. (J. A. 224.) The effectiveness of the 1935 amendments was also jeopardized by court decisions,[8] and Congress again acted by passing a new law, the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. This statute re-enacted the milk marketing provisions of the 1935 Act in substantially the same form and further provided that all market orders issued under that Act were "expressly ratified, legalized, and confirmed." 50 Stat. 249. Proceeding under the new Act the Secretary reinstated the 1936 Boston order including the additional

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[7] S. Rep. No. 1011, 74th Cong., 1st Sess., 8; H. R. Rep. No. 1241, 74th Cong., 1st Sess., 8.

[8] In *United States* v. *Butler,* 297 U. S. 1 (1936), this Court declared the processing tax provisions of the A. A. A. invalid, and some district courts then held that the entire Act was invalid. *E. g., United States* v. *David Buttrick Co.,* 15 F. Supp. 655 (D. C. Mass. 1936), rev'd, 91 F. 2d 66 (C. A. 1st Cir.), cert. denied, 302 U. S. 737 (1937).

payments to farmers located nearer the city, and that order and the 1937 Act have remained in substantially the same form until this time. With this general historical picture in mind, it is easier to answer the central legal question in this case which is whether the 1937 Act authorizes the Secretary of Agriculture to provide that nearby farmers will receive more for their milk than farmers farther away.

The Act provides that the Secretary shall establish by order certain basic prices for milk delivered by producers and allows him to adjust that basic price to reflect "volume, market, and production differentials customarily applied by the handlers subject to such order . . . ." 7 U. S. C. § 608c (5)(B), cl. (a) (1964 ed., Supp. IV).[9] The Secretary here argues that the payment of additional sums to farmers close to Boston is an authorized "market differential." The argument cannot be settled simply on the basis of the statutory language since there is no definition of the term "market." However the legislative history makes it clear beyond any doubt that this provision was designed to allow the Secretary broad leeway in regulating the milk industry in accordance with prior practices and differentials in the unregulated market. The committee reports in both Houses said that the milk order provisions in the Act were designed to "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of

[9] This language was first enacted in the 1935 amendments to the A. A. A., but was re-enacted in the 1937 Agricultural Marketing Agreement Act without change. There is no relevant legislative history for the 1937 Act, but the parties all agree that the history of the 1935 amendments also applies to the 1937 Act. The discussion of legislative history in the text is based on the 1935 legislative record.

The complete text of the relevant portions of the present statute is set forth in n. 8, *ante,* at 176–177.

licenses issued pursuant to the present section 8 (3) of the Agricultural Adjustment Act." [10] The only discussion of these provisions during the congressional floor debates fully supports this statement. Senator Copeland, a former commissioner of health in New York City and a man well acquainted with the milk industry in New England, asked Senator Murphy, the floor manager for the bill, about the possibility that farmers near the cities would receive the same price for milk as farmers farther away. Senator Murphy's initial answer indicated this would be so, but when Senator Copeland pressed the inquiry further, stating that not all factors had been considered, Senator Murphy indicated that the provisions for specific differentials "adopt the present practice of business." [11] To me that reply indicates that nearby differentials would be permissible, if they were part of the business practice—as they were. The majority diminishes the importance of this discussion by saying that it represents the views of only two men, not those of the committee, but anyone acquainted with the realities of the United States Senate knows that the remarks of the floor manager are taken by other Senators as reflecting the views of the committee itself. This history makes it clear that Congress did not intend to limit the authorized differentials to any specific payments, but rather intended to permit the Secretary to employ whatever practices, consistent with the history of the unreg-

[10] S. Rep. No. 1011, 74th Cong., 1st Sess., 9; H. R. Rep. No. 1241, 74th Cong., 1st Sess., 9. This basic purpose is reflected in the fact that Congress provided the Secretary with three different schemes of regulation, each of which followed a variety of regulations used by the milk cooperatives. See n. 10, *ante,* at 177. In 1965 Congress followed this same basic purpose when it amended the Act to make explicit the Secretary's power to employ base-rating plans, described in n. 4, *ante,* at 173–174. See 79 Stat. 1187, 7 U. S. C. § 608c (5) (B), cl. (d) (1964 ed., Supp. IV).

[11] The full discussion is set out in n. 22, *ante,* at 186–187.

ulated market, he found necessary to achieve stability in the milk industry.

Applying these considerations it becomes plain that the additional payments to nearby farmers are authorized as a "differential customarily applied." Nearby farmers had always obtained a higher price for their milk than farmers farther away and the Secretary's regulations in 1933 and 1936 reflected this historical fact. Reinstatement of the nearby differentials after passage of the 1937 Act merely continued this prior administrative practice, based on the earlier economic realities, of paying more for milk produced on farms close to Boston. Had Congress intended to eliminate this feature of the prior practice, it would have been easy to say so, but there is absolutely nothing in the statute or in the legislative history that demonstrates a desire to alter the advantage nearby farmers had always enjoyed.

My conclusion that this differential is authorized is buttressed by the actions of Congress and the Secretary since 1937. There has always been a healthy controversy among farmers about this differential, and extensive hearings in 1963 brought forth strong arguments against continuing it. (J. A. 360-599.) Yet Congress, even though it amended the statute in 1965, 79 Stat. 1187, still has not in any way indicated that the nearby differential was unauthorized by the 1937 Act or that it should be eliminated at this time. Similarly the Secretary has continually reviewed this provision and refused to eliminate it, the most recent time being 1964. (J. A. 346, 349.) Since Congress, in my view, intended in 1933, 1935, and 1937 to authorize payments like the nearby differential and since it has not altered this authorization in the past 32 years, I cannot agree that this Court should or properly can eliminate the payment, ostensibly through a process of statutory interpretation.

This interpretation is not based on a theory of legislative silence as the majority seems to imply. To me the legislative history speaks clearly in saying that Congress intended the Secretary to regulate the industry in accordance with prior practices, and the statutory language, statements in committee reports, and floor debates do not "illumine two different roads," *ante,* at 185. I see only one path that is marked by the legislative record, and the only silence I perceive is the striking absence of any statements in the statute or the legislative history that support the majority's interpretation.

My conclusion that the location differential is authorized by the Act finds support in other judicial decisions. In *United States* v. *Rock Royal Co-op.,* 307 U. S. 533 (1939), certain milk handlers made a broadside attack on the New York order issued under the 1937 Act. This Court rejected that challenge. One part of the argument was that the nearby differential provision of that order was invalid. This Court noted that "[t]he Act authorizes such an arrangement," citing the provision for market differentials customarily applied. *Id.,* at 567. Although that provision was promulgated under § 8c (5)(A) of the Act, the identical language supporting that conclusion is found in § 8c (5)(B), and it is that latter section which is involved in the present case. The majority attempts to distinguish that case by noting that it was a suit brought by the Government against handlers, but it is difficult to see what difference that makes. It does not matter who sues, if the Court decides an issue of statutory interpretation that decision should remain the same even if the litigants change.[12]

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[12] The majority also seems to imply, *ante,* at 191–192, that *Rock Royal* did not decide this issue since the handlers did not have standing to raise it. It seems to me that the Court there did decide that the handlers, who argued that the nearby differential reduced their own profits, could raise this issue.

The nearby differential of the Boston order involved here was also approved by the First Circuit in *Green Valley Creamery* v. *United States,* 108 F. 2d 342 (1939). The majority's dismissal of that case on the conclusion the handlers did not have standing to raise this issue is irrelevant. The First Circuit there found the differential valid and then stated that "[f]urthermore" the handlers lacked standing. *Id.,* at 346. It does not matter to me whether the decision on the validity of the location differential is classified as dictum or a holding. The point remains that the First Circuit considered these payments and found them expressly provided for by the language of § 8c (5)(B). *Ibid.*

The majority disagrees with the interpretation of the statute set forth above and instead finds that the foundation of the portion of 1937 Act involved here was to provide uniform prices to all producers, with adjustments to that uniform price only as "compensation for rendering an economic service." *Ante,* at 188. This interpretation, as I understand it, would require the Secretary to disregard the historical price advantage nearby producers had in the sale of their milk, and to consider only whether there is a present economic justification for particular payments. I respectfully submit that this interpretation cannot be supported by the language of the Act considered as a whole or by the relevant expressions of congressional intent found in the legislative history. The theory of this Act adopted by the majority is clearly not that of Congress, but one created by the Court itself.

The conclusion that each of the differentials specified in the Act represents only "compensation for rendering an economic service" finds no support whatsoever in the language of the Act or the legislative history. None of the adjustments described in the Act is defined in terms of any "economic service." The majority does not refer

to any legislative history that indicates such a definition was intended. It may well be possible for an analyst to fit the language of the Act, the committee reports, and the floor debates into a coherent pattern of economic services, but had Congress desired to require this as a touchstone for the authorized differentials, it would have been easy for it to have said so. Congress did not choose to do so in 1933, 1935, or 1937, and it has not done so in the intervening 32 years. Moreover, if there is any pattern into which all the differentials clearly fit that is fully supported by express legislative history, it is the clear pattern of allowing the Secretary to incorporate provisions reflecting the customary practices of the milk industry itself.[13]

Even if the majority's statutory interpretation were correct, I do not understand why it would lead to the conclusion that the judgment below should be affirmed and the challenged payments distributed at this time to all farmers. Until this Court's decision the Secretary had

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[13] In a footnote, n. 18, *ante,* at 184, the majority implies that there is support for this novel interpretation in our prior decision in *Brannan* v. *Stark,* 342 U. S. 451 (1952), which held invalid a provision in the Boston milk order that distributed certain sums to producer cooperatives. That case specifically held that such payments were not authorized by the catchall provision in the Act permitting provisions in milk orders "[i]ncidental to, and not inconsistent with, the terms and conditions specified in [other sections] and necessary to effectuate the other provisions of such order." 7 U. S. C. § 608c (7) (D); *Brannan,* at 457–458. It is true that the majority there did decide that the challenged payments did not represent compensation for an economic benefit received by all producers, but regardless of the validity of that decision, it is irrelevant to the decision in this case. It may be that payments that are sought to be justified solely on the basis of the "necessary provisions" section require independent economic justification, but that certainly does not mean that where the Secretary relies on a specific adjustment set forth in the Act, as he does here, he must also defend it on economic grounds.

no reason to know that he had to justify the provisions of this order as "compensation for rendering an economic service," and his failure to have provided such a defense does not necessarily mean it is unavailable. Indeed the Court apparently would approve this same provision were the Secretary to issue it again, but only if it were then accompanied by an economic study that this Court—composed of lawyers, not economic or agricultural experts—finds acceptable. If such a justification is present, the differential is in fact lawful at this time, and it would not seem to matter that the Secretary has not yet incanted the proper magic words.

I do not see what harm would follow if this Court were simply to vacate the judgment below, remand the cases to the Secretary for appropriate study, and continue to place the payments in the special fund pending ultimate resolution of the controversy. If the Secretary cannot make the proper economic justification, the only result would be to postpone the day when the accumulating funds, which now amount to over $8,000,000, would be distributed. If, on the other hand, he is able to show that these payments compensate for an economic service, then the Court would not have unnecessarily given the accumulated millions to farmers who are not legally entitled to receive them.

My conviction that the Act was designed to permit the Secretary to include adjustments that reflected the prior practice of the milk industry does not mean that he can act with unlimited abandon and approve a payment simply because historically it was provided for prior to federal regulation. The statute requires that the Secretary issue orders which "will tend to effectuate the declared policy of [the Act] . . . ." 7 U. S. C. § 608c (4). Those policies are specifically set forth, 7 U. S. C. § 602, and in general provide that orders should establish and maintain orderly marketing condi-

tions and parity prices for milk producers. In his latest promulgation of the Boston order the Secretary specifically refused to eliminate the nearby differentials (J. A. 349–357) and found that the order "will tend to effectuate the declared policy of the Act." 29 Fed. Reg. 12236. That finding cannot be disturbed, nor the nearby differential invalidated, unless it is shown that the order is not supported by substantial evidence in the administrative record considered in its entirety. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951). In this action the Court of Appeals did not make a specific finding on the substantiality of the evidence, and the respondents argue that it is insubstantial, but a review of the entire record in light of the appropriate legal standards indicates that the nearby differential in the Boston order is fully supported by substantial evidence.

In reaching this conclusion, it must be remembered that the Secretary is required to find only two things. First, that the proposed provision represents a payment customarily applied in the milk market, and second, that inclusion of the proposed provision will further the policies of the Act. The first of these questions is essentially a factual one, and there is no real argument in this action that the Secretary was wrong in finding as a matter of historical fact that nearby farmers received additional payments which are reflected in the location differential. The respondents do not really deny the historical existence of this higher price, but rather attack its legality under the Act. The Court of Appeals, moreover, specifically recognized the historical fact that such differentials existed, but accepted the respondents' argument that they were illegal. 131 U. S. App. D. C., at 112–114, 118, 402 F. 2d, at 663–665, 669. An independent review of the record confirms the conclusion that such differentials had been customary in the market. It is thus easy to conclude that the factual finding

required by the Act has been supported by substantial evidence in the administrative record.

The second required finding, that the provision will further the policies of the Act, is a mixed question of fact and administrative policy. The Secretary has held extensive hearings in the past on the provisions of the Boston milk order (J. A. 233–247, 257–302, 305–330, 360–651), and he has repeatedly found that the nearby location differential furthers the policies of the Act. Since this is essentially a question of administrative discretion and will be set aside only on a strong showing by the parties that the finding is without support in the basic facts on which the Secretary has relied, it is proper to say on this record that this second finding is adequately supported. Nothing in the respondents' arguments indicates that the nearby differential does not further the policies of the Act, but rather they argue only that elimination of the differential would better serve those policies. But this question is one for the Secretary, not for the parties or for this Court, to decide.

What is involved here is simply a question of interpreting and following the will of Congress. Over 30 years ago Congress decided that milk producers needed governmental assistance in stabilizing their income, but it also decided that this stabilization should be accomplished with a minimal amount of change in the industry's prior practices. Congress therefore authorized the Secretary of Agriculture to regulate the industry and left most of the details to him. For over 30 years he has used his authority to regulate the Boston milk market, and has consistently found it desirable to provide higher prices for milk produced on farms close to Boston. It may well be that this decision is not the best or the most economically sound one that he could make in light of changed economic conditions in 1969, but that decision is one Congress has committed to the Secretary alone. In my view

this Court and the Court of Appeals in this litigation effectively substitute their will for the will of Congress and their views of economics and wise administration for those of the Secretary whom Congress selected to carry out its will. The Court indicates that its decision will avoid a "windfall." *Ante*, at 197. In fact the Court itself creates a windfall of over $8,000,000 which is siphoned out of the pockets of farmers close to Boston and bestowed like a Christmas present on those farther away. This the Court does contrary to the informed judgment of the Secretary who, faithful to the Act, has declared for years that distant farmers are not eligible for such a bonus. I am unable to agree that this is a proper function for the Court to perform and I therefore dissent.

NACIREMA OPERATING CO., INC., ET AL. *v.* JOHNSON ET AL.

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

No. 9. Argued March 25, 1969—Reargued October 20, 1969—Decided December 9, 1969*

One longshoreman was killed and two others were injured on piers permanently affixed to shore in accidents that occurred while they were attaching cargo from railroad cars to ships' cranes. The District Court upheld denial of compensation claims under the Longshoremen's and Harbor Workers' Compensation Act of 1927. The Court of Appeals reversed. *Held:*

1. The Longshoremen's Act, which covers injuries occurring "upon navigable waters," and furnishes a remedy only "if recovery . . . through workmen's compensation proceedings may not validly be provided by state law," does not provide compensation to workmen injured on a pier permanently affixed to the land and hence clearly within the jurisdiction of the States. Pp. 214–221.

2. Though the Extension of Admiralty Jurisdiction Act extends admiralty tort jurisdiction to ship-caused injuries on a pier, it does not enlarge the coverage of the Longshoremen's Act. Pp. 221–223.

398 F. 2d 900, reversed.

Randall C. Coleman argued the cause for petitioners in No. 9 on the original argument and on the reargument. With him on the briefs was *William B. Eley.* *Solicitor General Griswold* argued the cause for petitioners in No. 16 on the original argument and on the reargument. With him on the brief were *Assistant Attorney General Ruckelshaus* and *Lawrence G. Wallace.*

John J. O'Connor, Jr., argued the cause and filed briefs for respondents Johnson et al. on the original argument

*Together with No. 16, *Traynor et al., Deputy Commissioners* v. *Johnson et al.,* also on certiorari to the same court.

and on the reargument in both cases. *Ralph Rabinowitz* argued the cause and filed a brief for respondent Avery on the original argument and on the reargument in both cases.

E. D. Vickery, Francis A. Scanlan, Scott H. Elder, and *J. Stewart Harrison* filed a brief for the National Maritime Compensation Committee as *amicus curiae* urging reversal in both cases.

Briefs of *amici curiae* urging affirmance in both cases were filed by *Louis Waldman* and *Seymour M. Waldman* for the International Longshoremen's Association, AFL–CIO, and by *Paul S. Edelman* for the American Trial Lawyers Association.

MR. JUSTICE WHITE delivered the opinion of the Court.

The single question of statutory construction presented by these cases is whether injuries to longshoremen occurring on piers permanently affixed to shore are compensable under the Longshoremen's and Harbor Workers' Compensation Act of 1927 (Longshoremen's Act), 44 Stat. 1424, 33 U. S. C. §§ 901–950.

Johnson and Klosek were employed by the Nacirema Operating Company as longshoremen; Avery was similarly employed by the Old Dominion Stevedoring Corporation. All three men were engaged at the time of their accidents in performing similar operations as "slingers," attaching cargo from railroad cars located on piers [1] to ships' cranes for removal to the ships. Klosek was killed, and each of the other men was injured, when cargo hoisted by the ship's crane swung back and knocked him to the pier or crushed him against the side of the

[1] The piers involved extended from shore into the Patapsco River at Sparrows Point, Maryland, and into the Elizabeth River at Norfolk, Virginia.

railroad car. Deputy Commisioners of the United States Department of Labor denied claims for compensation in each case on the ground that the injuries had not occurred "upon the navigable waters of the United States" as required by the Act.[2] The District Courts upheld the Deputy Commissioners' decisions. 243 F. Supp. 184 (D. C. Md. 1965); 245 F. Supp. 51 (D. C. E. D. Va. 1965). The Court of Appeals for the Fourth Circuit, sitting *en banc,* reversed.[3] 398 F. 2d 900 (1968). We granted certiorari, 393 U. S. 976 (1968), to resolve the resulting conflict with decisions in other circuits holding that pier injuries are not covered by the Act.[4] We have concluded from an examination of the language, purpose, and legislative history of the Act, as well as prior decisions of this Court, that the judgment of the Court of Appeals must be reversed.

Since long before the Longshoremen's Act was passed, it has been settled law that structures such as wharves

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[2] § 3 (a) of the Act, 33 U. S. C. § 903 (a), provides in relevant part:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ."

[3] The three cases were consolidated on appeal. In a fourth case, an award to a longshoreman who had drowned after being knocked off a pier into the water was affirmed by the District Court and the Court of Appeals. *Marine Stevedoring Corp.* v. *Oosting,* 238 F. Supp. 78 (D. C. E. D. Va. 1965).

[4] *Nicholson* v. *Calbeck,* 385 F. 2d 221 (C. A. 5th Cir. 1967), cert. denied, 389 U. S. 1051 (1968); *Houser* v. *O'Leary,* 383 F. 2d 730 (C. A. 9th Cir. 1967), cert. denied, 390 U. S. 954 (1968); *Travelers Insurance Co.* v. *Shea,* 382 F. 2d 344 (C. A. 5th Cir. 1967), cert. denied *sub nom. McCollough* v. *Travelers Insurance Co.,* 389 U. S. 1050 (1968); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F. 2d 640 (C. A. 2d Cir.), cert. denied, 382 U. S. 835 (1965).

and piers, permanently affixed to land, are extensions of the land.[5] Thus, literally read, a statute that covers injuries "upon the navigable waters" would not cover injuries on a pier even though the pier, like a bridge, extends over navigable waters.[6]

Respondents urge, however, that the 1927 Act, though it employs language that determines coverage by the "situs" of the injury, was nevertheless aimed at broader coverage: coverage of the "status" of the longshoreman employed in performing a maritime contract. We do not agree. Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts.[7] But the language of the Act is to the con-

[5] *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1 (1946); *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647 (1935); *T. Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179 (1928); *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263 (1922); *Cleveland Terminal & Valley R. Co.* v. *Cleveland S. S. Co.*, 208 U. S. 316 (1908); *The Plymouth*, 3 Wall. 20 (1866); 1 E. Benedict, The Law of American Admiralty §§ 28, 29 (6th ed. 1940); G. Gilmore & C. Black, The Law of Admiralty §§ 6–46, 7–17 (1957); G. Robinson, Handbook of Admiralty Law in the United States § 11 (1939).

[6] We reject the alternative holding of the Court of Appeals that all injuries on these piers, despite settled doctrine to the contrary, may now be considered injuries on navigable waters—a proposition rejected implicitly by a unanimous Court just last Term. See *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S. 352, 360, 366 (1969). Piers, like bridges, are not transformed from land structures into floating structures by the mere fact that vessels may pass beneath them.

[7] The admiralty jurisdiction in tort was traditionally "bounded by locality," *De Lovio* v. *Boit*, 7 F. Cas. 418, 444 (No. 3776) (C. C. D. Mass. 1815) (Story, J.) (followed in *Insurance Co.* v. *Dunham*, 11 Wall. 1 (1871)), encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction "extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea." *De Lovio* v. *Boit*, *supra*, at 444. Since a workmen's compensation act com-

trary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one.

Ten years before the Act was passed this Court in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 (1917), held that a State was without power to extend a compensation remedy to a longshoreman injured on the gangplank between the ship and the pier. The decision left longshoremen injured on the seaward side of the pier without a compensation remedy, while longshoremen injured on the pier enjoyed the protection of state compensation acts. *State Industrial Commission* v. *Nordenholt Corp.,* 259 U. S. 263 (1922).

Twice Congress attempted to fill this gap by passing legislation that would have extended state compensation remedies beyond the line drawn in *Jensen.*[8] Each time, this Court struck down the statute as an unlawful delegation of congressional power. *Washington* v. *Dawson & Co.,* 264 U. S. 219 (1924); *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149 (1920). Finally, responding to this Court's suggestion that what Congress could not empower the States to do, it could do itself,[9] Congress passed the Longshoremen's Act. The clear implication is that in enacting its own compensation statute, Con-

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bines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates, however, the history of the Act shows that Congress did indeed do just that.

[8] Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

[9] *Washington* v. *Dawson & Co.,* 264 U. S. 219, 227 (1924). The passage from *Dawson & Co.* was referred to in the hearings in both the Senate and the House. See Hearings on S. 3170 before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., 18, 31, 103 and n. 3 (1926) (hereinafter "Senate Hearings"); Hearing on H. R. 9498 before the House Committee on the Judiciary, 69th Cong., 1st Sess., ser. 16, pp. 18, 119 and n. 3 (1926) (hereinafter "House Hearing").

gress was trying to do what it had failed to do in earlier attempts: to extend a compensation remedy to workmen injured beyond the pier and hence beyond the jurisdiction of the States. This purpose was clearly expressed in the language limiting coverage to injuries occurring "upon the navigable waters," and permitting recovery only "if recovery . . . through workmen's compensation proceedings may not validly be provided by State law." [10]

This conclusion is fully supported by the legislative history. As originally drafted, § 3 extended coverage to injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation and commerce." [11] During the hearings, it was repeatedly emphasized and apparently assumed by representatives from both the shipping industry and the unions that a "place within the admiralty jurisdiction" did not include a dock or pier.[12] In fact, a representative of the Labor Depart-

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[10] Drydocks were conceded to be within the admiralty jurisdiction in both the hearings and the debates, even though such structures are not always floating structures. See House Hearing 34; 68 Cong. Rec. 5403 (1927). If Congress had thought the words "upon the navigable waters" were broad enough to embrace the limits of admiralty jurisdiction, there would have been no need to add the parenthetical "(including any dry dock)."

[11] See Senate Hearings 2.

[12] Mr. Dempsey, representing the International Longshoremen's Association, testified that the bill would cover injuries on the dock as well as on the ship. When pressed as to how injuries on the dock could come within the admiralty jurisdiction, he confessed he did not understand the legal theory, and would defer to the longshoremen's attorney, Mr. Austin. Mr. Austin proceeded to testify: that the dock was not within the admiralty jurisdiction; that injuries on the dock were compensable under state law; that the problem arose because the longshoreman was left "high and dry" once he left the State's jurisdiction and stepped on the gangplank; and that "[t]hat is the gap that we are trying to fill . . . ." Senate Hearings 28, 30–31. Testimony that longshoremen injured on the docks would

ment objected to the bill precisely for that reason, urging the Committee to extend coverage to embrace the contract, "and not the man simply when he is on the ship." [13] If Congress had intended to adopt that suggestion, it could not have chosen a more inappropriate way of expressing its intent than by substituting the words "upon the navigable waters" for the words "within the admiralty jurisdiction." [14] Indeed, the Senate Report that accompanied the revised bill, containing the language of the present Act, makes clear that the suggestion was rejected, rather than adopted: "[I]njuries occurring in

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not be covered by the Act also came from representatives of the shipbuilders. See Senate Hearings 58, 95, 103. See also n. 15, *infra;* Hearing on S. 3170 before the House Committee on the Judiciary, 69th Cong., 1st Sess., ser. 16, pt. 2, pp. 141, 157 (1926) (testimony on the revised bill, containing the language of the present § 3).

[13] Senate Hearings 40.

[14] While the reason for the change in the language concerning the bill's coverage is not expressly indicated, it appears to have been a response to objections that the original language, carving out an exception for employment of "local concern," was too vague to define clearly the line being drawn, and might even encounter problems once again at the hands of this Court. See Senate Hearings 56–57, 95; House Hearing 77, 100. In fact, the same spokesman for the shipbuilders who objected to the vagueness of the "local concern" exception, also objected that the bill as written might "upset all the present arrangements with respect to compensating men on the dock." Senate Hearings 57. The implication is that no one expected the federal law to extend into the area of the State's jurisdiction on the dock, but that confusion existed as to whether, conversely, state remedies would be exclusive as to injuries "on navigable waters" but within the "maritime but local" exception created by *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469 (1922). This reading of the legislative history was adopted in *Calbeck* v. *Travelers Insurance Co.,* 370 U. S. 114, 121–127 (1962), where the Court concluded that the Act did not prevent recovery for injuries on navigable waters, even though a state remedy would also have been available under *Rohde.*

loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States." S. Rep. No. 973, 69th Cong., 1st Sess., 16. We decline to ignore these explicit indications of a design to provide compensation only beyond the pier where the States could not reach. "That is the gap that we are trying to fill." [15] In filling that gap Congress did not extend coverage to longshoremen like those respondents whose injuries occurred on the landward side of the *Jensen* line,

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[15] See n. 12, *supra*. Other indications that Congress had no intention of replacing or overlapping state compensation remedies for dockside injuries can be found throughout the hearings. At one point, in attempting to calculate the increased costs involved in the federal Act, Senator Cummins, Chairman of the Committee, pointed out that "we are proceeding on the theory that these people can not be compensated under the New York compensation law or any other compensation law." "[T]he purpose of this law," he agreed with a witness, was simply to cover the men who "are going to be exposed a part of the time on board vessels . . . and therefore will have to be compensated in some other way where the New York law is not the remedy available." Senate Hearings 84–85. Similarly, Representative Graham, Chairman of the House Committee, agreed that "the real necessity for this legislation" was to provide workers with compensation when they stepped from dock to ship. House Hearing 25. In fact, the labor representative who was testifying at that point in the hearing insisted that the legislation sought was only for "[t]hose who are injured on board vessels at the dock." Those injured on the dock "are taken care of under the State law." *Id.*, at 28. There was also testimony by a longshoremen's representative that "65 per cent of the accidents in the courts of New York happen on board ships or on gangplanks; . . . therefore . . . 65 per cent of the accidents of the men who are injured by performing this work will be compensable under this bill." *Id.*, at 35. See also *id.*, at 44. Another noted that "our men that are working on the dock are protected, and well protected, under the New York compensation act, but our men on board ship are not protected. We feel that Congress wants to protect them . . . ." Senate Hearings 42.

clearly entitling them to protection under state compensation Acts.[16]

Decisions of this Court have more than once embraced this interpretation. *Swanson* v. *Marra Bros., Inc.,* 328 U. S. 1 (1946), held that neither the Jones Act nor the Longshoremen's Act covered a longshoreman injured on the dock in the course of his employment even if the injury was caused by a vessel on navigable waters. *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 249 (1941), concluded that the purpose of the Act "was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states." *Davis* v. *Dept. of Labor & Industries,* 317 U. S. 249, 256 (1942), noted that in passing the Longshoremen's Act, Congress had specifically adopted the *Jensen* line. The interpretation endorsed by these cases is also reflected in a consistent course of administrative construction commencing immediately after the enactment of the Act. Employees' Compensation Commission Opinions Nos. 5 and 16, 1927 A. M. C. 1558 and 1855; No. 30, 1928 A. M. C. 417.

It is true that since *Jensen* this Court has permitted recovery under state remedies in particular situations seaward of the pier, *Parker* v. *Motor Boat Sales, supra,* and in *Calbeck* v. *Travelers Insurance Co.,* 370 U. S. 114 (1962), approved recovery under the Longshoremen's Act for injuries occurring on navigable waters which might also have been compensable under state law. *Calbeck* made it clear that Congress intended to exercise its full jurisdiction seaward of the *Jensen* line

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[16] Both Johnson and Klosek's widow and minor children have filed claims, and are concededly entitled to benefits, under the Maryland Workmen's Compensation Act. Avery has already been awarded benefits under the Virginia Workmen's Compensation Law.

and to cover all injuries on navigable waters, whether or not state compensation was also available in particular situations. The proviso to § 3 (a) conditioning coverage on the unavailability of state remedies was not meant to deny federal relief where the injury occurred on navigable waters. But removing uncertainties as to the Act's coverage of injuries occurring on navigable waters is a far cry from construing the Act to reach injuries on land traditionally within the ambit of state compensation acts.

Indeed, *Calbeck* freely cited the *Parker* and *Davis* declarations that the Longshoremen's Act adopted the *Jensen* line, and *Calbeck*'s holding rejected the notion that the line should advance or recede simply because decisions of this Court had permitted state remedies in narrow areas seaward of that line. Otherwise, the reach of the federal Act would be subject to uncertainty, and its coverage would "expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters," with the result "that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies . . . ." 370 U. S., at 126. As in *Calbeck,* we refuse to impute to Congress the intent of burdening the administration of compensation by perpetuating such confusion.

Nor can we agree that what Congress did not do in 1927, it did in 1948 when it passed the Extension of Admiralty Jurisdiction Act (Extension Act), 62 Stat. 496, 46 U. S. C. § 740. In pertinent part, that Act provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused

> by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

By its very choice of language, the Act re-enforces the conclusion that Congress was well aware of the distinction between land injuries and water injuries and that when it limited recovery to injuries on navigable waters, it did not mean injuries on land. The Act no doubt extended the admiralty tort jurisdiction to ship-caused injuries on a pier. But far from modifying the clear understanding in the law that a pier was an extension of land and that a pier injury was not on navigable waters but on land, the Act accepts that rule and nevertheless declares such injuries to be maritime torts if caused by a vessel on navigable waters.

The Extension Act was passed to remedy the completely different problem that arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all.[17] There is no evidence that Congress thereby intended to amend or affect the coverage of the Longshoremen's Act or to overrule *Swanson* v. *Marra Bros., supra,* decided just two years earlier.[18] While the Exten-

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[17] See Gilmore & Black, *supra,* n. 5, § 7–17.

[18] The legislative history of the Extension Act is devoid of any reference to the Longshoremen's Act, as might well be expected in an Act dealing with a wholly unrelated problem. See S. Rep. No. 1593, 80th Cong., 2d Sess. (1948); H. R. Rep. No. 1523, 80th Cong., 2d Sess. (1948).

The House Report accompanying the Extension Act notes that "the bill will not create new causes of action," *id.,* at 3, and the statute speaks of extending jurisdiction to suits "in rem or in personam" for "damage" to "person or property"—concepts wholly at odds with the theory of workmen's compensation—awards made in an administrative proceeding. The conclusion of the District Court

sion Act may have the effect of permitting respondents to maintain an otherwise unavailable libel in admiralty,[19] see *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206 (1963), the Act has no bearing whatsoever on their right to a compensation remedy under the Longshoremen's Act.

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its

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is inescapable. "The two statutes do not deal with the same subject matter, are inherently inconsistent with each other, and cannot be read as being in pari materia." 243 F. Supp. 184, 194 (1965).

It is worth noting that a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. See Act of June 24, 1948, 62 Stat. 602 (a bill to increase benefits under the Longshoremen's Act, passed five days after the Extension Act). And, a House Report dated July 28, 1958—10 years after enactment of the Extension Act—points out that employees "on the navigable waters of the United States" are covered under the Longshoremen's Act, but are under state protection "when performing work on docks and in other shore areas." H. R. Rep. No. 2287, 85th Cong., 2d Sess., 2 (accompanying a bill to provide safety programs for longshoremen).

[19] We were informed in argument that two of the parties have in fact already commenced actions against the shipowner.

compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

We dissent for the reasons stated by Judge Sobeloff speaking for the Court of Appeals sitting *en banc.* 398 F. 2d 900. As he says, the Longshoremen's and Harbor Workers' Compensation Act is not restricted to conventional "admiralty tort jurisdiction" but is "status oriented, reaching all injuries sustained by longshoremen in the course of their employment." *Id.,* at 904. The matter should be at rest after *Calbeck* v. *Travelers Insurance Co.,* 370 U. S. 114. In that suit under this Act we said that " 'Congress intended the compensation act to have a coverage co-extensive with the limits of its authority.' " *Id.,* at 130, quoting from *De Bardeleben Coal Corp.* v. *Henderson,* 142 F. 2d 481, 483. Judge Sobeloff in the instant cases, while answering the argument that *Calbeck* was not concerned with the meaning of "upon the navigable waters," referred to Judge Palmieri's opinion in *Michigan Mutual Liability Co.* v. *Arrien,* 233 F. Supp. 496, 500, aff'd, 344 F. 2d 640:

> "What is just as important as the actual holding in Calbeck is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction."

Judge Sobeloff went on to say:

> "This affirmative exercise of the admiralty power of Congress 'to the fullest extent' of its jurisdiction, creating 'a coverage co-extensive with the limits of its authority,' can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority. Again, in the words of Judge Palmieri, 'it thus appears that "upon navigable waters" is to be equated with "admiralty jurisdiction."' " 398 F. 2d, at 905.

In addition to the cases being reviewed here, the Court of Appeals affirmed a judgment in favor of the widow of a longshoreman (238 F. Supp. 78), who, while working on the pier, was struck by a cable and knocked into the water where he died. It is incongruous to us that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened. For this and the other reasons stated by Judge Sobeloff, we dissent from a reversal of these judgments.

CARTER ET AL. *v.* WEST FELICIANA PARISH SCHOOL BOARD ET AL.

ON APPLICATION TO THE HONORABLE HUGO L. BLACK, CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT, FOR A TEMPORARY INJUNCTIVE ORDER

No. 944. Decided December 13, 1969

Petitioners, whose petition for certiorari seeks review of a Court of Appeals ruling authorizing a delay in student desegregation in three Louisiana school districts until September 1970, are—pending disposition of their petition—granted temporary injunctive relief requiring the respondent school boards to take the necessary preliminary steps to effectuate complete student desegregation by February 1, 1970. *Alexander* v. *Holmes County Board of Education, ante,* p. 19.

See 419 F. 2d 1211. Application granted and judgment vacated in part.

Richard B. Sobol, Murphy W. Bell, Robert F. Collins, Norman C. Amaker, and *Melvyn Zarr* for petitioners.

PER CURIAM.

This matter reaches the Court on an application presented to MR. JUSTICE BLACK, as Circuit Justice for the Fifth Circuit, seeking a temporary injunctive order and other relief; and it appearing that

1. Three cases were originally filed in 1965, seeking the desegregation of three Louisiana school districts.

2. Pursuant to orders of the District Courts, in July of this year the Office of Education of the United States Department of Health, Education, and Welfare prepared and submitted terminal desegregation plans for each of the districts here involved for the school year 1969–1970. These plans were rejected by the District Courts.

3. The District Courts' orders were reversed by the United States Court of Appeals for the Fifth Circuit

sitting en banc, on December 1, 1969, subsequent to this Court's decision in *Alexander* v. *Holmes County Board of Education, ante,* at 19. That court ordered respondent school boards and 13 other school boards to desegregate faculties completely and to adopt plans for conversion to unitary school systems by February 1, 1970, but authorized a delay in pupil desegregation until September 1970.

4. On December 10, 1969, petitioners filed in this Court a petition for a writ of certiorari, together with a motion to advance consideration of the petition and a motion for summary disposition, contending that the decision of the Court of Appeals is inconsistent with this Court's decision in *Alexander* v. *Holmes County Board of Education, supra.* The relief sought on the merits is the implementation of the Department of Health, Education, and Welfare plans for student assignment on or before February 1, 1970, simultaneous with the other steps ordered by the Court of Appeals.

5. Petitioners, by this application seek a temporary injunctive order

> "requiring the respondent school boards, pending a decision by this Court on the merits, to take all necessary clerical and administrative steps—such as determining new student assignments, bus routes and athletic schedules and preparing for any necessary physical changes—preparatory to complete conversion under the HEW plans by February 1, 1970. If petitioners are successful, the administrative and clerical tasks necessary to conversion will have been undertaken roughly according to the timetable established by the court below in the *Alexander* cases, and petitioners' right to effective relief will not have been put in question by the passage of time. If petitioners are unsuccessful in this Court, the school boards would be under no compulsion to

convert during this school year." Application to the Honorable Hugo L. Black, Circuit Justice for the Fifth Circuit, for a Temporary Injunctive Order 3–4. (Footnote omitted.)

It is hereby adjudged, ordered, and decreed:

(1) Petitioners' application for a temporary injunctive order requiring the respondent school boards to take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970, is granted. *Alexander* v. *Holmes County Board of Education, supra.*

(2) By way of interim relief, and pending this Court's disposition of the petition for certiorari, the judgment of the Court of Appeals is vacated insofar as it deferred desegregation of schools until the school year 1970–1971.

(3) By way of interim relief pending further order of this Court, the respondent school boards are directed to take no steps which are inconsistent with, or which will tend to prejudice or delay, a schedule to implement on or before February 1, 1970, desegregation plans submitted by the Department of Health, Education, and Welfare for student assignment simultaneous with the other steps ordered by the Court of Appeals.

(4) The respondents are directed to file any response to the petition herein on or before January 2, 1970.

Syllabus

SULLIVAN ET AL. *v.* LITTLE HUNTING PARK, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

No. 33. Argued October 13, 1969—Decided December 15, 1969

Little Hunting Park is a Virginia nonstock corporation operating playground facilities and a community park for residents in an area in Fairfax County, Virginia. A membership share entitles a shareholder and his family to use its facilities, and under the bylaws when he rents his house he may assign the share to his tenant, subject to approval by the board of directors. The facilities have been open to any white persons in the geographic area. Petitioner Sullivan, who owned and lived in a house in the area, leased to petitioner Freeman another house which Sullivan owned therein and assigned to Freeman his membership share. The board refused approval of the assignment because Freeman was a Negro and thereafter expelled Sullivan from the corporation for protesting that action. Petitioners each then sued for injunctive relief and monetary damages. The trial court, concluding that Little Hunting Park was a private social club, dismissed the complaints. The Supreme Court of Appeals of Virginia denied the appeals on the ground that they were not perfected as provided by law in that opposing counsel had not been given reasonable notice and opportunity, as required by a procedural rule of that court, to examine and correct the transcripts. Opposing counsel had been given three days' notice for that purpose and had not complained that the period was unreasonable. This Court granted certiorari, vacated the judgments, and remanded the case to the Supreme Court of Appeals for further consideration in light of *Jones* v. *Mayer Co.*, 392 U. S. 409. That court again rejected the appeals on the basis of its previous position that it lacked jurisdiction because of petitioners' failure to comply with its procedural rule. This Court again granted certiorari. Freeman no longer resides in the area served by Little Hunting Park and his claim is confined to damages. *Held:*

1. The notice rule is discretionary and not jurisdictional, not having been so consistently applied by Virginia's highest court as to deprive it of jurisdiction to entertain the federal claim presented here or to bar this Court's review of this case by certiorari. Pp. 232–234.

2. Petitioner Sullivan's membership share in Little Hunting Park (which is clearly not a private social club) was an integral part of the lease and respondents' racially discriminatory refusal to approve the assignment to Freeman constituted a violation of 42 U. S. C. § 1982, cf. *Jones* v. *Mayer Co., supra,* the right to lease being protected by that provision against the action of third parties as well as against the action of the lessor. Pp. 234–237.

3. Sullivan has standing under § 1982 to maintain this action as the "effective adversary" in Freeman's behalf. *Barrows* v. *Jackson,* 346 U. S. 249, 259. P. 237.

4. The Public Accommodations provision of the Civil Rights Act of 1964 does not affect the coverage of 42 U. S. C. § 1982. See *Jones* v. *Mayer Co., supra,* at 413–417. Pp. 237–238.

5. The state court's power to grant general injunctive relief includes the power to protect the federal right under § 1982 here involved. P. 238.

6. Petitioners are entitled to compensatory damages for violation of their rights under § 1982 and, though such damages are measured by federal standards, both federal and state rules on damages may be used. Pp. 238–240.

7. The fair-housing provisions of Title VIII of the Civil Rights Act of 1968, which was enacted long after petitioners brought their suits, do not foreclose relief here. P. 240.

Reversed. See: 209 Va. 279, 163 S. E. 2d 588.

Allison W. Brown, Jr., argued the cause for petitioners. With him on the briefs were *Peter Ames Eveleth, Robert M. Alexander, Jack Greenberg,* and *James M. Nabrit III.*

John Charles Harris argued the cause and filed a brief for respondents.

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Leonard, Louis F. Claiborne, Peter L. Strauss,* and *Joseph J. Connolly* for the United States, and by *Arnold Forster, Sol Rabkin, Melvin L. Wulf, Edwin J. Lukas, Samuel Rabinove,* and *Paul Hartman* for the Anti-Defamation League of B'nai B'rith et al.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

This case, which involves an alleged discrimination against a Negro family in the use of certain community facilities, has been here before. The Virginia trial court dismissed petitioners' complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it" under that court's Rule 5:1, § 3(f).[1]

The case came here and we granted the petition for certiorari and vacated the judgments and remanded the case to the Supreme Court of Appeals for further consideration in light of *Jones* v. *Mayer Co.*, 392 U. S. 409. 392 U. S. 657. On the remand, the Supreme Court of Appeals restated its prior position stating, "We had no jurisdiction in the cases when they were here before, and we have no jurisdiction now. We adhere to our orders refusing the appeals in these cases." 209 Va. 279, 163 S. E. 2d 588. We brought the case here the second time on a petition for certiorari. 394 U. S. 942.

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[1] Rule 5:1 which is entitled "The Record on Appeal" states the following in § 3 (f):

"Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end by him within 70 days after final judgment. It shall be forthwith delivered to the clerk who shall certify on it the date he receives it. Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it. The signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript or statement is authentic. He shall note on it the date it was tendered to him and the date it was signed by him."

I

When the case was first here respondents opposed the petition, claiming that Rule 5:1, § 3 (f), was not complied with. Petitioners filed a reply brief addressing themselves to that question. Thus the point now tendered was fully exposed when the case was here before, though we ruled on it *sub silentio*.

In this case counsel for petitioners on June 9, 1967, gave oral notice to counsel for respondents that he was submitting the transcripts to the trial judge. He wrote counsel for respondents on the same day to the same effect, saying he was submitting the transcripts to the trial judge that day, filing motions to correct them, and asking the trial court to defer signing them for a ten-day period to allow counsel for respondents time to consent to the motions or have them otherwise disposed of by the court. The judge, being absent from his chambers on June 9, ruled that he had not received the transcripts until June 12. The motions to correct came on for a hearing June 16, at which time the judge ruled that he would not act on the motions until counsel for respondents had agreed or disagreed with the changes requested. After examining the transcripts between June 16 and June 19, counsel for respondents told counsel for petitioners that he had no objections to the corrections or to entry of orders granting the motions to correct. Counsel for respondents then signed the proposed orders which counsel for petitioners had prepared. The proposed orders were submitted to the trial judge on June 20; and on the same day he signed the transcripts, after they had been corrected.

As we read its cases, the Supreme Court of Appeals stated the controlling principle in the following language:

> "The requirement that opposing counsel have a reasonable opportunity to examine the transcript sets out the purpose of reasonable notice. If, after

> receipt of notice, opposing counsel be afforded reasonable opportunity to examine the transcript, and to make objections thereto, if any he has, before it is signed by the trial judge, the object of reasonable notice will have been attained." *Bacigalupo* v. *Fleming,* 199 Va. 827, 835, 102 S. E. 2d 321, 326.

In that case opposing counsel had seven days to examine the record and make any objections. In the present case he had three days. But so far as the record shows he did not at the time complain that he was not given that "reasonable opportunity" he needed to examine and correct the transcripts.

Petitioners' counsel does not urge—nor do we suggest—that the Virginia Supreme Court of Appeals has fashioned a novel procedural requirement for the first time in this case; cf. *NAACP* v. *Alabama,* 357 U. S. 449, 457–458; past decisions of the state court refute any such notion. See *Bacigalupo* v. *Fleming, supra; Bolin* v. *Laderberg,* 207 Va. 795, 153 S. E. 2d 251; *Cook* v. *Virginia Holsum Bakeries,* 207 Va. 815, 153 S. E. 2d 209.[2] But those same decisions do not enable us

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[2] In *Bolin* v. *Laderberg,* 207 Va. 795, 153 S. E. 2d 251, appellants' counsel had delivered the transcript to appellees' counsel on November 24, 1965. The transcript was tendered to the trial judge on November 26, and was signed by him on December 3. Appellees moved to dismiss the appeal on the ground that they had not been given "reasonable notice and opportunity" under Rule 5:1. The court stated that the motion should be overruled on the ground that Rule 5:1 provides that "[t]he signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript . . . is authentic." The court noted that the judge's "signature appears on the transcript *without more* and is, therefore, his certification that counsel for [appellees] had the required notice of tendering the transcript and the required opportunity to examine it." *Id.,* at 797, 153 S. E. 2d, at 253.

In *Cook* v. *Virginia Holsum Bakeries,* 207 Va. 815, 153 S. E. 2d 209, notice that the transcript would be tendered to the trial judge on

to say that the Virginia court has so consistently applied its notice requirement as to amount to a self-denial of the *power* to entertain the federal claim here presented if the Supreme Court of Appeals desires to do so. See *Henry* v. *Mississippi,* 379 U. S. 443, 455–457 (BLACK, J., dissenting). Such a rule, more properly deemed discretionary than jurisdictional, does not bar review here by certiorari.

II

Little Hunting Park, Inc., is a Virginia nonstock corporation organized to operate a community park and playground facilities for the benefit of residents in an area of Fairfax County, Virginia. A membership share entitles all persons in the immediate family of the shareholder to use the corporation's recreation facilities. Under the bylaws a person owning a membership share is entitled when he rents his home to assign the share to his tenant, subject to approval of the board of directors. Paul E. Sullivan and his family owned a house

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October 20, 1965, was given to counsel for the appellee on October 15. Appellant's counsel, however, did not obtain a copy of the transcript until October 19. At a conference held on that same date, counsel for both parties went over the transcript and agreed on certain corrections and additions. At the hearing on October 20, appellee's counsel claimed he had not been given the reasonable notice and opportunity required by Rule 5:1. He then suggested numerous changes, and the trial judge ordered the transcript altered to reflect those changes. The revised transcript was tendered to the trial judge the next day, October 21, and signed by him that same day. On appeal, appellee moved to dismiss on the ground that the Rule 5:1 requirements had not been satisfied. The Virginia Supreme Court of Appeals overruled the motion, stating: "The narrative was amended to meet the suggested changes of counsel for [appellee], and he conceded in oral argument before us that the statement signed by the trial judge was correct." *Id.,* at 817, 153 S. E. 2d, at 210.

in this area and lived in it. Later he bought another house in the area and leased the first one to T. R. Freeman, Jr., an employee of the U. S. Department of Agriculture; and assigned his membership share to Freeman. The board refused to approve the assignment because Freeman was a Negro. Sullivan protested that action and was notified that he would be expelled from the corporation by the board. A hearing was accorded him and he was expelled, the board tendering him cash for his two shares.

Sullivan and Freeman sued under 42 U. S. C. §§ 1981, 1982 for injunctions and monetary damages. Since Freeman no longer resides in the area served by Little Hunting Park, Inc., his claim is limited solely to damages.

The trial court denied relief to each petitioner. We reverse those judgments.

In *Jones* v. *Mayer Co.*, 392 U. S. 409, we reviewed at length the legislative history of 42 U. S. C. § 1982.[3] We concluded that it reaches beyond state action and operates upon the unofficial acts of private individuals and that it is authorized by the Enabling Clause of the Thirteenth Amendment. We said:

> "Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands

[3] 42 U. S. C. § 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

> of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." 392 U. S., at 443.

The Virginia trial court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race. See *Daniel* v. *Paul,* 395 U. S. 298, 301–302. What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley* v. *Kraemer,* 334 U. S. 1, by reason of the Fourteenth Amendment.

In *Jones* v. *Mayer Co.,* the complaint charged a refusal to sell petitioner a home because he was black. In the instant case the interest conveyed was a leasehold of realty coupled with a membership share in a nonprofit company organized to offer recreational facilities to owners and lessees of real property in that residential area. It is not material whether the membership share be considered realty or personal property, as § 1982 covers both. Section 1982 covers the right "to inherit, purchase, lease, sell, hold, and convey real and personal property." There is a suggestion that transfer on the books of the corporation of Freeman's share is not covered by any of those verbs. The suggestion is without merit. There has never been any doubt but that Freeman paid part of his $129 monthly rental for the

assignment of the membership share in Little Hunting Park. The transaction clearly fell within the "lease." The right to "lease" is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor. Respondents' actions in refusing to approve the assignment of the membership share in this case was clearly an interference with Freeman's right to "lease." A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived. See 392 U. S., at 422–437.

We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows* v. *Jackson,* 346 U. S. 249, 259, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows,* there can be no question but that Sullivan has standing to maintain this action.

We noted in *Jones* v. *Mayer Co.,* that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U. S., at 413–417. What we said there is adequate to dispose of the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in § 1982. There is, moreover, a saving clause in the 1964 Act as respects "any

right based on any other Federal . . . law not inconsistent" with that Act.[4]

Section 1982 derived from the 1866 Act is plainly "not inconsistent" with the 1964 Act, which has been construed as not "pre-empting every other mode of protecting a federal 'right' or as granting immunity" to those who had long been subject to federal law. *United States* v. *Johnson,* 390 U. S. 563, 566.

We held in *Jones* v. *Mayer Co.* that although § 1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an effective equitable remedy. 392 U. S., at 414, n. 13. That federal remedy for the protection of a federal right is available in the state court, if that court is empowered to grant injunctive relief generally, as is the Virginia court. Va. Code Ann. § 8–610 (1957 Repl. Vol.).

Finally, as to damages, Congress, by 28 U. S. C. § 1343 (4), created federal jurisdiction for "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." We reserved in *Jones* v. *Mayer Co.,* 392 U. S., at 414–415, n. 14, the question of what damages, if any, might be appropriately recovered for a violation of § 1982.

We had a like problem in *Bell* v. *Hood,* 327 U. S. 678, where suit was brought against federal officers for alleged

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[4] Section 207 (b) of the Act of July 2, 1964, 78 Stat. 246, provides:

"The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

violations of the Fourth and Fifth Amendments. The federal statute did not in terms at least provide any remedy. We said:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.*, at 684.

The existence of a statutory right implies the existence of all necessary and appropriate remedies. See *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 569–570. As stated in *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ."

Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U. S. C. § 1988, which states:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary

> to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier* v. *Cherry*, 293 F. 2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired. We do not explore the problem further, as the issue of damages was not litigated below.

It is suggested, not by any party, but by the dissent, that any relief should await proceedings under the fair housing provisions of Title VIII of the Civil Rights Act of 1968. 82 Stat. 81, 42 U. S. C. § 3601 *et seq.* (1964 ed., Supp. IV). But petitioners' suits were commenced on March 16, 1966, two years before that Act was passed. It would be irresponsible judicial administration to dismiss a suit because of an intervening Act [5] which has no possible application to events long preceding its enactment.

Reversed.

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[5] The Act is not fully effective until December 31, 1969. 42 U. S. C. § 3603 (b) (1964 ed., Supp. IV). Even at that time it will not apply to a "single-family house" if the house is sold without the services of a real estate broker and without the notice described in § 3604 (c) (1964 ed., Supp. IV). See § 3603 (b) (1964 ed., Supp. IV). So no one knows whether the new Act would apply to these ancient transactions, even if they arose after December 31, 1969.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

In *Jones* v. *Mayer Co.*, 392 U. S. 409 (1968), the Court decided that a little-used section of a 100-year-old statute prohibited private racial discrimination in the sale of real property. This construction of a very old statute, in no way required by its language,[1] and open to serious question in light of the statute's legislative history,[2] seemed to me unnecessary and unwise because of the recently passed, but then not yet fully effective, Fair Housing Title of the Civil Rights Act of 1968 (hereafter Fair Housing Law).[3] Today, the Court goes yet beyond *Jones* (1) by implying a private right to damages for violations of 42 U. S. C. § 1982; (2) by interpreting § 1982 to prohibit a community recreation association from withholding, on the basis of race, approval of an assignment of a membership that was transferred incident to a lease of real property; and (3) by deciding that a white person who is expelled from a recreation association "for the advocacy of [a Negro's] cause" has "standing" to maintain an action for relief under § 1982.

Because the Fair Housing Law will become fully effective less than three weeks from now,[4] I think the majority even more unwise than it was in *Jones,* in precipitately breathing still more life into § 1982, which is both vague and open-ended, when Congress has pro-

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[1] 392 U. S., at 452–454 (dissenting opinion).

[2] 392 U. S., at 454–473 (dissenting opinion). See Casper, Jones v. Mayer: Clio, Bemused and Confused Muse, 1968 Sup. Ct. Rev. 89, 99–122; The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 93–103 (1968).

[3] Civil Rights Act of 1968, Tit. VIII, 42 U. S. C. § 3601 *et seq.* (1964 ed., Supp. IV).

[4] The third and final stage in the expansion of the coverage of the Fair Housing Law takes effect after December 31, 1969. See 42 U. S. C. § 3603 (b) (1964 ed., Supp. IV).

vided this modern statute, containing various detailed remedial provisions aimed at eliminating racial discrimination in housing. For this reason, which I elaborate in Part II, I would dismiss the writ in this case as improvidently granted. To provide examples of some of the difficulties the Court will inevitably encounter if it continues to employ § 1982 in these sorts of cases, I examine in Part III the undiscriminating manner in which the majority deals with, and for the most part ignores, the complexities involved in (1) giving Sullivan relief and (2) engrafting a damage remedy onto § 1982 in a case arising from a state court. But, first, I consider the threshold question of whether there is present in this case an adequate state ground which would bar review by this Court.

I

ADEQUACY OF THE STATE GROUND

The Virginia Supreme Court of Appeals, both before and after this Court's earlier remand, refused to consider the federal questions presented to it because it found that petitioners had failed to give opposing counsel "reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it," in violation of Rule 5:1, § 3 (f), of the local rules of court.[5] The majority here suggests that the State's procedural requirement, though not a "novel" one "fashioned . . . for the first time in this case," nevertheless had not been "so consistently applied . . . as to amount to a self-denial of the *power* to entertain the federal claim." The majority then goes on to conclude that because the State's procedural rule is "more properly deemed discretionary than jurisdictional," review should not be barred here.

[5] See n. 1 of the majority opinion, *ante*, at 231, for the text of the rule.

I agree with the majority's conclusion that there is no adequate state ground shown, but I find myself unable to subscribe to the majority's reasoning, which appears to me unclear and confusing.

I am not certain what the majority means in its apparent distinction between rules that it deems "discretionary" and those that it deems "jurisdictional." Perhaps the majority wishes to suggest that the dismissals of petitioners' writs of error by the Supreme Court of Appeals were simply *ad hoc* discretionary refusals to accept plenary review of the lower court's decisions, analogous to this Court's denial of certiorari. If this were all the Virginia Supreme Court of Appeals had done, review of a federal question properly raised below would of course not be barred here. The mere discretionary refusal of the highest state court to grant review of a lower court decision does not provide an adequate state ground. In such circumstances, the decision of the lower court, rather than the order of the highest court refusing review, becomes the judgment of the "highest court of a State in which a decision could be had" for purposes of 28 U. S. C. § 1257, our jurisdictional statute.[6]

But this case clearly does not present this kind of discretionary refusal of a state appellate court to accept review. Although the Virginia Supreme Court of Appeals may well have the "discretion" to refuse review[7] in a particular case without giving reasons or reconciling its refusal with earlier decisions, the dismissal below was not simply an *ad hoc* exercise of the power not to review every case presented. Instead the state court dismissed the petitions for review for a stated reason, namely, a

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[6] See, *e. g., Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 159–160 (1954).

[7] It appears that plenary review by the Virginia Supreme Court of Appeals is not a matter of right for many kinds of cases. See Va. Code Ann. § 8–462 (1957 Repl. Vol.); Va. Const. §§ 87, 88.

lack of "jurisdiction to entertain the appeals because of the failure of counsel for the Sullivans and the Freemans to meet the requirements of Rule 5:1, § 3 (f)." When a state appellate court's refusal to consider the merits of a case is based on the failure to conform to a state rule of practice, review by this Court is barred unless this Court is able to find that application of the state rule of practice to the case at hand does not constitute an adequate state ground. This is so quite irrespective of whether the state appellate court had the power to refuse review for no reason at all.[8]

The majority might have another meaning in mind when it describes the State's procedural rule as "discretionary." It may be suggesting that "reasonable written notice," and "reasonable opportunity to examine" are such flexible standards that the Virginia Supreme Court of Appeals has the "discretion" to decide a close case either of two ways without creating an obvious conflict with earlier decisions. If this is what the majority means by "discretionary rule," then I must register my disagreement. This kind of "discretion" is nothing more than "the judicial formulation of law," for a court has an obligation to be reasonably consistent and "to explain the decision, including the reason for according different treatment to the instant case." [9] Surely a state ground

[8] See *Hammerstein* v. *Superior Court,* 341 U. S. 491, 492 (1951); *Chesapeake & Ohio R. Co.* v. *McDonald,* 214 U. S. 191 (1909); *Newman* v. *Gates,* 204 U. S. 89 (1907).

[9] Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 226. See *id.,* at 225–226 for a discussion of MR. JUSTICE BLACK's dissent in *Henry* v. *Mississippi,* 379 U. S. 443, 455–457 (1965), which is cited by the majority. *Williams* v. *Georgia,* 349 U. S. 375 (1955), which is not cited by the majority, does not in my view support the reasoning of the majority. I think the result in *Williams* rests upon a determination of inconsistency in the application of the State's procedural requirements for a new trial. See 349 U. S., at 383.

is no less adequate simply because it involves a standard that requires a judgment of what is reasonable, and because the result may turn on a close analysis of the facts of a particular case in light of competing policy considerations.

Although the majority's loose use of the word "discretionary" may suggest that any decision made pursuant to a broad standard cannot provide an adequate state ground, I think examination of the earlier opinions of the Virginia Supreme Court of Appeals, several of which are cited by the majority, provides the proper foundation for the result reached by the majority, under the principle of *NAACP* v. *Alabama,* 357 U. S. 449 (1958).

The finding of the Virginia Supreme Court of Appeals of a violation of Rule 5:1, § 3 (f), in this case was in my view based on a standard of reasonableness much stricter than that which could have been fairly extracted from the earlier Virginia cases applying the rule [10] and its predecessor statute.[11] In other words, although Rule 5:1, § 3 (f), itself may not be novel, the standard implicitly governing the rule's application to the facts here was. I think it fair to conclude that in light of these earlier decisions, and the principle set forth in *Bacigalupo* v. *Fleming,* 199 Va. 827, 835, 102 S. E. 2d 321, 326 (1958),[12] the petitioners here might have justifiably

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[10] *Bolin* v. *Laderberg,* 207 Va. 795, 153 S. E. 2d 251 (1967); *Cook* v. *Virginia Holsum Bakeries,* 207 Va. 815, 153 S. E. 2d 209 (1967); *Taylor* v. *Wood,* 201 Va. 615, 112 S. E. 2d 907 (1960); *Bacigalupo* v. *Fleming,* 199 Va. 827, 102 S. E. 2d 321 (1958).

[11] *Stokely* v. *Owens,* 189 Va. 248, 52 S. E. 2d 164 (1949); *Grimes* v. *Crouch,* 175 Va. 126, 7 S. E. 2d 115 (1940).

[12] It can be seen from the passage quoted by the majority, see *ante,* at 232–233, that *Bacigalupo* interpreted the rule as requiring that (1) opposing counsel must have a reasonable opportunity to examine the transcript *after* he receives notice; and (2) based on this examination, opposing counsel must have a reasonable opportunity to make any objections he has to the accuracy of

thought that review in the Supreme Court of Appeals would not be barred by the rule, notwithstanding *Snead* v. *Commonwealth,* 200 Va. 850, 108 S. E. 2d 399 (1959), the one case cited below by the Virginia court, relied on here by respondent and yet somehow ignored by the majority.[13] Because "[n]ovelty in procedural re-

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the transcript *before* the transcript is signed by the trial judge. In this case, opposing counsel received notice by telephone on Friday, June 9, and by letter the following Monday. His opportunity to examine the transcript consisted of the time between Monday and Friday when the transcript was available to him in the judge's chambers; and the time between Friday, June 16, and Monday, the 19th, when he actually had in his possession a copy of the transcript. Any argument that this length of time, *per se,* is not reasonable opportunity is belied by *Cook* v. *Virginia Holsum Bakeries, supra,* where opposing counsel received a copy of a narrative only two days before the trial judge signed it, and the Virginia Supreme Court of Appeals found no violation of the rule.

[13] In *Snead,* the Virginia Supreme Court of Appeals said:

"It is important that time be given opposing counsel for a reasonable opportunity to analyze such statements characterized by defendant's counsel as being confusing. The entire testimony of a very material witness was left out of the narrative statement when it was presented to the trial judge and it was necessary for him to insert it. We are of the opinion that the notice delivered to the Commonwealth's Attorney at his residence, after office hours, thirty minutes before tendering a narrative statement of the evidence to the trial judge for his signature, does not constitute reasonable notice within the plain meaning of Rule 5:1, § 3 (f) and that the terms of the Rule are mandatory and jurisdictional." 200 Va., at 854, 108 S. E. 2d, at 402.

This case is far different from *Snead* in significant respects. First, in *Snead* the court was not confronted with a transcript but instead with a narrative; and this narrative was, by the admission of appellant's own counsel, "of a confusing nature and character." In this case, on the other hand, the record fails to show that counsel for respondent made any objection to the trial judge as to the adequacy of the notice, or to the accuracy of the transcript, see *Taylor* v. *Wood, supra; Stokely* v. *Owens, supra.* Furthermore, at oral argument before this Court, counsel for respondent could not point to a single inaccuracy in the transcript as signed by the

quirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal . . . rights," *NAACP* v. *Alabama,* 357 U. S., at 457–458, I conclude that the decision below does not rest on an adequate state ground.

II

Because Congress has now provided a comprehensive scheme for dealing with the kinds of discrimination found in this case, I think it very unwise as a matter of policy for the Court to use § 1982 as a broad delegation of power to develop a common law of forbidden racial discriminations. A comparison of 42 U. S. C. § 1982 with the new Fair Housing Law, and consideration of the Court's task in applying each, demonstrate to me the need for restraint, and the appropriateness of dismissing the writ in this case, now grounded solely on an alleged violation of § 1982.

Petitioners here complain of discrimination in the provision of recreation facilities ancillary to a rented house found in one of the four subdivisions served by Little Hunting Park. On the one hand, the Fair

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trial judge. Tr. of Oral Arg. 20. Second, in *Snead* opposing counsel was only given one-half hour's notice of a proposed tender to the judge *for signature that night.* In this case, although the transcript was sent to the judge at about the same time as opposing counsel received notice, that notice stated that the judge would not be asked to sign the transcript for a week, so counsel could first have an opportunity to examine it.

Respondent suggests that the rule requires that opposing counsel have notice and an opportunity to examine the transcript before the transcript is given to the judge rather than simply before the judge signs it. No prior Virginia case of which we have been made aware has so stated, however, and the principle of *Bacigalupo* quoted by the majority suggests that the key is that there be an opportunity to inspect and to make objections *before* the judge signs the transcript.

Housing Law has a provision that explicitly makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of . . . rental [of housing], *or in the provisions of services or facilities in connection therewith,* because of race, [or] color . . . ." 42 U. S. C. § 3604 (b) (1964 ed., Supp. IV). (Emphasis added.) In contrast, as the majority in *Jones* noted, § 1982 "does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling," 392 U. S., at 413.

By attempting to deal with the problem of discrimination in the provision of recreational facilities under § 1982, the Court is forced, in the context of a very vague statute, to decide what transactions involve "property" for purposes of § 1982. The majority states that "[i]t is not material whether the membership share [in Little Hunting Park] be considered realty or personal property, as § 1982 covers both." But examination of the opinion will show that the majority has failed to explain why the membership share is *either* real *or* personal property for purposes of § 1982. The majority's complete failure to articulate any standards for deciding what is property within the meaning of § 1982 is a fair indication of the great difficulties courts will inevitably confront if § 1982 is used to remedy racial discrimination in housing. And lurking in the background are grave constitutional issues should § 1982 be extended too far into some types of private discrimination.[14]

Not only does § 1982 fail to provide standards as to the types of transactions in which discrimination is unlawful, but it also contains no provisions for enforcement, either public or private. To give its construction of the statute effect, the Court has had to imply reme-

[14] See *Civil Rights Cases,* 109 U. S. 3 (1883).

dies that Congress has not explicitly provided—injunctive relief in *Jones,* and now a right to damages here. See Part III, *infra.*

These remedies are expressly provided for in the Fair Housing Law, which, with its variety of techniques for enforcing its prohibition of housing discrimination, again stands in sharp contrast with § 1982. First, an injured party can complain to the Secretary of Housing and Urban Development who is empowered to investigate complaints, and use "informal methods of conference, conciliation, and persuasion" to secure compliance with the law.[15] Should the Secretary's efforts prove unavailing, the complainant can go to court.[16] As an alternative to going first to HUD, it appears that a person may go directly to court to enforce his rights under the Fair Housing Law,[17] which expressly provides for a wide variety of relief, including restraining orders, injunctions, compensatory damages, and punitive damages up to $1,000.[18] Furthermore, the Act allows a court to appoint counsel and waive all fees for indigent plaintiffs, and to award costs and, in certain cases, counsel fees to a successful plaintiff.[19] In addition to actions initiated by private parties, the Attorney General is empowered to bring civil actions for preventive civil relief, and criminal actions to punish those who by force or threat of force willfully interfere with or intimidate

[15] 42 U. S. C. § 3610 (a) (1964 ed., Supp. IV).

[16] *Id.,* § 3610 (d).

[17] *Id.,* § 3612. See Fair Housing Law and Other Federal Civil Rights Laws and Executive Orders Relating to the Programs of the U. S. Department of Housing and Urban Development, Dept. of Housing and Urban Development, Office of Equal Opportunity; Note, Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968, 82 Harv. L. Rev. 834, 839, 855–859, 862–863 (1969).

[18] 42 U. S. C. § 3612 (c) (1964 ed., Supp. IV).

[19] *Id.,* §§ 3612 (b), 3612 (c).

those who wish to exercise, or aid others in the exercise, of their rights under the Fair Housing Law.[20]

Given this comprehensive, contemporary statute, the limitations of which have not yet even been established, I believe that the Court should not decide this case but should instead dismiss the writ of certiorari as improvidently granted.[21] This Court's certiorari jurisdiction should not be exercised simply "for the benefit of the particular litigants," *Rice* v. *Sioux City Cemetery,* 349 U. S. 70, 74 (1955), but instead for the "settlement of [issues] of importance to the public as distinguished from . . . the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 387, 393 (1923). Even from the perspective of the parties, this case has lost much of its practical importance due to the fact that Dr. Freeman's work has taken him and his family away from the area served by Little Hunting Park, thereby making moot his original claim for injunctive relief.[22] But more fundamentally, I think here, as I did in *Jones,* that the existence of the Fair Housing Law renders the decision of this case of little "importance to the public." For, although the 1968 Act does not cover this particular case,[23] should a Negro in the future rent a house but be

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[20] *Id.,* §§ 3613, 3631. See *id.,* § 3617.

[21] Cf. Bickel, Foreword: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40 (1961).

[22] Given that the market price of a membership share in Little Hunting Park apparently ranged from $150 to $230 during the time in question, see Government's *Amicus* Brief 5, Freeman's compensatory damages will not, in all probability, be substantial. And, as I point out in the next section, unresolved factual issues may bar any relief at all for Sullivan.

[23] The relevant events in this case all took place in 1965, long before the Fair Housing Law first went into effect on April 11, 1968. Whether the Fair Housing Law would protect Dr. Freeman were like events to take place again after December 31, 1969, in

denied access to ancillary recreational facilities on account of race, he could in all likelihood secure relief under the provisions of the Fair Housing Law.[24]

III

The undiscriminating manner in which the Court has dealt with this case is both highlighted and compounded by the Court's failure to face, let alone resolve, two issues that lie buried beneath the surface of its opinion. Both issues are difficult ones, and the fact that the majority has not come to grips with them serves to illustrate the inevitable difficulties the Court will encounter if it continues to employ § 1982 as a means for dealing with the many subtle human problems that are bound to arise as the goal of eliminating discriminatory practices in our national life is pursued.

A. RELIEF FOR SULLIVAN

Because the majority opinion is highly elliptical as to (1) the circumstances surrounding Sullivan's expulsion from Little Hunting Park, (2) the relief Sullivan sought in the state court, and (3) the decision of the trial court, it is necessary for me to begin my analysis simply by stating the facts of these aspects of the case. A full

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part would depend upon whether the transaction between Sullivan and Freeman would fall within any of the categories described in n. 24, *infra*. On the facts as they appear in this record, the exemption found in 42 U. S. C. § 3607 (1964 ed., Supp. IV) would not appear to bar recovery.

[24] In addition to covering all single-family houses not owned by private individuals, and single-family houses owned by a private individual who owns more than three houses, the Fair Housing Law, after December 31, 1969, covers the rental of all single-family homes (a) rented with the help of a real estate broker; or (b) offered for rental through a written notice or advertisement which is discriminatory. See 42 U. S. C. § 3603 (b) (1964 ed., Supp. IV).

examination of the record reveals, first, the necessity for a remand on the majority's own premises. It also makes apparent the majority's failure to provide any guidance as to the legal standards that should govern Sullivan's right to recovery on remand. An awareness of the complexity of the issues relevant to Sullivan's right to redress suggests further, I think, the appropriateness of a discretionary denial of review.

1. *The Circumstances of Sullivan's Expulsion.* After the Board of Little Hunting Park refused to approve the assignment of a membership share from Sullivan to Freeman, Sullivan attempted to convince the Board to reverse its decision. To this end, Sullivan first met with members of the Board, and protested their actions. He subsequently mobilized a campaign both by other members of the club and by persons in the community as a whole to force the Board to reconsider its decision. The means used in this campaign, as the brief for petitioner Sullivan acknowledges,[25] included phone calls to members of the Board, letters to local clergy, and the circulation among the members of Little Hunting Park of a petition that called for a meeting of the full membership to consider Dr. Freeman's case.

On July 8 Sullivan received a letter from the Board which stated that it had determined that there was "due cause" to warrant a hearing in order to determine whether Sullivan should be expelled from Little Hunting Park, pursuant to its bylaws, for "conduct inimicable to the Corporation members." This letter referred to Sullivan's "non-acceptance of the Board's decision on the assignment of your membership to your tenant . . . along with the continued harassment of the board members" as the basis for the Board's "due cause" determination.

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[25] See Petitioners' Brief 9–11, 39–50.

The Board subsequently provided a detailed specification of its charges against Sullivan,[26] and these included, *inter alia,* allegations that Sullivan had (a) instigated a campaign by which board members were harassed by "unfriendly phone calls" accusing them of bigotry; (b) used "abusive" language in a phone call to the president of the Board; (c) written letters to local clergy, including the minister of the church which employed the president of Little Hunting Park, accusing board members of participation in "real moral evil"; and (d) used "violent and abusive language" to members of Little Hunting Park who had refused to sign his petition. After the hearing on these charges, the Board expelled Sullivan and tendered to him the current market value of the two membership shares that he held.

In response to these actions, Sullivan brought this suit in the Circuit Court of Fairfax County, Virginia, against Little Hunting Park and its Board seeking as relief (1) an order compelling Little Hunting Park to reinstate his membership; (2) monetary damages in the amount of $15,000; and (3) an injunction requiring the Board to approve the assignment to Freeman and forbidding the Board to use race as a factor in considering membership. The trial court, after hearing disputed evidence as to the reasons for Sullivan's expulsion, found for the defendants. It stated that the

[26] See Appendix 181–182, 185–186. The detailed specification of charges against Sullivan was given by Little Hunting Park as part of a settlement of a suit brought by Sullivan to enjoin the hearing on his expulsion. This earlier suit, which was dismissed by agreement between the parties, was brought by Sullivan because of the vagueness of the July 8 letter as to the conduct upon which the due-cause hearing was to be held. The settlement of this earlier suit also included a stipulation between Sullivan and Little Hunting Park as to future lawsuits, which respondents claimed below barred Sullivan's suit before us now. This aspect of the stipulation was noted, but not passed on, by the trial judge below.

scope of its review of the Board's actions was "limited" because Little Hunting Park was a "private and social" club, and then went on to find that the Board had acted within "the powers conferred on it by the By-Laws" in expelling Sullivan, and that "there was ample evidence to justify [the Board's] conclusion that the complainant's acts were inimicable to the Corporation's members and to the Corporation."

2. With this statement of the record in mind, several observations must be made about the majority's treatment of Sullivan's rights. First, in stating that "Sullivan's expulsion [was] for the advocacy of Freeman's cause," the majority surely cannot be taken to have resolved disputed testimony, and decided the facts underlying Sullivan's expulsion. If these facts are relevant to Sullivan's remedial rights, as surely they must be, then a remand for detailed findings seems unavoidable under the majority's own premises.

Second, the majority has not explained what legal standard should determine Sullivan's rights under § 1982. The majority simply states that "Sullivan has standing to maintain this action" under § 1982, without even acknowledging that some standard is essential for this case to be ultimately decided.

One can imagine a variety of standards, each based on different legal conclusions as to the "rights" and "duties" created by § 1982, and each having very different remedial consequences. For example, does § 1982 give Sullivan a right to relief only for injuries resulting from Little Hunting Park's interference with *his* statutory duty to Freeman under § 1982? If so, what is Sullivan's duty to Freeman under § 1982? Unless § 1982 is read to impose a duty on Sullivan to *protest* Freeman's exclusion, he would be entitled to reinstatement under this standard only if the Board had expelled him for the simple act of assigning his share to Freeman.

As an alternative, Sullivan might be thought to be entitled to relief from those injuries that flowed from the Board's violation of *its* "duty" to Freeman under § 1982. Such a standard might suggest that Sullivan is entitled to damages that resulted from Little Hunting Park's initial refusal to accept the assignment to Freeman but again not to reinstatement. Or does the Court think that § 1982 gives Sullivan a right to relief from injuries that result from his "legitimate" protest aimed at convincing the Board to accept Freeman? If so, what protest activities were legitimate here? Most extreme would be a standard that would give Sullivan relief from injuries that were the result of *any* actions he took to protest the Board's initial refusal, irrespective of Sullivan's means of protest. Only this standard would require reinstatement, irrespective of the disputed facts here. But this standard would mean that § 1982 gave Sullivan a right to regain his membership even if the Board has expelled him for using intemperate and abusive threats as a means of protesting Freeman's exclusion.[27]

B. STATE COURT REMEDIES FOR FEDERAL RIGHTS

Because this case arises from a state court, it presents special problems which the majority overlooks, and which suggests again the undesirability of deciding this case in the context of this ancient statute. In deciding that there is a right to recover damages in this case, the majority overlooks the complications involved by dint of the fact that a state court is being asked to provide

[27] *Barrows* v. *Jackson,* 346 U. S. 249 (1953), upon which the majority appears to place heavy reliance, gives no guidance as to the extent a state court is obliged to allow a white person to recover affirmatively either damages or other relief after he has transferred a real estate interest to a Negro. In *Barrows* the Court held that damages could not be awarded *against* a white defendant sued for breach of a racially restrictive covenant.

a remedy for a federal right bottomed on a federal statute that itself has no remedial provisions.

Implied remedies for federal rights are sometimes solely a matter of federal law [28] and other times dependent, either wholly or partially, upon state law.[29] Difficult and complex questions are involved in determining what remedies a state court must [30] or must not [31] provide in cases involving federal rights.[32]

It should be noted that the majority's opinion, though perhaps deciding very little [33] only adds to the confusion already existing in this area. Section 1988 of Title 42, which the majority apparently thinks decides this case, is concerned with the remedial powers of *federal district courts* and it provides that the federal courts shall look to state law to find appropriate remedies when the applicable federal civil rights law is "deficient in the provisions necessary to furnish suitable remedies . . . ." But the majority turns this provision on its head by suggesting (1) that § 1988 creates a federal remedy, apart from state law, when the remedial provisions of a civil rights statute, like § 1982, are "deficient"; and (2) that § 1988 itself somehow imposes this federal remedy on the States.

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[28] See *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964).

[29] See *Ward* v. *Love County*, 253 U. S. 17 (1920); *The Tungus* v. *Skovgaard*, 358 U. S. 588 (1959).

[30] *Testa* v. *Katt*, 330 U. S. 386 (1947) (state court obligated to give treble damages, required by federal statute, for violation of Emergency Price Control Act).

[31] See *Avco Corp.* v. *Aero Lodge No. 735*, 390 U. S. 557, 560 n. 2 (1968) (Court did not decide whether the remedies available in a state court in a suit to enjoin a strike are limited to the remedies available under federal law).

[32] See H. Hart & H. Wechsler, The Federal Courts and The Federal System 474–477 (1953); Greene, Hybrid State Law in the Federal Courts, 83 Harv. L. Rev. 289, 315–319 (1969).

[33] The majority, in its penultimate paragraph, appears not to decide whether the "rule of damages" is "drawn from federal or state sources."

If § 1988 says anything at all relevant for this case, it suggests that in those cases where it is appropriate to cure remedial deficiencies of a federal civil rights statute by implication, this is to be done by looking to state law to see what remedies, consistent with federal policies, would be available there.

By reason of these considerations, many of which could hardly have been foreseen at the time certiorari was granted, I would dismiss the writ in this case as improvidently granted.

NATIONAL LABOR RELATIONS BOARD *v.* J. H. RUTTER-REX MANUFACTURING CO., INC., ET AL.

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

No. 32. Argued October 22, 1969—
Decided December 15, 1969

Respondent company's employees went on strike in April 1954. The union filed charges against the company, including a charge for refusal to bargain, and while these charges were pending, terminated the strike in April 1955, and applied for reinstatement of many of the strikers. Not all these employees were reinstated. In February 1956 the National Labor Relations Board (NLRB) found that the company had been guilty of an unlawful refusal to bargain and ordered it to offer reinstatement to all strikers who applied and to "make such applicants whole for any loss of pay by reason of the . . . refusal, if any, to reinstate them." The Court of Appeals entered a decree in August 1957 enforcing the order. The NLRB regional office then notified the company that the case would remain open until the company had fully complied with the decree. In November 1957 the company wrote the regional office that it had complied with "some of the provisions of the decree" and requested that "any instance of a failure to comply" be brought to its attention. In March 1960 an NLRB compliance officer requested payroll and other records to determine the employment and back-pay rights of employees. In November 1961 a back-pay specification was filed and the company applied to the Court of Appeals for a permanent stay, alleging that the NLRB had delayed improperly in issuing the specification. The Court of Appeals denied the stay, although noting that the delay was regrettable. After a lengthy hearing, the NLRB, in June 1966, ordered back pay, which, for cases where no company offer was made, would accrue through the last quarter of 1961, when the specification was filed. On review, the Court of Appeals found that the NLRB had been guilty of "inordinate" delay prejudicing the company and modified the order to eliminate back pay accruing after July 1959. *Held:* While the delay in the administrative process is deplorable, the Court of Appeals

here exceeded the narrow scope of review provided for the NLRB's remedial orders when it shifted the cost of the delay from the company to the employees. Pp. 262–266.

399 F. 2d 356, reversed.

Arnold Ordman argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Peter L. Strauss, Dominick L. Manoli, Norton J. Come,* and *Allison W. Brown, Jr.*

Henry J. Read argued the cause for respondent J. H. Rutter-Rex Manufacturing Co., Inc. With him on the briefs were *Peter H. Beer* and *Daniel Lund. Jacob Sheinkman, Ralph N. Jackson,* and *James J. Graham* filed a brief for respondent Amalgamated Clothing Workers' of America, AFL–CIO.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether, when an employer has improperly failed to reinstate striking employees, and the National Labor Relations Board has after considerable delay ordered back pay for those employees, a court of appeals may, on account of the delay, modify the Board's order to provide an early cutoff date for back pay. In the circumstances of this case, we hold such a modification to be an unwarranted interference with the Board's remedial power to implement the policies of the National Labor Relations Act.

I

The employees in question chose the Amalgamated Clothing Workers of America, AFL–CIO, as their bargaining representative in January 1954. After three bargaining sessions between the union and the company, the employees went out on strike in April 1954. At that point and thereafter the company refused to bar-

gain further with the union representatives. Charges of unfair labor practices, including a refusal to bargain in good faith, were filed against the company. In April 1955, while these charges were pending, the union terminated the strike and applied for the reinstatement of many of the strikers. The company reinstated some of these employees and failed to reinstate others.

In February 1956 the Board found that the company had indeed been guilty of an unlawful refusal to bargain. It ordered the company to offer reinstatement to all strikers who applied, and to "make such applicants whole for any loss of pay suffered by reason of the . . . refusal, if any, to reinstate them." *J. H. Rutter-Rex Mfg. Co.*, 115 N. L. R. B. 388, 391 (1956). As is apparently the Board's practice in reinstatement cases involving strikers, the order did not name the individuals covered, but left disputes over the details of reinstatement and back pay to the compliance stage of the proceedings. The Court of Appeals enforced the Board's order, *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 245 F. 2d 594 (C. A. 5th Cir. 1957), and entered its decree on August 19, 1957.

On August 21, 1957, the Board's regional office sent the company the standard letter describing compliance procedures, which included the following:

> "When you have fully complied with the affirmative terms of the Decree and there are no violations of its negative provisions, you will be notified that the case has been closed. Until you receive such notice you will know that the case still remains open for all purposes as awaiting compliance."

On November 7, 1957, the company wrote to the regional office stating that it had complied with "some of the provisions of the decree," and asking that the regional office bring "any instance of a failure to fully comply with the order" to the company's attention. The regional office did not answer this letter, and the com-

pany heard nothing until March 22, 1960, when a Board compliance officer notified the company that the case had been assigned to him, and requested payroll and other records necessary to determine the employment and back-pay rights of employees.

On November 16, 1961, the regional office filed a 428-page back-pay specification, alleging that the company owed more than $342,000 to some 207 strikers who had either not been reinstated within five days after applying, or who had never been reinstated, in violation of the Board and court orders. The company applied to the Court of Appeals for a permanent stay of further action in the back-pay proceedings, alleging that the Board had delayed improperly in issuing the specification. By affidavit, the Board explained that the delay was caused in part by the great complexity of the task of processing the claims of approximately 600 strikers, and in part by the extremely heavy caseload and severe limitations in staff that the New Orleans regional office experienced during the late 1950's. The Court of Appeals noted that the delay was regrettable, but denied the requested stay. *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 305 F. 2d 242 (C. A. 5th Cir. 1962).

After a lengthy hearing, a Trial Examiner denied back pay to 35 of the 207 claimants, and reduced the amount due to just over $160,000. He determined that each employee should receive net back pay, computed according to the Board's usual formula,[1] for the period running from five days after his application for reinstatement until the company made a complying offer. Where no offer was made, the back pay was to accrue through the last quarter of 1961, the quarter in which the specification was filed. His findings and recommendations were adopted with minor modifications by the Board on June 6, 1966. *J. H. Rutter-Rex Mfg. Co.*,

[1] *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 345 (1953).

158 N. L. R. B. 1414 (1966). Both the Examiner and the Board considered and rejected the company's contention that the delay in issuing the specification should bar the back-pay award, either in whole or in part.

On review, the Court of Appeals found that the Board had been guilty of "inordinate" delay, in violation of § 6 (a) of the Administrative Procedure Act, 60 Stat. 240, 5 U. S. C. § 1005 (a), now 5 U. S. C. § 555 (b) (1964 ed., Supp. IV), and to the prejudice of the company, which had been "lulled into the belief that the Board was satisfied and that no further action was to be expected." *J. H. Rutter-Rex Mfg. Co.* v. *NLRB,* 399 F. 2d 356, 363 (C. A. 5th Cir. 1968). Arguing that the purpose of back-pay awards is to "deter unfair labor practices," *id.,* at 364, and believing that a substantial award of back pay would be sufficient to achieve such deterrent effect, the court modified the Board order to eliminate all back pay accruing after July 1, 1959, thus reducing the awards of some 37 strikers who had not yet received complying offers of reinstatement by that date. We granted certiorari to consider the propriety of this modification,[2] 393 U. S. 1116 (1969), and we reverse the judgment below.

II

We start with the broad command of § 10 (c) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. § 160 (c), that upon finding that an unfair labor practice has been committed, the Board shall order the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad

[2] The Court of Appeals also reversed back-pay awards as to 10 strikers in their entirety, finding the awards not supported by substantial evidence. 399 F. 2d, at 365. Certiorari was not sought as to this modification of the Board's order.

discretionary one, subject to limited judicial review." *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203, 216 (1964).

The legitimacy of back pay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute, *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 278 (1956), and the purpose of the remedy is clear. "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *NLRB,* 344 U. S. 25, 27 (1952). As with the Board's other remedies, the power to order back pay "is for the Board to wield, not for the courts." *NLRB* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 346 (1953). "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.,* at 346–347.

Here the Board ordered back pay through December 1961 for employees who had not yet received complying offers of reinstatement by that date. That order clearly falls within the general purpose of making the employees whole, and thus restoring the economic status quo that would have obtained but for the company's wrongful refusal to reinstate them. The employees encompassed by the order earned less during the relevant quarterly periods than they would have, had they been reinstated in their old or substantially equivalent jobs with the company. Thus the Court of Appeals' modification, cutting off the accrual of back pay at the arbitrary date of July 1, 1959, left the employees who had not been reinstated by that date worse off than they would have been but for the company's wrongful action in refusing reinstatement. Either the company or the employees

had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees.

The Court of Appeals justified the modification as a proper balancing of the interests of the company, which it found was prejudiced in litigating the back-pay claims by the Board's delay, and the interests of the employees in full restitution. It found statutory support for the company's position in what it took to be the Board's violation of its duty under the Administrative Procedure Act to "proceed with reasonable dispatch to conclude any matter presented to it." 5 U. S. C. § 1005 (a). Thus, the Court of Appeals reasoned, the case fell within the admonition that reviewing courts in labor cases not "rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown,* 380 U. S. 278, 291 (1965).

Assuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full back-pay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of "the economic hardship caused by many years of undeservedly substandard earnings," lengthy delays "must render the back pay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. *NLRB* v. *Mastro Plastics Corp.,* 354 F. 2d 170, 180 (C. A. 2d Cir. 1965). This Court has held before that

the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. *NLRB* v. *Electric Cleaner Co.*, 315 U. S. 685, 698 (1942); *Labor Board* v. *Katz*, 369 U. S. 736, 748 n. 16 (1962).

The Court of Appeals reasoned further that the purpose of the back-pay remedy is deterrence of unfair labor practices, and that the substantial back-pay award that it enforced would sufficiently serve that deterrent purpose. But the Board could properly conclude that back pay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941).

Finally, the Court of Appeals reasoned that the company was "lulled into the belief that the Board was satisfied and that no further action was to be expected." 399 F. 2d, at 363. We need not decide whether this sort of estoppel argument would justify a court in reducing a back-pay award, for no estoppel appears in this case. The Board clearly informed the company that this case would remain open as awaiting compliance until the company received a notice that the case was closed. No such closing notice was ever given. As the Court of Appeals itself stated, the company's subsequent letter asking that violations of the order be called to its attention "could not shift or avoid its duty of compliance." *Ibid.*

We do not mean that delay in the administrative process is other than deplorable. It is deplorable if, as the Court of Appeals thought, the company was hampered in the presentation of its defenses to the back-pay specification by the delay. It is even more deplorable if, as seems clear, innocent employees had to live for some years on reduced incomes as a combined result

of the delay and the company's illegal failure to reinstate them. It may be that the company could have, through the courts, compelled earlier Board action.[3] But the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of the delay from the company to the employees in this case.

Reversed.

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

Universal Camera Corp. v. *NLRB*, 340 U. S. 474, requires a dismissal of the writ of certiorari.

To start with, the Board is allowed a wide field of discretion over awards of back pay against a company found to have committed an unfair labor practice. As the Court said in *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 198:

> "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

Thus the employees in this case have no automatic "right" to any award of back pay.

The *Universal Camera* case concerned the scope of judicial review of orders of the Board. Prior to that decision, many courts had conceived their function of review as an extremely narrow one; some courts looked

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[3] Section 10 (e) (A) of the Administrative Procedure Act, 5 U. S. C. § 1009 (e) (A), now 5 U. S. C. § 706 (1) (1964 ed., Supp. IV), provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed."

only for evidence which, when viewed in isolation, substantiated the Board's findings. Congress registered its dissatisfaction with this restricted scope of review by stating the proper test in the Taft-Hartley Act as one of "substantial evidence on the record considered as a whole." 61 Stat. 148, 29 U. S. C. § 160 (e). This meant that the courts of appeals were to "assume more responsibility for the reasonableness and fairness of Labor Board decisions" than had been the practice of many of these courts in the past. 340 U. S., at 490.

The impact of this decision was to vest the courts of appeals with general supervisory responsibility over Board decisions and orders. Accordingly, the role of this Court was to be an extremely limited one. The Court in *Universal Camera* put it this way:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Id.*, at 490–491.

The problem in the present case is one of working out the equities of a back-pay order. Because the Board's delay in initiating compliance proceedings with respect to its original order was deemed unreasonable, the Court of Appeals saw fit to modify the terms of that order. The impact of the specific facts relating to the Board's and the company's actions in this case was taken into account by the Court of Appeals in reviewing the terms of the back-pay order. It arrived at its judgment as

an exercise of its responsibility "for assuring that the Board keeps within reasonable bounds" (*id.*, at 490) in a subject area that necessarily involves "diverse, complicated situations."

Casting the issue as one of "law" rather than as one of "fact" does not conceal the substantial departure in this case from the learning of *Universal Camera:* that the courts of appeals, and not this Court, are the watchdogs of the Board.

I would dismiss the writ as improvidently granted.

DOWELL ET AL. *v.* BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS ET AL.

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

No. 603. Decided December 15, 1969

The District Court approved a school board's desegregation proposal to revise school boundaries effective at the start of the school year and ordered the board to submit a complete desegregation plan within two months thereafter. Intervenors appealed with respect to the boundary provision and sought a stay of its effectuation. The Court of Appeals summarily vacated the District Court's order as inappropriate except as part of an overall plan. *Held:* The Court of Appeals should have allowed the implementation of the proposal, as to which petitioners did not object, pending argument and decision of the appeal. *Alexander* v. *Holmes County Board, ante,* p. 19.

Certiorari granted; vacated and remanded.

Jack Greenberg and *James M. Nabrit III* for Dowell et al., and *Calvin W. Hendrickson* for Sanger et al., petitioners.

J. Harry Johnson and *Leslie L. Conner* for the Board of Education of Oklahoma City Public Schools et al., and *V. P. Crowe, C. Harold Thweatt, George F. Short,* and *Norman E. Reynolds* for McWilliams et al., respondents.

PER CURIAM.

In this school desegregation case, the District Court for the Western District of Oklahoma, by order entered August 13, 1969, approved respondent Oklahoma City School Board's proposal for furthering desegregation of some Oklahoma City schools by revising school attend-

ance boundaries effective September 2, 1969, the start of the 1969–1970 school year. The order also decreed that the School Board prepare and submit on or before November 1, 1969, a comprehensive plan for the complete desegregation of the entire school system. Intervenors of the "McWilliams Class" appealed to the Court of Appeals for the Tenth Circuit from the provision of the order which approved implementation of the School Board's proposed boundary changes by September 2, 1969, and sought a stay of that provision pending decision of the appeal. The Court of Appeals, on August 27, 1969, instead of limiting relief to the requested stay, summarily vacated the District Court's approval of the School Board's proposal. The Court of Appeals held that consideration of the proposal was inappropriate "at this stage of the proceedings" and should await the District Court's "consideration and adoption of a full and comprehensive plan for the complete desegregation and integration of the Oklahoma City School system as contemplated in the court's order of August 13, 1969."

The petition for certiorari is granted.[1] The Court of Appeals erred in holding that the District Court's approval of the School Board's plan must be vacated because consideration of the proposal was inappropriate except in the context of a comprehensive city-wide plan. The burden on a school board is to desegregate an unconstitutional dual system at once. *Green* v. *County School Board,* 391 U. S. 430, 439 (1968); *Alexander* v. *Holmes County Board of Education, ante,* p. 19. Since

[1] The petition was filed pursuant to an expedited schedule specified by MR. JUSTICE BRENNAN when on petitioners' application he, as Acting Circuit Justice, vacated the order of the Court of Appeals and reinstated that of the District Court, pending action by this Court on the petition.

the District Court ordered the desegregation measures into effect, and since the petitioners did not object to their scope, the Court of Appeals should have permitted their implementation pending argument and decision of the appeal. *Alexander* v. *Holmes County Board of Education, supra.* The order of the Court of Appeals is therefore vacated and the case is remanded to that court promptly to hear and determine, consistently with *Alexander,* all pending appeals from the District Court order.[2]

It is so ordered.

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[2] We are informed by the parties that the School Board on September 12, 1969, also filed an appeal from the District Court's approval of the Board's proposal, and another appeal from the District Court's denial on September 11, 1969, of the Board's application for amendment of the August 13 order to extend from November 1, 1969, to March 31, 1970, the time for filing of a comprehensive desegregation plan for secondary schools. The District Court granted the Board's application as to a plan for desegregation of the elementary schools.

CARLTON ET AL. *v.* CONNER, COMMISSIONER OF AGRICULTURE OF FLORIDA

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 625. Decided December 15, 1969

223 So. 2d 324, appeal dismissed.

John R. Beranek and *Charles H. Damsel, Jr.*, for appellants.

Robert A. Chastain for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

AMERICAN SMELTING & REFINING CO. *v.* COUNTY OF CONTRA COSTA ET AL.

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

No. 656. Decided January 12, 1970

271 Cal. App. 2d 437, 77 Cal. Rptr. 570, appeal dismissed.

Valentine Brookes, Alexander J. Gillespie, Jr., C. Rudolf Peterson, and *George W. Beatty* for appellant.

John B. Clausen for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LOCAL 1497, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 703. Decided January 12, 1970

301 F. Supp. 1108, appeal dismissed.

George Louis Creamer for appellants.

Max P. Zall for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

IN RE REED

APPEAL FROM THE SUPREME COURT OF DELAWARE

No. 706. Decided January 12, 1970

— Del. —, 257 A. 2d 382, appeal dismissed.

Warren B. Burt for appellant.

David P. Buckson, Attorney General, and *Ruth M. Ferrell,* State Solicitor, for the State of Delaware.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LYON *v.* FLOURNOY, CONTROLLER OF CALIFORNIA, ET AL.

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

No. 715. Decided January 12, 1970

271 Cal. App. 2d 774, 76 Cal. Rptr. 869, appeal dismissed.

Randal F. Dickey, Jr., and *Robert L. McCarty* for appellant.

Thomas C. Lynch, Attorney General of California, *Harold B. Haas,* Assistant Attorney General, and *William J. Power,* Deputy Attorney General, for appellees.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MICHAEL SCHIAVONE & SONS, INC. *v.* UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 722. Decided January 12, 1970

304 F. Supp. 773, appeal dismissed.

Joseph S. Oteri for appellant.

Solicitor General Griswold for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 741. Decided January 12, 1970

300 F. Supp. 1339, affirmed.

James E. Nisbet, Ed White, and *Jeremiah C. Waterman* for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Fritz R. Kahn, and *Jerome Nelson* for the United States et al., and *Warren Price, Jr.,* and *John W. McConnell, Jr.,* for Sea-Land Service, Inc., appellees.

PER CURIAM.

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

SANCHEZ *v.* NEW MEXICO

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

No. 974, Misc. Decided January 12, 1970

80 N. M. 438, 457 P. 2d 370, appeal dismissed.

Pat Sheehan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ARIEL *v.* MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 897, Misc. Decided January 12, 1970

— Mass. —, 248 N. E. 2d 496, appeal dismissed and certiorari denied.

Edward J. Duggan for appellant.

Robert H. Quinn, Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, and *Lawrence P. Cohen,* Deputy Assistant Attorney General, 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.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

DOYLE ET AL. *v.* O'BRIEN, CHIEF OF POLICE OF SOMERVILLE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 1123, Misc. Decided January 12, 1970

304 F. Supp. 704, affirmed.

Edward J. Duggan for appellants.

Robert H. Quinn, Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, and *Lawrence P. Cohen,* Deputy Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

SWAIN ET AL. *v.* BOARD OF ADJUSTMENT OF THE CITY OF UNIVERSITY PARK ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

No. 714. Decided January 12, 1970

433 S. W. 2d 727, appeal dismissed and certiorari denied.

William Burrow for appellants.

Alfred L. Ruebel 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.

FISHKIN ET AL. *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL.

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

No. 681. Decided January 12, 1970

309 F. Supp. 40, appeal dismissed.

Thomas C. Lynch, Attorney General of California, and *Richard L. Mayers,* Deputy Attorney General, for appellant the State of California.

Solicitor General Griswold, Assistant Attorney General Ruckelshaus, and *Alan S. Rosenthal* for appellees.

PER CURIAM.

The appeal is dismissed for failure to docket the case within the time prescribed by Rule 13.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

BONOMO ET AL. *v.* JONES

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 662. Decided January 12, 1970

Appeal dismissed and certiorari denied.

Robert E. Dauer 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.

GRAHAM *v.* ALABAMA

APPEAL FROM THE COURT OF APPEALS OF ALABAMA

No. 738. Decided January 12, 1970

45 Ala. App. 79, 224 So. 2d 905, appeal dismissed and certiorari denied.

Truman Hobbs for appellant.

MacDonald Gallion, Attorney General of Alabama, and *David W. Clark* and *Lloyd G. Hart,* Assistant Attorneys General, 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.

SCHWEGMANN *v.* LOUISIANA STADIUM AND EXPOSITION DISTRICT ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 748. Decided January 12, 1970

254 La. 579, 225 So. 2d 362, appeal dismissed and certiorari denied.

Paul O. H. Pigman for appellant.

Harry B. Kelleher, Gerald P. Fedoroff, and *John E. Jackson, Jr.,* 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.

EX PARTE CARRINGTON

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

No. 787, Misc. Decided January 12, 1970

Appeal dismissed and certiorari denied.

Leon B. Polsky for Carrington.

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Judith T. Younger,* Assistant Attorney General, for the State of New York.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. The petition for a writ of certiorari is denied.

NEW YORK *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 100. Decided January 12, 1970*

No. 100, 299 F. Supp. 989; No. 520, 303 F. Supp. 990, affirmed.

Louis J. Lefkowitz, Attorney General of New York, *Dunton F. Tynan,* Assistant Solicitor General, and *Walter J. Myskowski* for appellant in No. 100. *Gordon P. MacDougall, William G. Mahoney,* and *C. C. Sheldon,* Assistant Attorney General of Nebraska, for appellants in No. 520.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, and *Jerome Nelson* for the United States et al. in No. 100. *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Fritz R. Kahn* for the United States et al. in No. 520. *Wallace R. Steffen* for Erie Lackawanna Railway Co., appellee in No. 100. *George G. Coughlin* for Broome County Chamber of Commerce, appellee in No. 100, supporting the position of the appellant. *Howard J. Trienens* and *Richard T. Cubbage* for Chicago, Burlington & Quincy Railroad Co., appellee in No. 520.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

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*Together with No. 520, *City of Sheridan et al.* v. *United States et al.*, on appeal from the United States District Court for the District of Wyoming.

WADE *v.* WILSON, WARDEN, ET AL.

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

No. 55. Argued November 12, 1969—
Decided January 13, 1970

Petitioner and a codefendant were convicted of murder and given life sentences. Petitioner's codefendant received a free copy of the transcript for preparing his appeal but contrary to California court rules, would not share it with petitioner, who was then loaned a copy by the State for preparing his appeal. The convictions were affirmed. Several years later petitioner, having fruitlessly sought the transcript from his codefendant, and having been denied a free copy of his own by the California courts in connection with collateral proceedings in the state courts, brought this habeas corpus proceeding alleging his indigency and contending that California's failure to provide him a free transcript violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court granted the writ. The Court of Appeals reversed, holding that the trial court failed to find that petitioner claimed error in the proceedings leading to his conviction that warranted post-conviction relief and that petitioner was not entitled to a transcript "to enable him to comb the record in the hope of discovering some flaw." *Held:*

1. Petitioner may not attack the state court rules, which concern only the furnishing of transcripts for purposes of direct appeal, since petitioner had the transcript for that purpose and did not complain that his having it only on loan impaired its use on appeal. Pp. 285–286.

2. This Court need not decide whether the Constitution requires a State to furnish indigent prisoners with free copies of trial transcripts to aid in preparing petitions for collateral relief unless and until it appears that petitioner cannot again borrow a copy from the State, or procure one from his codefendant or other custodian; or show that it would be significantly more advantageous for him to own rather than borrow a copy. Pp. 286–287.

District Court judgment and 390 F. 2d 632, vacated and remanded.

Marshall L. Small, by appointment of the Court, 394 U. S. 941, argued the cause for petitioner. With him on the briefs was *Melvin R. Goldman.*

John T. Murphy, Deputy Attorney General of California, argued the cause for respondents. With him on the brief were *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Karl S. Mayer,* Deputy Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1961, petitioner and one Pollard appealed to the California District Court of Appeal from murder convictions upon which the California Superior Court had sentenced each of them to life imprisonment. California Rules of Court 35 (c) and 10 (c) required that the appellants be furnished with one free copy of the trial transcript to be shared by them for the purposes of the appeal. Pollard received the free copy but would not share it with petitioner. However, the State Attorney General loaned petitioner's appellate counsel his copy. The District Court of Appeal affirmed the convictions, 194 Cal. App. 2d 830, 15 Cal. Rptr. 214 (1961).

Five years later, in 1966, petitioner wished to pursue a collateral remedy and sought the transcript from Pollard but Pollard "refuse[d] to communicate on the subject." Petitioner's inquiry of his appellate lawyer elicited the response that the copy borrowed from the Attorney General had been returned. Petitioner then turned to the California courts seeking, however, not temporary use of a copy, but to be furnished with a copy of his own. He applied initially to the trial court and was advised that the original of the transcript was in the District Court of Appeal. He thereupon filed a *pro se* motion for a copy in the District

Court of Appeal, which motion was denied on the ground that the Court of Appeal had only the original and was not equipped to duplicate copies. He next filed a proceeding in the California Supreme Court and was advised by the clerk of that court that he must proceed in "the court possessed of the original record." [1] He renewed his application to the District Court of Appeal, which again denied it on the ground that that court had "no facility for reproducing records"; but this time petitioner was advised that the original record would be made available for copying at his expense. Petitioner then abandoned further efforts in the California courts.

In 1967, he filed the instant federal habeas corpus proceeding in the District Court for the Northern District of California. His petition alleged his indigency and the single claim that California's refusal to furnish him without cost his own copy of the transcript denied him due process and equal protection of the laws in violation of the Fourteenth Amendment. The District Court after hearing granted the writ and ordered California either to provide the free transcript or to release the petitioner. The District Court stated in an unreported opinion, "although there is no square holding on the precise question of the right to a transcript in preparing a petition for a writ of habeas corpus rather than an appeal, the logic of the Supreme Court holdings compels a finding that such a right exists." [2] The Court of Appeals for the

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[1] Petitioner styled his application to the Supreme Court of California "A Petition for a Writ of Habeas Corpus" but the only relief he requested was issuance of the record in his case or an order to the District Court of Appeal to furnish him with the record. He did not request an order releasing him from custody.

[2] The District Court cited *Smith* v. *Bennett*, 365 U. S. 708 (1961) (habeas corpus filing fee); *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (transcript on direct appeal); *Lane* v. *Brown*, 372 U. S. 477 (1963) (transcript on post-conviction appeal); *Long* v. *District Court*,

Ninth Circuit reversed on the ground that "the trial court failed to find that Wade was claiming that there was any error which occurred in the proceedings which led to his conviction which would warrant the granting of post-conviction relief. . . . Wade was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw." 390 F. 2d 632, 634 (1968). We granted certiorari. 393 U. S. 1079 (1969).

The California Court Rules require that a free transcript be furnished to convicted persons separately tried in felony cases and to each codefendant where one or more codefendants are under sentence of death.[3] Petitioner argues that in furnishing only one copy to be shared by codefendants where none received the death penalty California interposes an unconstitutional barrier to the use of its criminal appellate proceedings and that the

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385 U. S. 192 (1966) (transcript on post-conviction appeal). See also *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Gardner* v. *California*, 393 U. S. 367 (1969).

[3] Rules 35 (c) and 10 (c) provide in pertinent part:

Rule 35 (c): "As soon as both the clerk's and reporter's transcripts are completed, the clerk shall deliver one copy to the defendant or his attorney and one copy to the district attorney . . . . When there are two or more appealing defendants in a case in which a judgment of death has been rendered against one or more of the defendants, the clerk shall deliver a copy of both transcripts to each such defendant or his attorney. . . . Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy shall be made available for the use of the appellants in the manner provided in Rule 10."

Rule 10 (c): "The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court."

distinction made by the Rules, without more, establishes that California has denied him equal protection of the laws. But petitioner will not be heard to attack the Rules since they concern only the furnishing of transcripts for purposes of direct appeal and he and his appellate counsel in fact had the use on his direct appeal of the transcript borrowed from the State Attorney General and did not complain that the terms on which it was made available in any way impaired its effective use on the appeal. See *United States* v. *Raines,* 362 U. S. 17, 21–22 (1960).

Petitioner argues that in any event, contrary to the Court of Appeals, the District Court was correct in holding that because "it may not be possible to pinpoint . . . alleged errors in the absence of a transcript," petitioner was entitled to a transcript for use in petitioning for habeas corpus even though he did not specify what errors he claimed in his conviction. To pass on this contention at this time would necessitate our decision whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief. This is a question of first impression which need not be reached at this stage of the case. Notwithstanding petitioner's success in borrowing a copy of the transcript in connection with his direct appeal, his insistence in the subsequent proceedings in both the California and federal courts is that he has a constitutional right to a copy of his own. We think consideration of that contention should be postponed until it appears that petitioner cannot again borrow a copy from the state authorities, or successfully apply to the California courts to direct his codefendant, Pollard, or some other custodian of a copy to make a copy available to him. Cf. Rule 10 (c). Without such a showing, or a showing that having his own copy would

be significantly more advantageous than obtaining the use of someone else's copy, the District Court should not have reached the merits of petitioner's claim. We think, however, that the case should be retained on the District Court's docket pending petitioner's efforts to obtain access to the original or a copy. Upon being advised by the parties that petitioner has been provided such access, the court should dismiss the action. We vacate the judgments of both the Court of Appeals and the District Court and remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

Petitioner and one Joe Pollard were convicted of murder in 1960 and sentenced to life imprisonment. Pollard received a trial transcript and when he refused to turn it over to petitioner for his use in preparing an appeal, the State Attorney General's Office loaned a copy to petitioner's appellate counsel. The California District Court of Appeal affirmed in 1961. 194 Cal. App. 2d 830, 15 Cal. Rptr. 214. Five years later, in 1966, petitioner tried in the state courts to obtain a trial transcript. Failing there, he filed a petition in the United States District Court for the Northern District of California in 1967 asking to be released because of the State's refusal to provide him a copy of the transcript. The United States District Court held petitioner was entitled to a copy of the trial record but the United States Court of Appeals reversed, holding that since petitioner did not allege any trial error which might warrant post-conviction relief he was "not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw." 390 F. 2d 632, 634 (1968).

This Court today says the petitioner thus raises a constitutional question of first impression, "whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief." *Ante,* at 286. It may be conceivable that the Constitution would under certain special circumstances impose this duty on the State when it has such a record in its possession, but I cannot agree that anything shown in this record presents those special circumstances.

It is now over nine years since this case was tried. At petitioner's request a trial record was made available for him to take an appeal; eight years ago he took that appeal and lost. There certainly is no constitutional requirement that a State must continue to supply convicted defendants trial records to enable them to raise the same old challenges to their convictions again and again and again. There is not a word or a suggestion in the whole record in this case that demonstrates or even intimates that any new events have occurred since petitioner's 1961 appeal which could under any possible circumstances justify even a shadowy argument that petitioner was not guilty of the murder he was convicted of having committed. Although more than eight years have passed since that appeal, I would join in granting relief to this petitioner if he had shown, or even given any reason to believe, that new circumstances now indicate he was wrongfully convicted of a crime of which he was not guilty. See *Fay* v. *Noia,* 372 U. S. 391 (1963); cf. *Kaufman* v. *United States,* 394 U. S. 217, 231 (1969) (BLACK, J., dissenting); *Harris* v. *Nelson,* 394 U. S. 286, 301 (1969) (BLACK, J., dissenting). But we have no such case here. Petitioner has not raised any claims which indicate in the slightest that he has been convicted of a crime of which he is innocent. At the

most he has asserted a desire to review the record to find some technical legal point which he can argue to a court as a basis for release from confinement. He has already had one chance to make such arguments on direct appeal, and he lost that battle. I do not think he needs a transcript to know whether he was convicted erroneously or whether some new circumstances have arisen that now show a fatal constitutional error in the prior proceedings. In any event he has not yet based his request for a transcript on any indication of such a need. In such circumstances I see no reason whatsoever for the State to have to obtain a copy for him. This case is but another of the multitudinous instances in which courts are asked interminably to hash and rehash points that have already been determined after full deliberation and review. One considered appeal is enough, in the absence of factors which show a possibility that a substantial injustice has been inflicted on the defendant.

Nothing in this petitioner's application for certiorari or his briefs and arguments gave any indication that he might be entitled to post-conviction relief, and there is thus no reason why this Court should even have reviewed his case. I would dismiss this writ as being improvidently granted.

CARTER ET AL. *v.* WEST FELICIANA PARISH SCHOOL BOARD ET AL.

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

No. 944. Decided January 14, 1970*

Certiorari granted; 419 F. 2d 1211, reversed and remanded.

Richard B. Sobol, Murphy W. Bell, Robert F. Collins, Norman C. Amaker, and *Melvyn Zarr* for petitioners in No. 944. *Jack Greenberg, James M. Nabrit III, Mr. Amaker, Mr. Zarr, Oscar W. Adams, Jr., John H. Ruffin, Jr.,* and *Earl M. Johnson* for petitioners in No. 972.

John F. Ward, Jr., for respondents in No. 944. *Robert C. Cannada* and *Thomas H. Watkins* for Jackson Municipal Separate School District et al., *Hardy Lott* for Marshall County Board of Education, *Reid B. Barnes* for Jefferson County Board of Education, *Edwin L. Brobston* for Board of Education of the City of Bessemer et al., *Palmer Pillans* and *George F. Wood* for Board of School Commissioners of Mobile County et al., *Frank C. Jones* and *Wallace Miller, Jr.,* for Bibb County Board of Education et al., *H. A. Aultman* for Houston County Board of Education, *W. Fred Turner* for Board of Public Instruction of Bay County, and *Sam T. Dell, Jr.,* for Board of Public Instruction of Alachua County et al., respondents in No. 972.

Briefs of *amici curiae* in Nos. 944 and 972 were filed by *Solicitor General Griswold* for the United States, and

*Together with No. 972, *Singleton et al.* v. *Jackson Municipal Separate School District et al.,* also on petition for writ of certiorari to the same court.

by *Mr. Ward* for the Louisiana Teachers Association. *Rivers Buford, Jr.,* and *Gerald Mager* filed a brief for the State Board of Education of Florida as *amicus curiae* in No. 972.

PER CURIAM.

Insofar as the Court of Appeals authorized deferral of student desegregation beyond February 1, 1970, that court misconstrued our holding in *Alexander* v. *Holmes County Board of Education, ante,* p. 19. Accordingly, the petitions for writs of certiorari are granted, the judgments of the Court of Appeals are reversed, and the cases remanded to that court for further proceedings consistent with this opinion. The judgments in these cases are to issue forthwith.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE joins, concurring.

I join the Court's order. I agree that the action of the Court of Appeals in these cases does not fulfill the requirements of our recent decision in *Alexander* v. *Holmes County Board of Education, ante,* p. 19, and accordingly that the judgments below cannot stand. However, in fairness to the Court of Appeals and to the parties, and with a view to giving further guidance to litigants in future cases of this kind, I consider that something more is due to be said respecting the intended effect of the *Alexander* decision. Since the Court has not seen fit to do so, I am constrained to set forth at least my own understanding of the procedure to be followed in these cases. Because of the shortness of the time available, I must necessarily do this in a summary way.

The intent of *Alexander,* as I see it, was that the burden in actions of this type should be shifted from plaintiffs, seeking redress for a denial of constitutional

rights, to defendant school boards. What this means is that upon a prima facie showing of noncompliance with this Court's holding in *Green* v. *County School Board of New Kent County,* 391 U. S. 430 (1968), sufficient to demonstrate a likelihood of success at trial, plaintiffs may apply for immediate relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system. Cf. *Magnum Import Co.* v. *Coty,* 262 U. S. 159 (1923).

Such relief, I believe it was intended, should consist of an order providing measures for achieving disestablishment of segregated school systems, and should, if appropriate, include provisions for pupil and teacher reassignments, rezoning, or any other steps necessary to accomplish the desegregation of the public school system as required by *Green.* Graduated implementation of the relief is no longer constitutionally permissible. Such relief shall become effective immediately after the courts, acting with dispatch, have formulated and approved an order that will achieve complete disestablishment of all aspects of a segregated public school system.

It was contemplated, I think, that in determining the character of such relief the courts may consider submissions of the parties or any recommendations of the Department of Health, Education, and Welfare that may exist or may request proposals from the Department of Health, Education, and Welfare. If Department recommendations are already available the school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the proposals, and if such proposals are found unworkable, the courts shall devise measures to provide the required relief. It would suffice that such measures will tend to accomplish the goals set forth in *Green,* and, if they are less than educationally perfect, proposals for amendments may thereafter be made. Such proposals for amendments are in

no way to suspend the relief granted in accordance with the requirements of *Alexander*.

Alexander makes clear that any order so approved should thereafter be implemented in the minimum time necessary for accomplishing whatever physical steps are required to permit transfers of students and personnel or other changes that may be necessary to effectuate the required relief. Were the recent orders of the Court of Appeals for the Fifth Circuit in *United States* v. *Hinds County School Board*, 423 F. 2d 1264 (November 7, 1969), and that of the Fourth Circuit in *Nesbit* v. *Statesville City Board of Education*, 418 F. 2d 1040 (December 2, 1969), each implementing in those cases our decision in *Alexander*, to be taken as a yardstick, this would lead to the conclusion that in no event should the time from the finding of noncompliance with the requirements of the *Green* case to the time of the actual operative effect of the relief, including the time for judicial approval and review, exceed a period of approximately eight weeks. This, I think, is indeed the "maximum" timetable established by the Court today for cases of this kind.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL express their disagreement with the opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE WHITE. They believe that those views retreat from our holding in *Alexander* v. *Holmes County Board of Education*, *ante*, at 20, that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

Memorandum of THE CHIEF JUSTICE and MR. JUSTICE STEWART.

We would not peremptorily reverse the judgments of the Court of Appeals for the Fifth Circuit. That court, sitting en banc and acting unanimously after our deci-

sion in *Alexander* v. *Holmes County Board of Education, ante,* p. 19, has required the respondents to effect desegregation in their public schools by February 1, 1970, save for the student bodies, which are to be wholly desegregated during the current year, no later than September. In light of the measures the Court of Appeals has directed the respondent school districts to undertake, with total desegregation required for the upcoming school year, we are not prepared summarily to set aside its judgments. That court is far more familiar than we with the various situations of these several school districts, some large, some small, some rural, and some metropolitan, and has exhibited responsibility and fidelity to the objectives of our holdings in school desegregation cases. To say peremptorily that the Court of Appeals erred in its application of the *Alexander* doctrine to these cases, and to direct summary reversal without argument and without opportunity for exploration of the varying problems of individual school districts, seems unsound to us.

GUTKNECHT *v.* UNITED STATES

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

No. 71. Argued November 20, 1969—Decided January 19, 1970

While petitioner's I–A Selective Service classification was on appeal from the local board's denial of his application for exemption as a conscientious objector, petitioner surrendered his registration certificate and classification notice by leaving them, along with a statement against the war in Vietnam, on the steps of the federal building. The State Board denied the exemption and classified petitioner I–A. He was thereafter declared delinquent by his local board for failing to retain his registration and classification papers in his possession at all times as required by the Selective Service regulations. Pursuant to the regulations promulgated under the Military Selective Service Act of 1967 a local board may declare a registrant a "delinquent" for failure to perform duties required by the Selective Service law. A registrant in I–A status who is declared delinquent is, under 32 CFR § 1642.13, assigned first priority in the order of induction call, depriving him of his previous standing in the order of call. Petitioner was ordered to report for induction about a month after he had been declared a delinquent. In view of petitioner's age (20), it is unlikely that he would have been called at that time for induction had he not been declared a delinquent. Following petitioner's refusal on the designated date to be processed for induction he was indicted and later convicted for wilfully and knowingly failing "to perform a duty required of him" under the Act. His conviction was affirmed on appeal. Petitioner attacks as invalid the Selective Service regulations accelerating the induction of one declared to be a delinquent. *Held:*

1. Petitioner's failure to appeal administratively from the order declaring him delinquent does not deprive him of standing to contest his conviction, as the regulations conferring hearing rights apply to those contesting classifications made by local boards and not to those like petitioner whose delinquency rests on undisputed facts or to those whose induction has merely been accelerated. Pp. 299–301.

2. The delinquency regulations under which petitioner was punitively deprived of the order-of-call preference accorded to

him are not authorized by the Act and are therefore void. Pp. 301–308.

(a) Congress intended to punish delinquents through the criminal law and not through a delinquency procedure, which has no statutory sanction. Pp. 302–303.

(b) Deferment of the order of call may bestow great benefits and its acceleration may be extremely punitive. Pp. 304–306.

(c) The power under the Selective Service regulations to declare a registrant "delinquent" lacks statutory standards or guidelines without which the legality of a delinquency declaration cannot be judged. Pp. 306–308.

406 F. 2d 494, reversed.

Michael E. Tigar argued the cause for petitioner *pro hac vice*. With him on the briefs were *Melvin L. Wulf* and *Chester Bruvold*.

Assistant Attorney General Ruckelshaus argued the cause for the United States. With him on the brief were *Attorney General Mitchell, Assistant Attorney General Wilson,* and *Philip R. Monahan*.

Briefs of *amici curiae* urging reversal were filed by *George Soll* and *Joseph B. Robison* for the American Jewish Congress, and by *Marvin M. Karpatkin, Michael N. Pollet,* and *E. Curry First* for the Central Committee for Conscientious Objectors.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents an important question under the Military Selective Service Act of 1967, 62 Stat. 604, as amended, 65 Stat. 75, 81 Stat. 100.

Petitioner registered with his Selective Service Local Board and was classified I–A. Shortly thereafter he received a II–S (student) classification. In a little over a year he notified the Board that he was no longer a student and was classified I–A. Meanwhile he had asked for an exemption as a conscientious objector. The

Board denied that exemption, reclassifying him as I–A, and he appealed to the State Board. While that appeal was pending, he surrendered his registration certificate and notice of classification by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining he was opposed to the war in Vietnam. That was on October 16, 1967. On November 22, 1967, his appeal to the State Board was denied. On November 27, 1967, he was notified that he was I–A.

On December 20, 1967, he was declared delinquent by the local board. On December 26, 1967, he was ordered to report for induction on January 24, 1968. He reported at the induction center, but in his case the normal procedure of induction was not followed. Rather, he signed a statement, "I refuse to take part, or all, [*sic*] of the prescribed processing." Thereafter he was indicted for wilfully and knowingly failing and neglecting "to perform a duty required of him" under the Act. He was tried without a jury, found guilty, and sentenced to four years' imprisonment. 283 F. Supp. 945. His conviction was affirmed by the Court of Appeals. 406 F. 2d 494. The case is here on a petition for a writ of certiorari. 394 U. S. 997.

I

Among the defenses tendered at the trial was the legality of the delinquency regulations which were applied to petitioner. It is that single question which we will consider.

By the regulations promulgated under the Act a local board may declare a registrant to be a "delinquent" whenever he

> "has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to com-

> ply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) . . . ." 32 CFR § 1642.4.

In this case, petitioner was declared a delinquent for failing to have his registration certificate (SSS Form No. 2) and current classification notice (SSS Form No. 110) in his personal possession at all times, as required by 32 CFR §§ 1617.1 and 1623.5, respectively.

The consequences of being declared a delinquent under § 1642.4 are of two types: (1) Registrants who have deferments or exemptions may be reclassified in one of the classes available for service, I–A, I–A–O, or I–O, whichever is deemed applicable. 32 CFR § 1642.12. (2) Registrants who are already classified I–A, I–A–O, or I–O, and those who are reclassified to such a status, will be given first priority in the order of call for induction, requiring them to be called even ahead of volunteers for induction. 32 CFR § 1642.13. The latter consequence deprives the registrant of his previous standing in the order of call as set out in 32 CFR § 1631.7.[1]

The order-of-call provision in use when petitioner was declared "delinquent"[2] is set out in 32 CFR § 1631.7 (a). The provision lists, in order, six categories of registrants and provides that the registrants shall be selected and ordered to report for induction according to the order of those categories. The first category is delinquents; the next category is volunteers; the other four categories consist of nonvolunteers.

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[1] Under the terms of 32 CFR § 1631.7 (a)(1) in effect at the time of petitioner's trial, the first in line for induction were "[d]elinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first." That provision has been included in the new § 1631.7 (a) promulgated after the random system of selection, discussed hereafter, was adopted.

[2] The order of call provided for by 32 CFR § 1631.7 (b) concerned calls of a designated "age group or groups," a system never used.

In this case, the petitioner was in the third of the six categories at the time he was declared to be a "delinquent." By virtue of the declaration of delinquency he was moved to the first of the categories which meant, according to the brief of the Department of Justice, that "it is unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early date had he not been declared a delinquent."

If a person, who is ordered to report for induction or alternative civilian service, refuses to comply with that order, he subjects himself to criminal prosecution. See 32 CFR §§ 1642.41, 1660.30.

There is no doubt concerning the propriety of the latter criminal sanction, for Congress has specifically provided for the punishment of those who disobey selective service statutes and regulations in § 12 of the Military Selective Service Act of 1967, 50 U. S. C. App. § 462 (1964 ed., Supp. IV). The question posed by this case concerns the legitimacy of the delinquency regulations, which were applied to the petitioner, so as to deprive him of his previous standing in the order of call.

II

There is a preliminary point which must be mentioned and that is the suggestion that petitioner should have taken an administrative appeal from the order declaring him "delinquent" and that his failure to do so bars the defense in the criminal prosecution.

The pertinent regulation is 32 CFR § 1642.14, which gives a delinquent who "is classified in or reclassified into Class I–A, Class I–A–O or Class I–O" three rights:

(a) the right to a personal appearance, upon request, *"under the same circumstances as in any other case";*

(b) the right to have his classification reopened *"in the discretion of the local board";* and

(c) the right to an appeal *"under the same circumstances and by the same persons as in any other case."* (Emphasis added.)

The right to a personal appearance "in any other case" is covered by 32 CFR § 1624.1 (a). That section gives the right to "[e]very registrant *after his classification is determined by the local board"* provided a request is made therefor within 30 days. (Emphasis added.) The action taken against this petitioner, however, did not involve classification. The term "classification" is used exclusively in the regulations to refer to classification in one of the classes determining availability for service, *e. g.*, I–A, I–O. See 32 CFR pts. 1621–1623. "Delinquency" is not such a classification, and a registrant is "declared" a delinquent, *not* "classified" as a delinquent. See 32 CFR pt. 1642.

The right to reopen his classification is also irrelevant to petitioner as he is not attacking his classification, but only his accelerated induction.

The right to appeal "as in any other case" is covered by 32 CFR § 1626.2 (a). That section provides that "[t]he registrant . . . may appeal to an appeal board *from the classification of a registrant by the local board."* (Emphasis added.)

Again, since petitioner was not classified in conjunction with his delinquency, but only had his induction accelerated, it would mean that he did not have the right to an appeal under the regulations.[3] We are not advised, in

[3] Cf. *McKart* v. *United States,* 395 U. S. 185. In *McKart,* the petitioner, who challenged his I–A classification, was given a right to appeal under the regulations but failed to exercise it. This Court held that this failure did not preclude the petitioner from raising the invalidity of his I–A classification as a defense to his prosecution for refusal to report for induction. The doctrine of exhaustion of remedies, we held, was inapplicable where the question sought to be raised was solely one of statutory interpretation, *id.,*

any authoritative way, that this interpretation of the regulations is contrary to the administrative construction of them or to the accepted practice.[4]

III

We come then to the merits. The problem of "delinquency" goes back to the 1917 Act, 40 Stat. 76, as shown in the Appendix to this opinion. The present "delinquency" regulations with which we are concerned stem from the 1948 Act, 62 Stat. 604.

The regulations issued under the 1948 Act were substantially identical to the present delinquency regulations, 32 CFR pt. 1642. Nothing in the 1948 Act or in any prior Act makes reference to delinquency or delinquents. The regulations purport to issue under the authority of § 10 of the 1948 Act. Section 10, however, relates neither to selection (§ 5) nor to deferments and exemptions (§ 6), but simply to the administration of the Act as delegated to the President: "The President is authorized—(1) to prescribe the necessary rules and regulations to carry out the provisions of this title." 62 Stat. 619.

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at 197–199, and where application of the doctrine would serve to deprive a criminal defendant of a defense to his prosecution, *id.*, at 197.

[4] The Department of Justice does not suggest that a registrant who has been declared a "delinquent" has administrative remedies for a review of that action. It points out, however, that the regulations, 32 CFR § 1642.4 (c), provide that: "A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time." It suggests that "at least up to the time of the issuance of the order to report for priority induction, it would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty." Whatever may be the ultimate reach of 32 CFR § 1642.4 (c), it seems to be conceded that it has little relevance to the present case where, the Department states, "the local board had solid evidence that petitioner had dispossessed himself of his draft cards."

The delinquency provisions of 32 CFR pt. 1642 survived the Military Selective Service Act of 1967 largely intact. Again, however, there is nothing to indicate that Congress authorized the Selective Service System to reclassify exempt or deferred registrants for punitive purposes and to provide for accelerated induction of delinquents. Rather, the Congress reaffirmed its intention under § 12 (50 U. S. C. App. § 462 (1964 ed., Supp. IV)), to punish delinquents through the criminal law.

It is true, of course, that Congress referred to "delinquents" in § 6 (h)(1), 81 Stat. 102, 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. IV):

> "As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made *after delinquents* and volunteers." (Emphasis added.)

This reference concerns only an order-of-call provision which institutes a call by age groups, 32 CFR § 1631.7 (b), a provision which has never been used. This casual mention of the term "delinquents," moreover, must be measured against the explicit congressional provision for criminal punishment of those who violate the selective service laws, 50 U. S. C. App. § 462 (1964 ed., Supp. IV), the congressional provision for exemptions and deferments, 50 U. S. C. App. § 456 (1964 ed., Supp. IV), and congressional expressions emphasizing the importance of an impartial order of call, 50 U. S. C. App. § 455 (1964 ed., Supp. IV); H. R. Conf. Rep. No. 346, 90th Cong., 1st Sess., 9–10. Thus it was that the Solicitor General stated in his brief in *Oestereich* v. *Selective Service Board,* No. 46, O. T. 1968, 393 U. S. 233:

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion

> to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction . . . ." Brief for the United States 54.

Judge Dooling stated in *United States* v. *Eisdorfer,* 299 F. Supp. 975, 989:

> "The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 amendment of 50 U. S. C. App. § 456 (h)(1) . . . . The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges."

Oestereich involved a case where a divinity school student with a statutory exemption and a IV–D classification was declared "delinquent" for turning in his registration certificate to the Government in protest against the war in Vietnam. His Board thereupon reclassified him as I–A. After he exhausted his administrative remedies, he was ordered to report for induction. At that point he brought suit in the District Court for judicial review of the action by the Board. We held that under the unusual circumstances of the case, pre-induction judicial review was permissible prior to induction and that there was no statutory authorization to use the "delinquency" procedure to deprive a registrant of a statutory exemption. We said:

> "There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal

of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

"Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption." 393 U. S., at 237.

The question in the instant case is different because no "exemption," no "deferment," no "classification" in the statutory sense is involved. "Delinquency" was used here not to change a classification but to accelerate petitioner's induction from the third category to the first; and it was that difference which led the Court of Appeals to conclude that what we said in *Oestereich* was not controlling here.

Deferment of the order of call may be the bestowal of great benefits; and its acceleration may be extremely punitive. As already indicated, the statutory policy is the selection of persons for training and service "in an impartial manner." 50 U. S. C. App. § 455 (a)(1) (1964 ed., Supp. IV). That is the only express statutory provision which gives specific content to that phrase. That section does permit people registered at one time to be selected "before, together with, or after" persons registered at a prior time. Moreover, those who have not reached the age of 19 are given a deferred position in the order of call. But those variations in the phrase "in an impartial manner" are of no particular help in the instant case, except to underline the concern of Congress with the integrity of that phrase.

We know from the legislative history that, while Congress did not address itself specifically to the "delin-

quency" issue, it was vitally concerned with the order of selection, as well as with exemptions and deferments. Thus in 1967 a Conference Report brought House and Senate together against the grant of power to the President to initiate "a random system of selection"—a grant which, it was felt, would preclude Congress from "playing an affirmative role" in the constitutional task of "raising armies." H. R. Conf. Rep. No. 346, *supra,* at 9–10. It is difficult to believe that with that show of resistance to a grant of a more limited power, there was acquiescence in the delegation of a broad, sweeping power to Selective Service to discipline registrants through the "delinquency" device.

The problem of the order of induction was once more before the Congress late in 1969. Section 5 (a)(2) of the 1967 Act, 50 U. S. C. App. § 455 (a)(2) (1964 ed., Supp. IV), provided:

> "Notwithstanding the provisions of paragraph (1) of this subsection, the President in establishing the order of induction for registrants within the various age groups found qualified for induction shall not effect any change in the method of determining the relative order of induction for such registrants within such age groups as has been heretofore established and in effect on the date of enactment of this paragraph, unless authorized by law enacted after the date of enactment of the Military Selective Service Act of 1967."

While § 5 (a)(2) gave the President authority to designate a prime age group for induction, it required him to select from the oldest first within the group. S. Rep. No. 91–531, 91st Cong., 1st Sess., 1. The Act of November 26, 1969, 83 Stat. 220, repealed § 5 (a)(2)

pursuant to a request of the President that a random system of selection be authorized. See S. Rep. No. 91–531, *supra,* at 3–4; H. R. Rep. No. 91–577, 91st Cong., 1st Sess., 2, 9.[5] The random system has now been put in force.[6] It applies of course only prospectively. But its legislative history, as well as the concern of the Congress that the order in which registrants are inducted be achieved "in an impartial manner," emphasizes a deep concern by Congress with the problems of the order of induction as well as with those of exemptions, deferments, and classifications.

While § 5 (a)(1) provides that "there shall be no discrimination against any person on account of race or color," 50 U. S. C. App. § 455 (a)(1) (1964 ed., Supp. IV), there is no suggestion that as respects other types of discrimination the Selective Service has freewheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure.

The power under the regulations to declare a registrant "delinquent" has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions. In *Kent* v. *Dulles,* 357 U. S. 116, 128–129, we refused to impute to Congress the grant of "unbridled discretion" to the Secretary of State to issue or withhold a passport from a citizen "for any substantive reason he may choose." *Id.,* at 128. Where the

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[5] And see 115 Cong. Rec. H 10255 *et seq.* (Oct. 29, 1969). *Id.,* at H 10301 *et seq.,* H 10313 *et seq.* (Oct. 30, 1969). *Id.,* at S 14632 *et seq.* (Nov. 19, 1969).

[6] The random selection was established by the President through Proclamation 3945, on November 26, 1969. 34 Fed. Reg. 19017 (Nov. 29, 1969).

liberties of the citizen are involved, we said that "we will construe narrowly all delegated powers that curtail or dilute them." *Id.*, at 129. The Director of Selective Service described the "delinquency" regulations as designed "to prevent, wherever possible, prosecutions for minor infractions of rules" during the selective service processing.[7] We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges that may be forfeited for transgressions that affront the local board. If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed. Standards would be needed by which the legality of a declaration of "delinquency" could be judged. And the regulations, when written, would be subject to the customary inquiries as to infirmities on their face or in their application, including the

[7] Selective Service System, Legal Aspects of Selective Service 46 (Rev. 1969).

"The escalation of the United States military involvement in Vietnam increased the draft calls, and there was an upsurge of public demonstrations in protest. Some of these protests took the form of turning 'draft' cards in to various public officials of the Department of Justice, the State or National Headquarters of Selective Service System, or directly to local boards. By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12 (a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards. In many instances, the local boards determined that a deferment of such registrant was no longer in the national interest, and he was reclassified 1–A delinquent for failure to perform a duty required of him under the Act, namely retaining in his possession the Registration Card and current Notice of Classification card." *Id.*, at 47.

question whether they were used to penalize or punish the free exercise of constitutional rights.

Reversed.

MR. CHIEF JUSTICE BURGER concurs in the result reached by the Court generally for the reasons set out in the separate opinion of MR. JUSTICE STEWART.

MR. JUSTICE WHITE joins the opinion of the Court insofar as it holds that Congress has not delegated to the President the authority to promulgate the delinquency regulations involved in this case.

APPENDIX TO OPINION OF THE COURT

Under the Selective Service Act of 1917, 40 Stat. 76, if a registrant failed to return his questionnaire or to report for physical examination, he was mailed a special order directing him to report for military service at a specified time. The registrant became a member of the service on the date specified in his order; any refusal to obey that order subjected him to prosecution under military law for desertion. "Since in most instances the delinquent registrant would never receive the order, due to not being in contact with his local board, he would normally acquire the status of a deserter without having any actual knowledge of his induction." Selective Service System, Enforcement of the Selective Service Law 13 (Special Monograph No. 14, 1950). Thus, enforcement of the 1917 Act rested principally with the military, with court-martial being the main weapon of enforcement.

In passing the Selective Training and Service Act of 1940, 54 Stat. 885, Congress specifically ended the practice of subjecting delinquent registrants to military jurisdiction immediately upon receipt of their orders to report. Rather, § 11 of the Act provided that no registrant should be tried in a military court for disobeying

selective service laws until he had been actually inducted, vesting criminal jurisdiction until such time in the United States district courts.

No mention was made in the 1940 Act of "delinquency" or "delinquents." These terms were first introduced by the Selective Service regulations issued under the Act, 32 CFR, c. VI (Supp. 1940), which prescribed various duties for registrants and defined a "delinquent" as one who failed to perform them:

> "A 'delinquent' is . . . (b) any registrant who prior to his induction into the military service fails to perform at the required time, or within the allowed period of given time, any duty imposed upon him by the selective service law, and directions given pursuant thereto, and has no valid reason for having failed to perform that duty." 32 CFR § 601.106 (Supp. 1940).

Furthermore, the regulations provided definite procedures for processing delinquents: after giving them notice of their suspected delinquency, 32 CFR § 603.389 (Supp. 1940), and after investigating those suspected charges, 32 CFR § 603.390 (Supp. 1940), the Selective Service System provided for two possible dispositions:

On the one hand—

> "If the local board is convinced that a delinquent is not innocent of wrongful intent, or if a suspected delinquent does not report to the board within 5 days after the mailing of the Notice of Delinquency . . . , the board should report him to a United States District Attorney for prosecution under section 11 of the Selective Service Act." 32 CFR § 603.391 (a) (Supp. 1940).

On the other hand—

> "If the board finds that the suspected delinquent is innocent of any wrongful intent, the board shall

> proceed with him just as if he were never suspected of being a delinquent." 32 CFR § 603.390 (a) (Supp. 1940).

The February 1942 amendments to the regulations added a provision by which local boards would advise the United States Attorney in the exercise of his discretion not to prosecute those who had violated the selective service laws:

> "If it is determined that the delinquency is not wilful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped." 32 CFR § 642.5 (Cum. Supp. 1938–1943).

This process was called the "enforcement procedure of education and persuasion." Selective Service System, Enforcement of the Selective Service Law, *supra,* at 1–3.

> "The first steps of the board were to try educating and persuading [the delinquent] to comply, but if such failed his case was referred to the United States attorney for further education and persuasion or if such also failed, for prosecution." Selective Service System, Organization and Administration of the System 241 (Special Monograph No. 3, 1951).

If it was determined that the delinquency was "wilful" or that for any reason the United States Attorney should not exercise his discretion not to prosecute, the registrant was given an opportunity to avoid prosecution by "volunteering" for induction.

> "[T]he registrant could volunteer for induction from any classification, not just I–A, any time he so de-

> sired, and if he was a delinquent under prosecution such volunteering was often allowed from any stage of the proceedings." *Ibid.*

This procedure made it possible for the boards to siphon into military service some delinquents who might otherwise have traveled to jail:

> "Since the purpose of the [selective service] law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing." Selective Service System, Legal Aspects of Selective Service 47 (Rev. 1969).

In November 1943, a new and substantially different set of regulations was issued. These regulations did not rely upon a delinquent's "volunteering" for induction; instead they provided for reclassification of deferred or exempted delinquents into classes available for service, 32 CFR § 642.12 (a) (Supp. 1943), and provided for their priority induction without regard to the order of call established elsewhere in the regulations, 32 CFR § 642.13 (a) (Supp. 1943).

A deferred or exempted registrant who was reclassified into a class available for service was accorded the procedural rights of personal appearance and appeal to which he would otherwise have been entitled. 32 CFR § 642.14 (a) (Supp. 1943). In the case of a registrant who was not reclassified as a result of his delinquency, the local board could "reopen" the classification and accord rights of personal appearance and appeal "at any time before induction." 32 CFR § 642.14 (b) (Supp. 1943). If the local board determined that the registrant "knowingly became a delinquent," however,

it was directed to decline to reopen the registrant's classification. *Ibid.*

With respect to those registrants who were given appeal rights under § 642.14, the appeal board would determine if they had "knowingly" become delinquents. If they had, they were to be retained in a class available for service. If they had not, they were to be "classified on appeal in the usual manner" and their status as delinquents was to be "disregarded." 32 CFR § 642.14 (c) (Supp. 1943).

The purpose of these regulations was "*to prevent delay* in the induction of apprehended delinquent registrants." Selective Service System, Enforcement of the Selective Service Law, *supra,* at 56 (emphasis added). More important, the Service recognized that the procedure had little to do with the statutory exemptions delineated by Congress but, rather, was punitive in nature:

> "[T]he Selective Service Regulations concerning delinquents . . . were amended again on November 1, 1943 . . . . The purposes of these changes were . . . *To provide for the administrative penalty to a delinquent* of prompt classification into Classes I–A, I–A–O or IV–E as available for service, *in addition to the existing criminal sanction.*" (*Ibid.*) (Emphasis added.)

The regulation of November 1, 1943, purportedly drew its authority from § 3 of the 1940 Act, 54 Stat. 885. Nothing in that section, however, gives the Service powers of punitive reclassification and accelerated induction. Moreover, to the extent that § 3 has been so construed, it would conflict with the spirit of § 4 (a):

> "The selection of men for training and service under section 3 . . . shall be made in an impartial manner, under such rules and regulations as the President

may prescribe, from the men *who are liable for such training and service* and who at the time of selection are registered and classified *but not deferred or exempted.*" 54 Stat. 887 (emphasis added).

The delinquency provisions under the 1940 Act expired on March 31, 1947. The provisions issued under the 1948 Act are discussed in the text, *supra.*

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with the following observations. First, as I see it, nothing in the Court's opinion prevents a selective service board, under the present statute and existing regulations, from classifying as I–A a registrant who fails to provide his board with information essential to the determination of whether he qualifies for a requested exemption or deferment. Section 1622.10 of 32 CFR provides that: "In Class I–A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class." I assume, of course, that under this regulation a board has no authority to keep a registrant classified I–A once it has information that justifies some lower classification.

Second, I think it entirely possible that consistently with our opinion today the President might promulgate new regulations, restricted in application to cases in which a registrant fails to comply with a duty essential to the classification process itself, that provide for accelerated induction under the existing statute. However, in order to avoid those punitive features now found to be unauthorized under existing legislation, any new regulations would have to give to a registrant being subjected to accelerated induction the right (like a person held in civil contempt) to avoid any sanction by future com-

pliance. In other words, while existing legislation does not authorize the use of accelerated induction to punish past transgressions, it may well authorize acceleration to encourage a registrant to bring himself into compliance with rules essential to the operation of the classification process.

MR. JUSTICE STEWART, concurring in the judgment.

I do not reach the question whether Congress has authorized the delinquency regulations, because even under the regulations the petitioner's conviction cannot stand. After the petitioner's local board declared him delinquent, he had 30 days as a matter of right to seek a personal appearance before the board and to take an appeal from its ruling. Yet the board gave him no chance to assert either of those rights. Instead, it ordered him to report for induction only five days after it had mailed him a notice of the delinquency declaration.

The local board thus violated the very regulations it purported to enforce. Those provisions seek to induce Selective Service registrants to satisfy their legal obligations by presenting them with the alternative prospect of induction into the armed forces. The personal appearance and appeal are critical stages in the delinquency process. They enable the registrant declared delinquent by his local board to contest the factual premises on which the delinquency declaration rests, to correct his oversight if the breach of duty has arisen merely from neglect, or to purge himself of his delinquency if his violation has been wilful. In any event, the regulatory objective is remedial. The board's authority to reclassify a registrant based on his delinquency and to accelerate his induction is analogous to the age-old power of the courts to pronounce judgments of civil contempt. In each case the subject of the order carries "the keys . . .

in [his] own pocket" to the termination of the order's effect.[1]

The Government has advanced the civil-contempt analogy, not only in this case, but also in others before the Court both this Term and last.[2] Such an interpretation of the delinquency regulations comports with the view of the agency charged with their administration—that their purpose is to provide young men for the armed services, not the penitentiaries.[3] It comports, as well, with the regulatory scheme itself, under which the local board may reopen its classification of a delinquent registrant without regard to the usual restrictions against such action,[4] and remove the registrant from delinquency status at any time, even after it has ordered him to report for induction.[5]

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[1] Cf. *Shillitani* v. *United States,* 384 U. S. 364, 368–372; *Green* v. *United States,* 356 U. S. 165, 197–198 (BLACK, J., dissenting); *Penfield Co.* v. *SEC,* 330 U. S. 585, 590; *United States* v. *United Mine Workers,* 330 U. S. 258, 330–332 (BLACK and DOUGLAS, JJ., concurring in part and dissenting in part).

[2] The Government has spelled out the analogy in its briefs in *Oestereich* v. *Selective Service Local Bd. No. 11,* 393 U. S. 233; *Breen* v. *Selective Service Board,* No. 65, O. T. 1969, awaiting decision; *Troutman* v. *United States,* No. 623, O. T. 1969, cert. pending; and the present case. See also Griffiths, Punitive Reclassification of Registrants Who Turn in Their Draft Cards, 1 Sel. Serv. L. Rep. 4001, 4010–4012.

[3] Selective Service System, Legal Aspects of Selective Service 47 (Rev. 1969).

[4] 32 CFR § 1642.14 (b); cf. 32 CFR § 1625.2.

[5] 32 CFR § 1642.4 (c). Of similar import is the board's authority, before notifying the local United States Attorney that a registrant has failed to report for induction, to wait 30 days if it believes it may be able to locate the registrant and secure his compliance. 32 CFR § 1642.41 (a).

The civil-contempt interpretation draws further support from the historical development of the law of Selective Service delinquency. In the First World War, one who failed to fill out his questionnaire

Accordingly, even though the regulations seem to say that such reopening and removal lie within the discretion of the local board,[6] the Government agrees that the board would abuse its discretion if it refused such remedial relief to a registrant who breached his duty inadvertently or carelessly, or who sought to correct the breach, even if originally wilful, and to return to compliance with his obligations.[7] But the Government

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was simply inducted into the military, and his failure to report for duty led to a court-martial for desertion. See *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897, 899. By the Second World War, when the precursor of the present delinquency regulations first appeared, 32 CFR §§ 601.106, 603.389–603.393 (Supp. 1940), the law provided compliance procedures for registrants who offered to satisfy their obligations, even after their boards had referred their cases to the United States Attorneys for prosecution. 32 CFR § 642.5 (Cum. Supp. 1938–1943). However, from 1943 on, the regulations required denial of reopenings for knowingly delinquent registrants. 32 CFR § 642.14 (b) (Supp. 1943). Under the present regulations even a registrant whose delinquency is wilful may redeem himself before his local board. Surely this historical progression demonstrates that whatever may have been the punitive nature of the draft law's initial response to the delinquency problem, its present character is remedial: recalcitrant registrants are handled in civilian rather than military proceedings, and receive an opportunity to recant even where their dereliction has been deliberate.

Such an understanding of the delinquency regulations underlies recent decisions in the federal courts, *e. g.*, *Wills* v. *United States*, 384 F. 2d 943, 945–946, cert. denied, 392 U. S. 908; *United States* v. *Bruinier*, 293 F. Supp. 666, including those upholding the constitutionality of the regulations, *e. g.*, *Anderson* v. *Hershey*, 410 F. 2d 492, 495–496 n. 10, 498 nn. 15–16, 499, No. 449, cert. pending; cf. *United States* v. *Branigan*, 299 F. Supp. 225, 236–237; but see *United States* v. *Eisdorfer*, 299 F. Supp. 975, 984–989, app. docketed, No. 330, O. T. 1969.

[6] See 32 CFR §§ 1642.4 (c), 1642.14 (b).

[7] The Government qualifies its interpretation by implying that a local board might not abuse its discretion in refusing removal in the case of a registrant who sought in good faith to correct his breach

argues that in this case the petitioner cannot avail himself of these provisions in the delinquency regulations, because he made no effort to correct his delinquency. The fact is that the petitioner's local board never gave him a chance to purge his delinquency. It declared him a delinquent on December 20, 1967, sent him a notice to that effect the next day, and five days later ordered him to report for induction, more than two weeks before the expiration of the petitioner's time to seek a personal appearance or take an appeal.[8] In these circumstances the petitioner's failure to seek his local board's advice on what he should do, as suggested by the delinquency notice, does not detract from the force of his attack upon the validity of his criminal conviction.[9]

The Government also argues that the petitioner was not prejudiced by the local board's departure from the prescribed regulatory routine because when he was declared delinquent he was already classified I–A. But the Court of Appeals noted that the petitioner's induction date was advanced as a result of the declaration,[10] and the Government concedes that since the petitioner was only 20 years old at the time, it is unlikely that he would

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of duty *after* the board had issued its order to report for induction. But that limitation has no application in the present case, where the local board improperly issued the order to report before the petitioner had a chance to bring himself into compliance. In *Troutman* v. *United States, supra,* where the Solicitor General has conceded that the local board erred in refusing to remove the petitioner's delinquency after he sought to bring himself into compliance with his Selective Service duties, nearly six months intervened between the board's declaration of delinquency that the petitioner sought to cure and its order to report for induction that gave rise to the prosecution for failure to submit to induction.

[8] 32 CFR §§ 1642.14, 1624.1 (a), 1624.2 (d), 1626.2 (c)(1).

[9] Cf. *McKart* v. *United States,* 395 U. S. 185, 197.

[10] 406 F. 2d 494, 496.

have been called at such an early date had he not been declared a delinquent. That the petitioner might eventually have been called—by no means a certainty, given the variations in draft calls and the possibility that he might subsequently have qualified for a deferment or exemption—does not mean he cannot complain that he was ordered to report for induction earlier than he should have been.[11]

Finally, it is said that the petitioner had no right to a personal appearance before the local board and an appeal from its ruling because its delinquency declaration did not entail his removal into Class I–A from some other category. Since the petitioner was already I–A, the argument runs, his local board never "reclassified" him; it just shifted him from a lower to the highest category within the I–A order of call.[12] Neither logic nor policy supports such a narrow reading of the regulations. Section 1642.14 specifically provides for a personal appearance and appeal, not only upon a "reclassification into" I–A, but also upon a "classification in" that category.[13] The regulation thus covers precisely those registrants who are already "classified in" Class I–A, and whose declaration of delinquency automatically elevates them to the head of the order of call, as well as those registrants who are not yet in I–A, and who must be "reclassified into" that category before they can be put at the top of the list. The regulation, recognizing that the status of the registrant prior to his being declared delinquent and placed at the head of the order of call is

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[11] *United States* v. *Baker*, 416 F. 2d 202, 204–205; *Yates* v. *United States*, 404 F. 2d 462, 465–466, rehearing denied, 407 F. 2d 50, cert. denied, 395 U. S. 925; *United States* v. *Smith*, 291 F. Supp. 63, 67–68; *United States* v. *Lybrand*, 279 F. Supp. 74, 77–83.

[12] See 32 CFR § 1631.7 (a).

[13] Cf. 32 CFR §§ 1642.12, 1642.13.

irrelevant to the delinquency process, ensures that all registrants declared delinquent will enjoy the same rights of personal appearance and appeal without regard to their previous status.

Because the challenged regulations afford the petitioner procedural rights that his local board never gave him a chance to exercise, I would reverse the judgment of conviction.

CARTER ET AL. *v.* JURY COMMISSION OF GREENE COUNTY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 30. Argued October 21, 1969—Decided January 19, 1970

Appellants, Negro citizens of Greene County, Alabama, who alleged that they were qualified to serve as jurors and desired to serve, but had never been summoned, brought this action seeking (1) a declaration that qualified Negroes were systematically excluded from Greene County grand and petit juries, that the Alabama jury-selection statutes were unconstitutional on their face and as applied, and that the jury commission was a deliberately segregated agency; (2) a permanent injunction forbidding the systematic exclusion of Negroes and requiring that all eligible Negroes be placed on the jury roll; and (3) an order vacating the jury commissioners' appointments and compelling the Governor to select new members without racial discrimination. The three-judge District Court found that although the 1960 census showed that three-fourths of the county's population were Negroes, the largest number of Negroes on the jury list from 1961 to 1963 was about 7% of the total. Following a 1964 declaratory judgment decree and a 1967 statutory amendment adding women to the list, the percentage of Negroes on the jury roll increased to 32%, but the 1967 county population was about 65% Negro. The jury commissioners appointed by the Governor for the past 12 years were white. The District Court found an "invalid exclusion of Negroes on a racially discriminatory basis," and directed the jury commissioners and their clerk "to take prompt action to compile a jury list . . . in accordance with the laws of Alabama and . . . constitutional principles," and to submit a compliance report. The court declined to enjoin the enforcement of the challenged statutes or to direct the Governor to appoint Negroes to the jury commission, and it is from these rulings that appellants took a direct appeal. *Held:*

1. There is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as this. Pp. 329–330.

2. The provision of the Alabama Code (Title 30, § 21) requiring the jury commissioners to select for jury service those persons

who are "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment . . ." is not unconstitutional on its face. Pp. 331–337.

(a) The Constitution does not forbid the States to establish relevant qualifications for jurors, and most States have enacted similar juror requirements. Pp. 332–335.

(b) Although here the jury commissioners and their clerk abused the statutory discretion in the preparation of the jury roll, that does not mean that § 21 is necessarily and under all circumstances invalid. The statute was "capable of being carried out with no racial discrimination whatsoever." *Smith* v. *Texas,* 311 U. S. 128, 130–131. Pp. 334–337.

3. Apart from the problems involved in a federal court's ordering a Governor to exercise his discretion in a specific way, it cannot be said on the record here that the absence of Negroes from the jury commission amounted in itself to a prima facie showing of discriminatory exclusion. Nor can appellants' present contention that the absence of Negroes from the commission compelled the District Court to order the appointment of Negro commissioners be upheld, as appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury. Pp. 337–339.

4. The District Court must consider whether the new jury roll prepared pursuant to its order complies therewith and whether other and further relief is appropriate. Pp. 339–340.

298 F. Supp. 181, affirmed.

Norman C. Amaker argued the cause for appellants. With him on the briefs were *Jack Greenberg* and *Orzell Billingsley, Jr.*

Leslie Hall argued the cause for appellees. On the brief were *MacDonald Gallion,* Attorney General of Alabama, and *Robert P. Bradley* and *Jasper B. Roberts,* Assistant Attorneys General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellants, Negro citizens of Greene County, Alabama, commenced this class action against officials charged with the administration of the State's jury-

selection laws: the county jury commissioners and their clerk, the local circuit court judge, and the Governor of Alabama. The complaint alleged that the appellants were fully qualified to serve as jurors and desired to serve, but had never been summoned for jury service. It charged that the appellees had effected a discriminatory exclusion of Negroes from grand and petit juries in Greene County—the Governor in his selection of the county jury commission, and the commissioners and judge in their arbitrary exclusion of Negroes. The complaint sought (1) a declaration that qualified Negroes were systematically excluded from Greene County grand and petit juries, that the Alabama statutes governing jury selection were unconstitutional on their face and as applied, and that the jury commission was a deliberately segregated governmental agency; (2) a permanent injunction forbidding the systematic exclusion of Negroes from Greene County juries pursuant to the challenged statutes and requiring that all eligible Negroes be placed on the jury roll; and (3) an order vacating the appointments of the jury commissioners and compelling the Governor to select new members without racial discrimination.

Alabama's jury-selection procedure is governed by statute. Ala. Code, Tit. 30, § 1 *et seq.* (1958 and Supp. 1967). The Governor appoints a three-member jury commission for each county. §§ 8–10. The commission employs a clerk, § 15, who is charged with the duty of obtaining the name of every citizen of the county over 21 and under 65 years of age, together with his occupation and places of residence and business. § 18. The clerk must "scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information . . . ." § 24. He must also "visit every precinct at least once a year

to enable the jury commission to properly perform the duties required of it . . . ." *Ibid.*[1] Once the clerk submits his list of names, the commission is under a duty to prepare a jury roll and jury box containing the names of all qualified, nonexempt citizens in the county, §§ 20, 24, who are "generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment . . . ." § 21.[2]

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[1] "The sole purpose of these requirements is to insure that the jury commissioners will have as complete a list as possible of names, compiled on an objective basis, from which to select qualified jurors." *Mitchell* v. *Johnson,* 250 F. Supp. 117, 123.

[2] The commission may not select any person who is under 21, a habitual drunkard, unfit to discharge a juror's duties because afflicted with a permanent disease or physical weakness, or unable to read English, nor anyone who has been convicted of an offense involving moral turpitude. A person who would be disqualified only because he cannot read English is still eligible for jury service if he is a freeholder or householder. A person over 65 may not be required to serve but is eligible if he is willing to do so. § 21. The commission is also required to exempt various classes of persons, based on their occupation, unless they consent to serve. § 3. In addition, the court may excuse any person who appears to be unfit to serve on a jury, or who is disqualified or exempt, "or for any other reasonable or proper cause . . . ." §§ 4, 5.

Until 1966 only men were eligible for service. The blanket exclusion of women was declared unconstitutional in *White* v. *Crook,* 251 F. Supp. 401, 408–409; thereafter Alabama amended its statutes to render women eligible. § 21 (1). The trial judge may, however, excuse them from jury duty for good cause shown. § 21.

The requirement that the commission place the name of every qualified, nonexempt person on the jury roll is permissive, not mandatory, in that the jury commission's failure to do so does not, absent fraud or denial of constitutional rights, compel the quashing of the indictment or venire. *Fikes* v. *State,* 263 Ala. 89, 95, 81 So. 2d 303, 309, rev'd on other grounds, 352 U. S. 191; see *Swain* v. *Alabama,* 380 U. S. 202, 207 n. 3; *White* v. *Crook, supra,* at 403 n. 6; *Mitchell* v. *Johnson, supra,* at 119 n. 5.

A three-judge District Court, convened pursuant to 28 U. S. C. §§ 2281 and 2284, conducted an extensive evidentiary hearing on the appellants' complaint. The record fully supports the trial court's conclusion, set out in its detailed opinion, that the jury-selection process as it actually operated in Greene County at the outset of this litigation departed from the statutory mandate in several respects:

> "The clerk does not obtain the names of all potentially eligible jurors as provided by § 18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it. The starting point each year is last year's roll. Everyone thereon is considered to be qualified and remains on the roll unless he dies or moves away (or, presumably, is convicted of a felony). New names are added to the old roll. Almost all of the work of the commission is devoted to securing names of persons suggested for consideration as new jurors. The clerk performs some duties directed toward securing such names. This is a part-time task, done without compensation, in spare time available from performance of her duties as clerk of the Circuit Court. She uses voter lists but not the tax assessor's lists. Telephone directories for some of the communities are referred to, city directories not at all since Greene County is largely rural.
>
> "The clerk goes into each of the eleven beats or precincts annually, usually one time. Her trips out into the county for this purpose never consume a full day. At various places in the county she talks with persons she knows and secures suggested names. She is acquainted with a good many Negroes, but very few 'out in the county.' She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court

the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been 'in trouble.' She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.

"The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk. The commissioners 'ask around,' each usually in the area of the county where he resides, and secure a few names, chiefly from white persons. Some of the names are obtained from public officials, substantially all of whom are white.

"One commissioner testified that he asked for names and that if people didn't give him names he could not submit them. He accepts pay for one day's work each year, stating that he does not have a lot of time to put on jury commission work. . . . He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others. He makes no inquiry or determination whether persons suggested can read or write . . . . Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations.

"Through its yearly meeting in August, 1966, the jury commission met once each year usually for one day, sometimes for two, to prepare a new roll. New names presented by clerk and commissioners, and some sent in by letter, were considered. The clerk checked them against court records of felony convictions. New names decided upon as acceptable were added to the old roll. The names of those

on the old roll who had died or moved away were removed.

"At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. This commissioner brought the name, or names, he proposed on a trade bill he had received, and after so using it threw it away. All lists of suggested names were destroyed. As a result of that meeting the number of Negro names on the jury roll increased by 37. . . . Approximately 32 of those names came from lists given the clerk or commissioners by others. The testimony is that at the one-day August meeting the entire voter list was scanned. It contained the names of around 2,000 Negroes.

"Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose names were never focused upon were given no consideration. Those who prepared the roll and administered the system were white and with limited means of contact with the Negro community. Though they recognized that the most pertinent information as to which Negroes do, and which do not, meet the statutory qualifications comes from Negroes there was no meaningful procedure by which Negro names were fed into the machinery for consideration or effectual means of communication by which the knowledge possessed by the Negro community was utilized. In practice most of the work of the commission has been de-

> voted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all." [3]

The District Court's further findings demonstrated the impact of the selection process on the racial composition of Greene County juries. According to the 1960 census, Negroes composed three-fourths of the county's population. Yet from 1961 to 1963 the largest number of Negroes ever to appear on the jury list was about 7% of the total. The court noted that in 1964 a single-judge federal district court had entered a declaratory judgment setting forth the duties of the jury commissioners and their clerk under Alabama law, instructing them not to pursue a course of conduct operating to discriminate against Negroes, forbidding them to employ numerical or proportional limitations with respect to race, and directing an examination of the jury roll for compliance with the judgment.[4] Thereafter, the situation had improved only marginally. In 1966 only 82 Negroes appeared among the 471 citizens listed on the jury roll; 50% of the white male population of the county found its way to the jury roll in that year, but only 4% of the Negro.[5] In 1967, following a statutory amendment, the commission added women to the jury roll. Upon the expansion of the list, Negroes composed 388 of the

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[3] *Bokulich* v. *Jury Commission of Greene County,* 298 F. Supp. 181, 187–188. (Footnotes omitted.)

[4] *Coleman* v. *Barton,* No. 63–4 (N. D. Ala. 1964). The opinion is unreported. See 298 F. Supp., at 184.

[5] In 1966 Alabama still limited jury service to males. See n. 2, *supra.*

1,198 potential jurors—still only 32% of the total, even though the 1967 population of the county was estimated to be about 65% Negro.[6]

The District Court found that "there is invalid exclusion of Negroes on a racially discriminatory basis." It enjoined the jury commissioners and their clerk from systematically excluding Negroes from the jury roll, and directed them "to take prompt action to compile a jury list . . . in accordance with the laws of Alabama and . . . constitutional principles"; to file a jury list so compiled within 60 days, showing the information required by Alabama law for each potential juror, together with his race and, if available, his age; and to submit a report setting forth the procedure by which the commission had compiled the list and applied the statutory qualifications and exclusions.

The court declined, however, either to enjoin the enforcement of the challenged Alabama statutory provisions or to direct the Governor to appoint Negroes to the jury commission. From these rulings the appellants took a direct appeal to this Court pursuant to 28 U. S. C. § 1253. We noted probable jurisdiction. 393 U. S. 1115.[7]

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[6] The District Court rejected the appellees' contention that an emigration of younger and better-educated Negroes from the county in the 1960's accounted for the disparity between the racial composition of the county in 1960 and of the jury rolls during the succeeding years of the decade. 298 F. Supp., at 188. See *Coleman* v. *Alabama,* 389 U. S. 22, 23.

[7] Other plaintiffs in the suit sought similar relief, as well as an injunction to prevent the grand jury from considering charges of grand larceny then outstanding against them. The District Court denied relief with respect to those plaintiffs, and they took a separate appeal. We affirmed that portion of the District Court's judgment last Term, and those plaintiffs are no longer before us. *Bokulich* v. *Jury Commission of Greene County,* 394 U. S. 97 (*per curiam*).

I

This is the first case to reach the Court in which an attack upon alleged racial discrimination in choosing juries has been made by plaintiffs seeking affirmative relief, rather than by defendants challenging judgments of criminal conviction on the ground of systematic exclusion of Negroes from the grand juries that indicted them,[8] the trial juries that found them guilty,[9] or both.[10] The District Court found no barrier to such a suit, and neither do we. Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.[11]

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[8] *Arnold* v. *North Carolina,* 376 U. S. 773 (*per curiam*); *Eubanks* v. *Louisiana,* 356 U. S. 584; *Reece* v. *Georgia,* 350 U. S. 85, 87; *Cassell* v. *Texas,* 339 U. S. 282; *Hill* v. *Texas,* 316 U. S. 400, 404, 406; *Smith* v. *Texas,* 311 U. S. 128, 129–130; *Pierre* v. *Louisiana,* 306 U. S. 354, 356–358, 362; *Rogers* v. *Alabama,* 192 U. S. 226, 231; *Carter* v. *Texas,* 177 U. S. 442, 447; *Bush* v. *Kentucky,* 107 U. S. 110, 121.

[9] *Avery* v. *Georgia,* 345 U. S. 559; *Hollins* v. *Oklahoma,* 295 U. S. 394 (*per curiam*).

[10] *Sims* v. *Georgia,* 389 U. S. 404, 407–408; *Whitus* v. *Georgia,* 385 U. S. 545; *Swain* v. *Alabama,* 380 U. S. 202; *Coleman* v. *Alabama,* 377 U. S. 129; *Patton* v. *Mississippi,* 332 U. S. 463; *Hale* v. *Kentucky,* 303 U. S. 613 (*per curiam*); *Norris* v. *Alabama,* 294 U. S. 587, 589; *Martin* v. *Texas,* 200 U. S. 316, 319; *Neal* v. *Delaware,* 103 U. S. 370, 396–397; *Strauder* v. *West Virginia,* 100 U. S. 303.

[11] *Billingsley* v. *Clayton,* 359 F. 2d 13, 16 (*en banc*); *Jewell* v. *Stebbins,* 288 F. Supp. 600, 604–605; *White* v. *Crook,* 251 F. Supp. 401, 405–406; *Mitchell* v. *Johnson,* 250 F. Supp. 117, 121. See Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235, 247–249; Note, The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966, 52 Va. L. Rev. 1069, 1084–1094 (1966).

Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here. The federal claim is bottomed on the simple proposition that the State, acting through its agents, has refused to consider the appellants for jury service solely because of their race. Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.[12] Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so,[13] it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias.[14] The exclusion of Negroes from jury service because of their race is "practically a brand upon them . . . , an assertion of their inferiority . . . ."[15] That kind of discrimination contravenes the very idea of a jury—"a body truly representative of the community,"[16] composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[17]

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[12] Cf. *Carrington* v. *Rash,* 380 U. S. 89, 91; *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50–51; *Pope* v. *Williams,* 193 U. S. 621, 632.

[13] Compare *Duncan* v. *Louisiana,* 391 U. S. 145, with *Hurtado* v. *California,* 110 U. S. 516.

[14] See *Ex parte Virginia,* 100 U. S. 339, 346–347; *Virginia* v. *Rives,* 100 U. S. 313, 321.

[15] *Strauder* v. *West Virginia, supra,* at 308.

[16] *Smith* v. *Texas, supra,* at 130.

[17] *Strauder* v. *West Virginia, supra.* Congress, recognizing such a right, has long provided a criminal sanction for its violation:

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or

II

On the merits, the appellants argue that the District Court erred in refusing to invalidate the Alabama statute requiring the jury commissioners to select for jury service those persons who are "generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment . . . ." Ala. Code, Tit. 30, § 21 (Supp. 1967). The appellants say § 21 is unconstitutional on its face because, by leaving Alabama's jury officials at large in their selection of potential jurors, it provides them an opportunity to discriminate on the basis of race—an opportunity of which they have in fact taken advantage.[18] Specifically, the charge is that § 21 leaves the commissioners free to give effect to their belief that Negroes are generally inferior to white people and so less likely to measure up to the statutory requirements; [19] to the commissioners' fear that white people in the community will suffer if Negroes are accorded the opportunity to exercise the power of their majority; [20] and to the commissioners' preference for Negroes who tend not to assert their right to legal and social equality.[21] The appellants say the injunctive relief granted by the District Court is inadequate, because the history of jury selection in Greene County demonstrates a practice of

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petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000." 18 U. S. C. § 243.

[18] Cf. *Whitus* v. *Georgia, supra,* at 552.

[19] Cf. *Witcher* v. *Peyton,* 405 F. 2d 725, 727.

[20] Cf. *Gray* v. *Main,* 309 F. Supp. 207, 224.

[21] Cf. *Brooks* v. *Beto,* 366 F. 2d 1, 27 (Wisdom, J., concurring in result), cert. denied, 386 U. S. 975.

discrimination persisting despite the federal court's prior grant of declaratory relief. Moreover, so long as § 21 remains the law, it is argued, Negro citizens throughout Alabama will be obliged to attack the jury-selection process on a county-by-county basis, thereby imposing a heavy burden on already congested court dockets and delaying the day that Alabama will be free of discriminatory jury selection.[22]

While there is force in what the appellants say, we cannot agree that § 21 is irredeemably invalid on its face. It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors.[23] The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment,[24] and to those possessing good intelligence, sound judgment, and fair character.[25] "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the popula-

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[22] According to the appellants, civil suits challenging alleged racial discrimination in jury selection have been commenced in federal district courts throughout Alabama.

[23] *Brown* v. *Allen*, 344 U. S. 443, 473 (opinion of Mr. Justice Reed, announcing judgment); *Cassell* v. *Texas*, *supra*, at 291 (Frankfurter, J., concurring in judgment); *Virginia* v. *Rives*, *supra*, at 334–335 (Field J., concurring in judgment); *Strauder* v. *West Virginia*, *supra*, at 310.

[24] *Neal* v. *Delaware*, *supra*, at 386; *Strauder* v. *West Virginia*, *supra*.

[25] *Gibson* v. *Mississippi*, 162 U. S. 565, 589. The federal courts have upheld similar qualifications in reviewing their own jury-selection system. See, *e. g.*, *United States* v. *Flynn*, 216 F. 2d 354, 388 (C. A. 2d Cir.) (Harlan, J.), cert. denied, 348 U. S. 909; *United States* v. *Dennis*, 183 F. 2d 201, 220 (C. A. 2d Cir.) (L. Hand, J.), cert. granted, limited to other grounds, 340 U. S. 863.

tion suitable in character and intelligence for that civic duty." [26]

Statutory provisions such as those found in § 21 are not peculiar to Alabama, or to any particular region of the country. Nearly every State requires that its jurors be citizens of the United States,[27] residents of the locality,[28] of a specified minimum age,[29] and able to understand English.[30] Many of the States require that jurors be of "good character" or the like; [31] some, that they be "intelligent" [32] or "well informed." [33]

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[26] *Brown* v. *Allen, supra,* at 474 (opinion of Mr. Justice Reed, announcing judgment).

[27] See, *e. g.,* Ariz. Rev. Stat. Ann. § 21–201 (1956); Wis. Stat. Ann. § 255.01 (1) (Supp. 1969).

[28] See, *e. g.,* Cal. Civ. Pro. Code § 198 (1954); Wash. Rev. Code § 2.36.070 (2) (1956).

[29] *E. g.,* Colo. Rev. Stat. Ann. § 78–1–1 (1) (1963) (21 years old); Md. Ann. Code, Art. 51, § 1 (1968 Repl. Vol.) (25 years); Hawaii Rev. Stat. § 609–1 (1) (1968) (20 years); Neb. Rev. Stat. § 25–1601 (1) (1964) (25 years); R. I. Gen. Laws Ann. § 9–9–1 (1956) (same).

[30] See, *e. g.,* Pa. Stat. Ann., Tit. 17, § 1322 (1962). Vermont has delegated the function of determining qualifications to court administrators. Vt. Stat. Ann., Tit. 4, § 902 (Supp. 1969).

[31] Ariz. Rev. Stat. Ann. § 21–201 (1956); Ark. Stat. Ann. § 39–206 (1962 Repl. Vol.); Conn. Gen. Stat. Rev. § 51–217 (1968); Fla. Stat. § 40.01 (3) (1965); Hawaii Rev. Stat. § 609–1 (3) (1968); Ill. Rev. Stat., c. 78, § 2 (1967) ("fair character"); Iowa Code § 607.1 (1966); Kan. Stat. Ann. § 43–102 (1964); Ky. Rev. Stat. § 29.025 (1962) ("temperate, discreet, and of good demeanor"); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964); Neb. Rev. Stat. § 25–1601 (1) (1964) ("fair character"); N. Y. Judiciary Law § 504 (4) (Supp. 1969); Okla. Stat. Ann., Tit. 38, § 28 (Supp. 1969); S. C. Code Ann. § 38–52 (Supp. 1968); Tex. Rev. Civ. Stat. Ann., Art. 2133 (2) (1964); Wis. Stat. Ann. § 255.01 (5) (Supp. 1969).

Another phrase frequently found is "approved integrity." *E. g.,* Conn. Gen. Stat. Rev. § 51–217 (1968); Fla. Stat. § 40.01 (3) (1965); Ill. Rev. Stat., c. 78, § 2 (1967); Kan. Stat. Ann. § 43–102

[*Footnotes 32 and 33 on p. 334*]

Provisions of similar breadth have been challenged here and sustained before. In *Franklin* v. *South Carolina*,[34] the Court rejected a similar attack upon a jury-selection statute alleged by the plaintiff in error to have conferred arbitrary power upon the jury commissioners. The pertinent law there provided that the commissioners should

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(1964); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964); Neb. Rev. Stat. § 25–1601 (1) (1964). See also Ariz. Rev. Stat. Ann. § 21–201 (1956) ("sober"); Md. Ann. Code, Art. 51, § 9 (Supp. 1968) ("integrity"); Miss. Code Ann. § 1762–02 (Supp. 1968) (not a "habitual drunkard"); Mo. Ann. Stat. § 494.010 (Supp. 1969) ("sober"); Okla. Stat. Ann., Tit. 38, § 28 (Supp. 1969) (not a habitual drunkard); Tenn. Code Ann. § 22–102 (1955) (same); W. Va. Code Ann. § 52–1–2 (1966) (same); cf. N. H. Rev. Stat. Ann. § 500:29 (1968 Repl. Vol.) (disqualification on account of "vicious habits"); Wash. Rev. Code § 2.36.110 (1959) ("unfit persons" must be excused).

[32] Ariz. Rev. Stat. Ann. § 21–201 (1956); Cal. Civ. Pro. Code § 198 (1954); Fla. Stat. § 40.01 (3) (1965); Hawaii Rev. Stat. § 609–1 (3) (1968); Md. Ann. Code, Art. 51, § 9 (Supp. 1968); Mo. Ann. Stat. § 494.010 (Supp. 1969); Mont. Rev. Codes Ann. § 93–1301 (2) (1964 Repl. Vol.); Neb. Rev. Stat. § 25–1601 (1) (1964); N. Y. Judiciary Law § 596 (5) (1968) (only for cities of one million in population); Wyo. Stat. Ann. § 1–77 (2) (Supp. 1969). See also Conn. Gen. Stat. Rev. § 51–217 (1968) ("sound judgment"); Fla. Stat. § 40.01 (3) (1965) (same); Ill. Rev. Stat., c. 78, § 2 (1967) (same); Iowa Code § 607.1 (1966) (same); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964) (same); N. D. Cent. Code § 27–09–01 (1960) ("sound mind and discretion"); Okla. Stat. Ann., Tit. 38, § 28 (Supp. 1969) (same); S. C. Code Ann. § 38–52 (Supp. 1968) ("sound judgment"); Utah Code Ann. § 78–46–8 (5) (1953) ("sound mind and discretion"); Wis. Stat. Ann. § 255.01 (5) (Supp. 1969) ("sound judgment").

[33] Ill. Rev. Stat., c. 78, § 2 (1967); Kan. Stat. Ann. § 43–102 (1964); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964); Neb. Rev. Stat. § 25–1601 (1) (1964); see Conn. Gen. Stat. Rev. § 51–217 (1968) ("fair education"). See Note, The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966, 52 Va. L. Rev. 1069, 1072–1073 (1966) (collecting references).

[34] 218 U. S. 161.

"prepare a list of such qualified electors under the provisions of the constitution, between the ages of twenty-one and sixty-five years, and of good moral character, of their respective counties as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than one from every three of such qualified electors . . . ." In upholding the validity of these standards, the Court said:

> "We do not think there is anything in this provision of the statute having the effect to deny rights secured by the Federal Constitution. . . . There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications." [35]

Again, in *Smith* v. *Texas*,[36] we dealt with a statute leaving a wide range of choice to the commissioners.[37] Yet we expressly upheld the validity of the law. The statutory scheme was not in itself unfair; it was "capable of being carried out with no racial discrimination whatsoever." [38]

No less can be said of the statutory standards attacked in the present case. Despite the overwhelming proof the appellants have adduced in support of their claim

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[35] 218 U. S., at 167–168.

[36] 311 U. S. 128.

[37] See *Akins* v. *Texas*, 325 U. S. 398, 402–403 and n. 3.

[38] 311 U. S., at 130–131. (Footnote omitted.) Cf. *Hernandez* v. *Texas*, 347 U. S. 475, 478–479, and *Cassell* v. *Texas, supra*, at 284, where no challenge was made to the statutory scheme.

that the jury clerk and commissioners have abused the discretion that Alabama law confers on them in the preparation of the jury roll, we cannot say that § 21 is necessarily and under all circumstances invalid. The provision is devoid of any mention of race.[39] Its antecedents are of ancient vintage,[40] and there is no suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination.[41] The federal courts are not incompetent to fashion detailed and stringent injunctive relief that will remedy any discriminatory application of the statute

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[39] From the earliest consideration of racial discrimination in jury selection, the Court has consistently distinguished, for purposes of determining the removability of a state criminal proceeding to a federal court, between a statute expressly excluding Negroes from jury service and one neutral on its face with respect to race but challenged as discriminatorily applied. Compare *Murray* v. *Louisiana,* 163 U. S. 101, 105–106; *Smith* v. *Mississippi,* 162 U. S. 592, 600; *Gibson* v. *Mississippi, supra,* at 579–586; *Bush* v. *Kentucky, supra,* at 116; *Neal* v. *Delaware, supra,* at 386–393; *Virginia* v. *Rives, supra,* at 318–323, with *Strauder* v. *West Virginia, supra,* at 310–312. See *City of Greenwood* v. *Peacock,* 384 U. S. 808, 827–828; *Georgia* v. *Rachel,* 384 U. S. 780, 797–804.

[40] See Ala. Pen. Code of 1841, c. X, §§ 1, 3.

[41] Such considerations distinguish the present case from *Louisiana* v. *United States,* 380 U. S. 145, where we invalidated a provision of the Louisiana Constitution that vested in the State's voting registrars "a virtually uncontrolled discretion as to who should vote and who should not," and that had been abused "to deprive otherwise qualified Negro citizens of their right to vote . . . ." 380 U. S., at 150. The District Court found that the constitutional provision, as written and as applied, was "part of a successful plan to deprive Louisiana Negroes of their right to vote." 380 U. S., at 151, aff'g 225 F. Supp. 353, 356, 363–381. Cf. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 312–313; *United States* v. *Mississippi,* 380 U. S. 128, 131–136, 143–144; *Alabama* v. *United States,* 371 U. S. 37, *per curiam,* aff'g 304 F. 2d 583, 584–589, aff'g 192 F. Supp. 677; *Schnell* v. *Davis,* 336 U. S. 933, *per curiam,* aff'g 81 F. Supp. 872, 876, 878–880.

at the hands of the officials empowered to administer it.[42] In sum, we cannot conclude, even on so compelling a record as that before us, that the guarantees of the Constitution can be secured only by the total invalidation of the challenged provisions of § 21.

III

The appellants also attack the composition of the Greene County jury commission. They urge that the record demonstrates the causal relation between the conceded absence of Negroes from the commission for at least the past decade and the systematic racial discrimination in the selection of potential jurors established before the District Court. It is argued that even the best-intentioned white jury commissioners are unlikely to know many Negroes who satisfy the statutory qualifications and that white jury officials in Alabama generally regard Negroes as incapable of satisfying the prerequisites for jury membership. Having shown a course of continuing and consistent disregard of statutory and constitutional standards on the part of the Greene County jury commissioners and the clerk, the appellants contend that if the discretionary provisions of § 21 are to remain the law, it is essential that the jury commission be representative of the community in which it functions, particularly in an area such as Greene County, where Negroes constitute a majority of the population. The District Court erred, the appellants say, in not ordering the Governor of Alabama to appoint Negroes to the Greene County jury commission.

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[42] In *Louisiana* v. *United States, supra,* the District Court held the challenged constitutional provision invalid *per se* on the basis of its finding that in view of the provision's "vote-abridging purpose and effect," its vices could not be cured by an injunction prohibiting its unfair application. 225 F. Supp., at 391, aff'd, 380 U. S., at 150 and n. 9. Cf. *Davis* v. *Schnell,* 81 F. Supp., at 877.

The claim was not presented to the District Court in precisely these terms. There the appellants did not urge that white commissioners could not perform their statutory task in an unbiased manner in a predominantly Negro county. Rather, they contended that the Governor of Alabama had deliberately appointed a segregated jury commission in exercising the discretion conferred upon him by statute. The argument, in short, went to the alleged racial discrimination in the appointment of the commission, not to the biases inherent in a commission composed entirely of white people, without regard to claimed discriminatory selection by the Governor.

For present purposes we may assume that the State may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves. But the District Court found the appellants had shown only that for many years the jury commission had been composed entirely of white men, and concluded that without more the appellants' attack failed for want of proof. We think that ruling was correct. Quite apart from the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way, we cannot say on this record that the absence of Negroes from the Greene County jury commission amounted in itself to a prima facie showing of discriminatory exclusion. The testimony before the District Court indicated that the Governor had appointed no Negroes to the Greene County commission during the 12 years preceding the commencement of suit. But the appellants' trial counsel conceded that he could not prove his charge of discriminatory selection without the testimony of the Governor.[43] Whether or not such a concession was nec-

[43] The District Court granted a motion to quash the subpoena served on the Governor when it appeared that the appellants had failed to tender him his fees. See Fed. Rule Civ. Proc. 45 (c).

essary, the statement may well have led counsel for the appellees to conclude that they were not obliged to produce witnesses on the State's behalf with respect to this phase of the appellants' case.

Nor can we uphold the appellants' present contention that, apart from the question of discrimination in the composition of the jury commission, the absence of Negroes from the commission compelled the District Court to order the appointment of Negro commissioners. The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury.[44]

IV

There remains the question of the propriety of the relief afforded the appellants by the District Court. The court, as we have noted, enjoined the jury clerk and commissioners from systematically excluding Negroes from the Greene County jury roll, and directed them "to take prompt action to compile a jury list . . . in accordance with the laws of Alabama and . . . constitutional principles . . . ."[45] Pursuant to the court's order, the commission submitted a new jury roll, dated November 6, 1968. The clerk stated she had been into each of the precincts of Greene County and had contacted people of both races by personal visit, letter, or telephone; with their recommendations and with the help of the voting list and telephone directory, the commission compiled

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[44] *Moore* v. *Henslee,* 276 F. 2d 876, 878–879; cf. *Swain* v. *Alabama, supra,* at 208; *Cassell* v. *Texas, supra,* at 291 (Frankfurter, J., concurring in judgment); *Akins* v. *Texas, supra,* at 403; *Martin* v. *Texas, supra,* at 320–321; *Gibson* v. *Mississippi, supra,* at 580; *Bush* v. *Kentucky, supra,* at 117; *Neal* v. *Delaware, supra,* at 394; *Virginia* v. *Rives, supra,* at 323; see *Hoyt* v. *Florida,* 368 U. S. 57, 59, 69.

[45] See 298 F. Supp., at 193.

a new jury roll. Whether this roll complies with the terms of the District Court's decree is a matter for that court to consider in the first instance. The court properly recognized that other and further relief might be appropriate. For that court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [46]

Accordingly, the judgment below is affirmed, without prejudice to the right of the appellants to seek modification of the District Court's decree as circumstances may require.

It is so ordered.

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[46] *Louisiana* v. *United States,* 380 U. S. 145, 154. Cf. *Alabama* v. *United States,* 304 F. 2d 583, 590–591, aff'd, 371 U. S. 37 (*per curiam*). Of particular relevance is the decree drawn by District Judge Johnson in *Mitchell* v. *Johnson,* in the District Court for the Middle District of Alabama, 250 F. Supp. 117, 123–124:

"The relief to be afforded in this case will involve not only the issuance of a prohibitory injunction, but an injunction requiring immediate affirmative action by the jury commissioners by their emptying the . . . County jury box, abandoning the present . . . jury roll without any further use of either, and by their compiling a jury roll and refilling the jury box in strict accordance with the law of Alabama and the constitutional principles herein set forth. . . . In remedying this wrong, the defendants are cautioned that if they apply Alabama's qualifications for jury service—particularly that qualification relating to good character and sound judgment and that qualification concerning the requirement that prospective jurors be able to read English—these qualification requirements must be imposed fairly and objectively and administered to all regardless of race, in a nondiscriminatory manner. . . .

. . . . . .

"Failure on the part of the defendants to comply immediately and in good faith with the requirements of this opinion and order will necessitate the appointment by this Court of a master or panel of masters to recompile the jury roll and to empty and refill the . . . jury box." (Footnotes omitted.)

Accord: *Pullum* v. *Greene,* 396 F. 2d 251, 257; *Turner* v. *Spencer,* 261 F. Supp. 542, 544; *White* v. *Crook,* 251 F. Supp. 401, 409–410.

MR. JUSTICE BLACK, concurring.

I concur in the judgment and opinion of the Court except insofar as it may leave an implication that this Court has the power to vacate a state governor's appointment of jury commissioners or the power to compel the governor of a State to appoint Negroes or any other persons to the office of jury commissioner. In my judgment the Constitution no more grants this Court the power to compel a governor to appoint or reject a certain individual or a member of any particular group than it grants this Court the power to compel the voters of a State to elect or defeat a particular person or a member of a particular group.

MR. JUSTICE DOUGLAS, dissenting in part.

There comes a time when an organ or agency of state law has proved itself to have such a racist mission that it should not survive constitutional challenge. The instances are not numerous in our history. But they have appeared. One was present in *Louisiana* v. *United States,* 380 U. S. 145, where a state constitution required every voter who applied to register to "be able to understand" as well as "give a reasonable interpretation" of any section of the State or Federal Constitution "when read to him by the registrar." *Id.,* at 149. This interpretation test had had a history of depriving "otherwise qualified Negro citizens of their right to vote," *id.,* at 150, and was deemed incapable of fair application through policing by injunction. *Id.,* at 150 n. 9. We therefore struck it down.

The District Court in the instant case held that "[t]he attack on racial composition of the [jury] commission fails for want of proof. No proof was adduced except that the commission in Greene County now is and for many years has been composed entirely of white men appointed by the governor." 298 F. Supp. 181, 192.

But, as the opinion of the Court states, the record shows much more: it demonstrates a systematic exclusion of Negroes from juries in Greene County even though the Negroes outnumber the whites by two to one. It shows (1) that the white jury officials—consistent with southern racial patterns—had little, if any, contacts with Negroes; (2) that the officials knew very few Negroes and practically nothing about the black community; (3) that only a few Negroes were contacted to secure black names for jury listing; (4) that in applying the statutorily created subjective standards, the white jury officials relied, not only on their own subjective judgments, but also on the subjective judgments of other people; (5) that few Negroes could be expected to pass muster under these standards; and (6) that, as stated by the Court, "[i]n 1966 only 82 Negroes appeared among the 471 citizens listed on the jury roll; 50% of the white male population of the county found its way to the jury roll in that year, but only 4% of the Negro. In 1967, following a statutory amendment, the commission added women to the jury roll. Upon the expansion of the list, Negroes composed 388 of the 1,198 potential jurors—still only 32% of the total, even though the 1967 population of the county was estimated to be about 65% Negro." *Ante,* at 327–328.

I cannot see any solution to the present problem, unless the jury commission is by law required to be bi-racial. In the Kingdom of Heaven, an all-white or an all-black commission could be expected to do equal justice to all races in the selection of people "generally reputed to be honest and intelligent" and "esteemed in the community for their integrity, good character and sound judgment." Ala. Code, Tit. 30, § 21 (Supp. 1967). But, where there exists a pattern of discrimination, an all-white or all-black jury commission in these times probably means that the race in power retains authority to control the

community's official life, and that no jury will likely be selected that is a true cross-section of the community.

We have often said that no jury need represent proportionally a cross-section of the community.[1] See *Swain* v. *Alabama,* 380 U. S. 202, 208–209; *Cassell* v. *Texas,* 339 U. S. 282, 286–287. Jury selection is largely by chance; and no matter what the race of the defendant, he bears the risk that no racial component, presumably favorable to him, will appear on the jury that tries him. The law only requires that the panel not be purposely unrepresentative. See *Whitus* v. *Georgia,* 385 U. S. 545, 550. Those finally chosen may have no minority representation as a result of the operation of chance, challenges for cause, and peremptory challenges.

The problem in the present case is to keep the selective process free of any racist influence. That implicates the jury commission that has continuing oversight over the operation of the jury system.

I expressed my doubts in *Sellers* v. *Laird,* 395 U. S. 950, whether under the Selective Service System an all-white

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[1] The Civil Rights Act of 1964, § 703, 78 Stat. 255, 42 U. S. C. § 2000e–2 (a), makes it unlawful for an employer on a federally financed project "to limit, segregate, or classify" his employees because of race. In commenting on the Philadelphia Plan, regulating employment on federally financed construction jobs, the Washington Post stated:

"Quotas are understandably abhorrent to those seeking to do away with discrimination. A quota in this context means a ceiling. Some years ago, when colleges were accused of discriminating against religious minorities in their admission policies, they fixed quotas in percentage terms for these minorities based upon their ratio to the general population and not upon their ability to meet competitive entrance tests; these quotas then became a maximum for the admission of minority group students. The goals embodied in the Philadelphia Plan constitute a floor, not a ceiling, a minimum rather than a maximum; they constitute an agreement to enlarge job opportunities for minority workers, not restrict them; and so they are in complete conformity with the essential spirit and purpose of the Civil Rights Act." Jan. 14, 1970, p. A18.

board could be expected to do equal justice to Negro registrants, at least as respects many problems. Those doubts are resolved here, because of the established pattern of racial discrimination which this all-white jury commission has credited to it. India has handled this type of problem by constitutional amendment.[2] But our

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[2] The Constitution of India contains provisions for her economically and educationally deprived classes, including the untouchables. Article 15 (4) provides: "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." This provision was added to the Constitution by a 1951 amendment, the object of which was to override the decision in *State of Madras* v. *Dorairajan,* All India Rptr. 1951 Sup. Ct. 226, and to make it constitutional for the State to *reserve* seats for backward classes of citizens and Scheduled Castes and Tribes in public educational institutions, or to take other similar action for their advancement.

Article 16 (4), relating to public employment, provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State." The objective of "adequate representation" applies not merely to lower government positions, but to all levels of government office. See *General Manager, S. R. Co.* v. *Rangachari,* All India Rptr. 1962 Sup. Ct. 36.

Articles 330 and 332 provide for the reservation of seats for Scheduled Castes and Scheduled Tribes, except for the Scheduled Tribes in the tribal areas of Assam, in the House of the People and the legislative assembly of every State. Article 331 provides for the nomination of not more than two members of the Anglo-Indian community if the President is of the opinion that the community is not adequately represented in the House of the People. The reservation of seats mentioned above and the nomination of members of the Anglo-Indian community is to cease after 20 years, viz., January 1970. A constitutional amendment extending that time is now before the national parliament and the legislatures of the several States. See Indian & Foreign Review, Jan. 1, 1970, p. 7.

constitutional mandate against racial discrimination is sufficient without more.

Where the challenged state agency, dealing with the rights and liberties of the citizen, has a record of racial discrimination, the corrective remedy is proportional representation. Under our Constitution that would indeed seem to be the only effective control over the type of racial discrimination long practiced in this case.

I would not write a decree that requires a governor to name two Negroes out of three commissioners. I would go no further than to strike down this jury commission system, because it does not provide for proportional representation of the two races.

TURNER ET AL. *v.* FOUCHE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

No. 23. Argued October 20, 1969—Decided January 19, 1970

Appellants, Negro residents of Taliaferro County, Georgia, brought this action to challenge the constitutionality of the statutory system used in Taliaferro and many other Georgia counties to select juries and school boards. The scheme provides for a county school board of five freeholders, which is selected by the grand jury, which in turn is drawn from a jury list selected by the six county jury commissioners, who are appointed by the state superior court judge for the circuit in which the county is located. Although the population of Taliaferro County is about 60% Negro, the school board members were white, selected by a predominantly white grand jury, which had been selected by white jury commissioners. The complaint attacked Georgia's constitutional and statutory provisions for school-board selection as accounting for the exclusion of Negroes and nonfreeholders from the school board and for the merely token inclusion of Negroes on the grand juries. A three-judge District Court, after a hearing, voiced concern that only 11 Negroes were on the 130-member grand-jury list and adjourned to enable the defendants to remedy the situation. It noted that there were two school-board vacancies and suggested that Negroes might be selected. A new grand-jury list was prepared containing the names of 44 Negroes and 77 whites, and one of the school-board vacancies was filled by a Negro. From the grand-jury list the superior court judge drew names leading to the impaneling of a new grand jury, of whose 23 members six were Negroes. To obtain the new grand-jury roll, the jury commissioners obtained the list of 2,152 names of registered voters, and aided by three Negroes, eliminated many names for poor health and old age, underage, death, absence from the county, and duplication, plus 225 about whom the commissioners could obtain no information and 178 (of whom 171 were Negroes) as not meeting statutory qualifications either because they were "unintelligent" or not "upright citizens." The 608 names left were alphabetically listed and every other one was placed on the list of potential jurors. Of these 304, 113 (37%) were Negroes.

The District Court found that prior to the commencement of the suit Negroes had been systematically excluded from grand juries through token inclusion but that the new grand-jury list was constitutional, and it declined to invalidate on their face the provisions governing school-board and grand-jury selections, or the freeholder requirement for school-board membership. The court did enjoin the jury commissioners from systematically excluding Negroes from the grand-jury system. *Held:*

1. The constitutional and statutory scheme by which the Taliaferro County grand jury selects the school board is not unconstitutional on its face, as the scheme is not inherently unfair, or necessarily incapable of administration without regard to race. *Carter* v. *Jury Commission, ante,* p. 320. Pp. 353–355.

2. The District Court erred in its determination that the new grand-jury list had been properly compiled. Pp. 359–361.

(a) The underrepresentation of Negroes, as reflected by the fact that the 304-member list from which the new grand jury was drawn contained only 37% Negroes compared with 60% Negroes in the county, should, absent a countervailing explanation by the appellees, warrant corrective action by a federal court charged with enforcing constitutional guarantees. P. 359.

(b) The District Court should have responded to the elimination of 171 Negroes out of the 178 citizens disqualified for lack of "intelligence" or "uprightness," as on this record it cannot be said that this purge of Negroes did not contribute substantially to the underrepresentation. Pp. 359–360.

(c) The District Court should have focused on the elimination of the 225 citizens for lack of information, as inquiry might have led to the discovery of many Negroes qualified for jury service. P. 360.

(d) Appellants made out a prima facie case of jury discrimination and the burden which fell on the appellees to overcome it was not met. Pp. 360–361.

3. Appellants and members of their class have a constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications, and, on this record, the limitation of school-board membership to freeholders violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 361–364.

290 F. Supp. 648, vacated and remanded.

Michael Meltsner argued the cause for appellants. With him on the briefs were *Jack Greenberg* and *Howard Moore, Jr.*

Alfred L. Evans, Jr., Assistant Attorney General of Georgia, argued the cause for appellees. With him on the brief for the State of Georgia were *Arthur K. Bolton*, Attorney General, *Howard N. Hill, Jr.*, Executive Assistant Attorney General, and *J. Lee Perry*, Assistant Attorney General.

Charles J. Bloch and *Wilbur D. Owens, Jr.*, filed a brief for appellees Fouche et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case, a companion to *Carter* v. *Jury Commission of Greene County, ante*, p. 320, involves a challenge to the constitutionality of the system used in many counties of Georgia to select juries and school boards. The basic statutory scheme at issue is this. The county board of education consists of five freeholders.[1] It is selected by the grand jury,[2] which in turn is drawn from a jury list selected by the six-member county jury commission.[3] The commissioners are appointed by the judge of the state superior court for the circuit in which the county is located.[4]

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[1] Ga. Const., Art. VIII, § V, ¶ I, Ga. Code Ann. § 2–6801 (1948). At the oral argument we were advised that under Georgia law a "freeholder" is any person who owns real estate.

[2] *Ibid.* See also Ga. Code Ann. § 32–902 (1969).

[3] Ga. Code Ann. §§ 59–101, 59–106 (1965 and Supp. 1968).

[4] Ga. Code Ann. § 59–101 (1965). Prior to 1966 the superior court judges were elected by all the voters in the State, but now they are elected by the voters of the circuits over which they have jurisdiction. See Ga. Const., Art. VI, § III, ¶ II, Ga. Code Ann. § 2–3802 (Supp. 1968); *Stokes* v. *Fortson*, 234 F. Supp. 575.

Some 2,500 to 3,000 people live in Taliaferro County, Georgia, of whom about 60% are Negroes.[5] The county school system consists of a grammar school and a high school, and all the students at both schools are Negroes, every white pupil having transferred elsewhere.[6] Sandra and Calvin Turner, a Negro schoolchild and her father who reside in that county, brought this class action against the members of the county board of education, the jury commissioners, and three named white grand jurors.[7] Their complaint alleged that the board of education consisted entirely of white people; that it had

[5] In its brief Georgia informs us that its Department of Public Health estimates that Taliaferro County now has about 1,500 Negro and 1,000 white citizens. According to the 1960 federal census, the county had a population of 3,370, of whom 2,096 were Negroes and 1,273 white people. U. S. Dept. of Commerce, Bureau of the Census, 1960 Census of Population, Vol. I, Characteristics of the Population, pt. 12, Georgia, 12–83.

[6] This state of affairs has arisen following litigation attacking the county's former dual school system. Prior to the fall of 1965 Taliaferro County had used one school building for Negroes and the other for whites. In that year, after 87 Negro pupils sought transfers to a desegregated school, the superintendent, knowing the white school would be closed, arranged for the transfer of the white pupils, at public expense, to public schools in adjoining counties. A three-judge District Court declared the arrangement illegal, placed the Taliaferro County school system in receivership under the State's superintendent of schools, and instructed him to prepare a plan that would allow those Negroes who wanted to transfer to a desegregated school the opportunity to do so. *Turner* v. *Goolsby*, 255 F. Supp. 724. It is undisputed that some white pupils now attend a private institution in the county. In addition, the appellants suggest that white children continue to attend public schools in neighboring counties. Efforts to combine districts to avoid an all-Negro school system in Taliaferro County have proved unsuccessful.

[7] The District Court struck the grand jurors as parties defendant for failure of the appellants to state as against them a claim upon which relief could be granted. The appellants did not appeal from that portion of the judgment below, and the motion of the appellee grand jurors to dismiss the appeal as to them is granted.

been selected by a predominantly white grand jury, which in turn had been selected by the jury commissioners, all of whom were white people. The complaint charged that the board of education had deprived the Negro schoolchildren of textbooks, facilities, and other advantages; also that the Turners and other Negro citizens had sought unsuccessfully to communicate their dissatisfaction to the board of education.

According to the appellants, the members of the county grand jury, on which white people were perennially overrepresented and Negroes underrepresented, chose only white people as members of the board of education pursuant to the Georgia constitutional and statutory provisions governing the school-board selection. The complaint attacked those provisions as accounting for both the exclusion of Negroes and nonfreeholders from the board of education, and for the merely token inclusion of Negroes on the grand juries. The appellants sought (1) an injunction prohibiting enforcement of the Georgia constitutional and statutory provisions by which the board of education and grand jury were selected; (2) a declaration that the provisions were void on their face and as applied; (3) a further declaration that the various positions on the board of education, grand jury, and jury commission were vacant; (4) the appointment of a receiver for the school system and a special master for the selection of the grand jurors; and (5) $500,000 in ancillary damages.

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284, and conducted extensive evidentiary hearings. The evidence showed that whenever a jury commissioner thought a voter from his area of the county qualified as a potentially good juror, he offered the name for consideration to his fellow commissioners; if all agreed, the name went on the master

jury list. No name of a county resident was placed on the list unless he was personally known to at least one of the jury commissioners. The commissioners looked for "people that we felt would be capable of interpreting proceedings of court and . . . render[ing] a just verdict . . . ." The state superior court judge had instructed them to put Negroes on the list. Following the compilation of the list, the commissioners "picked the ones we thought were the very best people in the county" and put them on the grand-jury list. The superior court judge then drew the names of the grand jurors at random in open court. Only he could excuse from grand-jury service those whose names he drew; and he denied that Negroes were ever excused out of turn, or on account of their race.

At its first hearing, held in January 1968, the District Court voiced its concern that only 11 Negroes had found their way to the 130-member grand-jury list. The court adjourned for one month to enable the defendants to remedy the situation. It noted that two vacancies had opened up on the board of education and that, although the board had held an interim election, the grand jury had not yet confirmed the new members. The court suggested that "[i]f those two men would willingly stand aside the other members might select two outstanding Negro citizens . . . to go on the Board." The court also advised counsel for the defendants to explain the law of jury discrimination to his clients, and expressed the hope that the jury commissioners would be "generous" in their recomposition of the panel.

At the adjourned hearing in February, it appeared that three days after the first hearing the state superior court judge had discharged the county grand jury and directed the jury commissioners to recompose the jury list. Work-

ing from the voter registration list at the last general election,[8] the commissioners had prepared a new grand-jury list containing the names of 44 Negroes and 77 white people. From this list the superior court judge drew the names that led to the impaneling of a new grand jury of 23 members, of whom only six were Negroes. Meanwhile the board of education had elected a Negro and a white man to fill the two vacancies, and the new grand jury had confirmed the new members in their offices.

Following these developments, the District Court declined to invalidate on their face either the various provisions governing the school-board and grand-jury selections, or the freeholder requirement for school-board membership. It found that at the commencement of suit Negroes had been systematically excluded from the grand juries through token inclusion, but it concluded that the new grand-jury list, drawn following the January hearing, was not unconstitutional. 290 F. Supp. 648.[9]

Subsequently the District Court entered a final judgment permanently enjoining the defendant jury commissioners and their successors from systematically excluding Negroes from the Taliaferro County grand-jury system. The appellants, complaining of the court's failure to hold the challenged provisions of Georgia law invalid on their face and as applied, took a direct appeal

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[8] Georgia has used the voter registration lists rather than the books of the tax receiver since our decision in *Whitus* v. *Georgia*, 385 U. S. 545.

[9] The District Court found that the appellants' claim that the board of education had deprived the Negro schoolchildren of textbooks, facilities, and other advantages failed for want of proof. The court also declined to reach the appellants' claim for ancillary damages, leaving this question to single-judge inquiry. No issue concerning these rulings is presented on the appeal.

to this Court pursuant to 28 U. S. C. § 1253, and we noted probable jurisdiction, 393 U. S. 1078.[10]

I

The appellants urge that the constitutional and statutory scheme by which the Taliaferro County grand jury selects the board of education is unconstitutional on its face. They point to the discretion of the state superior

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[10] We reject the appellees' suggestion that we lack jurisdiction to entertain an appeal from the District Court on the theory that a court of three judges was not required under 28 U. S. C. § 2281 because the appellants sought to enjoin only the acts of county officials. The jury commissioners and members of the board of education were "functioning pursuant to a statewide policy and performing a state function," *Moody* v. *Flowers,* 387 U. S. 97, 102; cf. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89, 92–95; and see *Dusch* v. *Davis,* 387 U. S. 112, 114; *Sailors* v. *Board of Education,* 387 U. S. 105, 107. The appellants cannot be denied a three-judge court below and direct review here simply because Georgia chooses to denominate as "local" or "county" the officials to whom it has entrusted the administration of the challenged constitutional and statutory provisions. *Rorick* v. *Board of Commissioners,* 307 U. S. 208, 212; cf. *City of Cleveland* v. *United States,* 323 U. S. 329, 332.

Under Georgia law Taliaferro County may replace the constitutional and statutory arrangement by which the grand jury elects the board of education with the direct election of the board by the qualified voters of the county upon the enactment of a local or special law by the legislature and its approval in a referendum by a majority of the qualified voters. Ga. Const., Art. VIII, § V, ¶ 2, Ga. Code Ann. § 2–6802 (Supp. 1968). But Georgia does not suggest that so many counties have taken advantage of this provision that the present selection of the board by the grand jury in effect amounts to a local option.

The appellees also propose a distinction between attacks on statutes and attacks upon the results of their administration, and urge that the appellants' case comes within the latter category. But this argument overlooks the line, delineated by our past decisions, that falls between a petition for injunction on the ground of the unconstitutionality of a *statute,* either on its face or as applied,

court judge to exclude anyone he deems not "discreet" from appointment to the jury commission,[11] and of the jury commissioners to eliminate from grand-jury service anyone they find not "upright" and "intelligent." [12] These provisions, the appellants say, provide the county officials an opportunity to discriminate exercised both before and after the commencement of this litigation. It is argued that the terms are so vague as to leave the judge and jury commissioners at large in the exercise of discretion, with their decisions "unguided by

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which requires a three-judge court, and a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional. *Louisiana* v. *United States,* 380 U. S. 145, 150 and n. 9; *Query* v. *United States,* 316 U. S. 486, 489; *Ex parte Bransford,* 310 U. S. 354, 361; *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10, 15; *Ex parte Hobbs,* 280 U. S. 168, 172.

Similarly, we reject the appellees' contention, ancillary to their basic attack on our jurisdiction, that the three-judge court was improperly convened because of the insubstantiality of the appellants' challenge to the Georgia laws. *Swift & Co.* v. *Wickham,* 382 U. S. 111, 115; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713, 715 (*per curiam*); *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 255 (*per curiam*); *Ex parte Poresky,* 290 U. S. 30, 32 (*per curiam*). Further, the District Court properly entertained the question whether the constitutional and statutory complex, even if not invalid on its face, was unconstitutionally administered. Without regard to whether that issue was one by itself warranting a three-judge court, see *Ex parte Bransford, supra;* Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37–50, it related to the appellants' claim that Georgia's school-board selection procedure was unlawful on its face. *Flast* v. *Cohen,* 392 U. S. 83, 90–91; *Zemel* v. *Rusk,* 381 U. S. 1, 5–6; *United States* v. *Georgia Pub. Serv. Commission,* 371 U. S. 285, 287–288; *Paul* v. *United States,* 371 U. S. 245, 249–250; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73, 75–85; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 303–304.

[11] Ga. Code Ann. § 59–101 (1965).

[12] Ga. Code Ann. § 59–106 (Supp. 1968).

statutory or other guidelines." Only by excising the challenged terms from Georgia's laws, it is urged, can the jury discrimination revealed in the record of this case be eliminated.

Such arguments are similar to those advanced in *Carter* v. *Jury Commission of Greene County, ante,* p. 320. Our decision in that case fairly controls disposition of the contentions here. Georgia's constitutional and statutory scheme for selecting its grand juries and boards of education is not inherently unfair, or necessarily incapable of administration without regard to race; the federal courts are not powerless to remedy unconstitutional departures from Georgia law by declaratory and injunctive relief. The challenged provisions do not refer to race; indeed, they impose on the jury commissioners the affirmative duty to supplement the jury lists by going out into the county and personally acquainting themselves with other citizens of the county whenever the jury lists in existence do not fairly represent a cross section of the county's upright and intelligent citizens.[13]

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[13] *Ibid.*

Our decisions in *Avery* v. *Georgia,* 345 U. S. 559, and *Whitus* v. *Georgia,* 385 U. S. 545, cannot aid the appellants. In *Avery* we reversed a judgment of conviction where the names of prospective petit jurors had been printed on differently colored tickets according to their race—white tickets for white people, and yellow tickets for Negroes. A state superior court judge drew the names from the jury box and handed them to the sheriff, who entrusted them to the court clerk for arranging the tickets and typing up the list of persons to be called to serve on the panel. We found that the use of the white and yellow tickets made it easier "for those to discriminate who are of a mind to discriminate," and that even if the judge had drawn the names without looking to see the color of the tickets, "opportunity was available to resort to [discrimination] at other stages in the selection process." 345 U. S., at 562.

Whitus involved a refinement of the process we had condemned in *Avery.* In *Whitus* the jury commissioners made up the jury list from which both traverse and grand jurors were selected by reference

But the appellants contend that even if the challenged provisions are not void on their face, they have been unconstitutionally applied. The District Court found that prior to the commencement of suit Negroes had been excluded in the administration of the grand-jury system, and the appellees do not contest that finding here.[14] The District Court also concluded that the newly composed grand-jury list was constitutional, and the appellants challenge that ruling. Consideration of the issues thus presented requires a fuller statement of the events following the January hearing in the court below.

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to the tax digest, which was segregated into sections—one with white sheets for white people and the other with yellow sheets for Negroes—and to an old jury list required by former law to be made up from the tax digest. We concluded that "[u]nder such a system the opportunity for discrimination was present," and on the record before us we could not say that that opportunity "was not resorted to by the commissioners." 385 U. S., at 552.

In both *Avery* and *Whitus* we noted without comment the "upright and intelligent" requirement for jury membership. 385 U. S., at 552; 345 U. S., at 562. In *Avery* we expressly commented that Georgia law did not authorize the use of the potentially discriminatory process under review. 345 U. S., at 562. In both cases we struck down the white-and-yellow system, however varied in design, because of the obvious danger of abuse. See *Williams* v. *Georgia*, 349 U. S. 375, 382. We dealt in both cases with a physical, even mechanical, aspect of the jury-selection process that could have no conceivable purpose or effect other than to enable those so disposed to discriminate against Negroes solely on the basis of their race. It is evident that the challenged provisions now before us contain no such defect. The appellants cannot contend that the present requirements serve no rational function other than to afford an opportunity to state officials to discriminate against Negroes if they desire to do so.

[14] Indeed, at the oral argument before this Court, counsel candidly conceded: "There is no question but that Georgia's jury selection statute is capable of being improperly administered. There is no question but that in Taliaferro County, Georgia, it has been misadministered."

As noted above, after the District Court had held its first hearing, the state superior court judge discharged the grand jury then sitting and ordered the jury commissioners to draw up a new jury list. The commissioners obtained the list of all persons registered to vote in the county in the last general election—2,152 names. To assist in the identification of all the people on the list, the commissioners consulted with "three Negroes that [they] brought in to work with [them] one afternoon . . . ." From the list the commissioners eliminated 374 people for poor health and old age; 79 as under 21 years old; [15] 93 as dead; 514 as away from the county most of the time but maintaining a permanent place of residence there; 48 who requested that they be removed from consideration; 225 about whom the commissioners could obtain no information; 33 as duplicated names; and 178 "as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens."

The process of elimination left 608 names. The commissioners arranged the names in alphabetical order and placed every other one on the list of potential jurors. At this point, for the first time, the commissioners classified the remaining 304 people by race: 113 were Negro, 191 white people. From this list the commissioners drew two-fifths of the names by lot for the grand-jury list; a check revealed 44 Negroes and 77 white people. The state superior court judge drew from this group nine Negroes and 23 white people by lot. He excused nine, leaving a 23-member grand jury of whom only six were

[15] Although Georgia grants the franchise to its citizens at 18, Ga. Const., Art. II, § I, ¶II, Ga. Code Ann. § 2–702 (1948), jurors must be over 21, Ga. Code Ann. § 59–201 (1965), and so the jury commissioners struck all persons under 21.

Negroes.[16] It was this grand jury that the District Court determined had been constitutionally impaneled.

After the February hearing of the District Court, and at that court's request, the commissioners classified by race the persons eliminated from the voter list in arriving at the 608 persons eligible for jury service. The classification revealed that 171 of those rejected as unintelligent or not upright were Negroes—96% of the total removed for that reason.[17] Although at the adjourned hearing the District Court recognized the potential for discrimination underlying the exclusion process, it did not reopen the matter following its receipt of the racial classification to consider the extraordinarily high percentage of Negroes eliminated as "unintelligent" or not "upright," or the large number of persons about whom the commissioners said they could obtain no information even though they were registered to vote in the county.

The appellants insist the District Court has erred. They say that since the grand jury selects the board of education, the situation must be viewed as one involving a distribution of voting power among the citizens of Taliaferro County in the manner of a voting apportionment case. A grand jury with only about 25% Negro membership, they say, constitutes the school-board "electorate" in a county whose population is about 60% Negro. The State must offer a compelling justification,

[16] At the adjourned hearing the superior court judge testified that he regularly excuses people from the traverse-jury lists as well as the grand-jury panel he draws in the courtroom. Whether the request to be excused was made in open court, in writing, or over the telephone, only the judge could excuse from grand-jury service those whose names he had drawn.

[17] It also appeared that 191 of those stricken for poor health and old age were Negro (51%); 71 of those under 21 (90%); 263 of those away from the county (51%); and three who asked to be relieved from jury duty (6%).

it is argued, in support of its "fencing out" such a substantial proportion of the potential Negro "electors" in the county.

We do not find it necessary to consider the appellants' argument. Nor do we reach the premise upon which it rests—that the choice of the county board of education by the grand jury rather than delegates from local school boards turns the challenged procedure into an "election" for federal constitutional purposes.[18] For we think that even under long-established tests for racial discrimination in the composition of juries, the District Court erred in its determination that the new list before it had been properly compiled.

The undisputed fact was that Negroes composed only 37% of the Taliaferro County citizens on the 304-member list from which the new grand jury was drawn. That figure contrasts sharply with the representation that their percentage (60%) of the general Taliaferro County population would have led them to obtain in a random selection. In the absence of a countervailing explanation by the appellees, we cannot say that the underrepresentation reflected in these figures is so insubstantial as to warrant no corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees.

Specifically, we hold that the District Court should have responded to the elimination of 171 Negroes out of the 178 citizens disqualified for lack of "intelligence" or "uprightness." On the record as presently constituted, it is impossible to say that this purge of Negroes from the roster of potential jurors did not contribute in substantial measure to the ultimate underrepresentation. The retention of these 178 citizens might well have produced a jury list of at least an equal percentage of

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[18] See *Sailors* v. *Board of Education,* 387 U. S. 105, 106.

Negroes and white people, instead of the highly disproportionate list that actually materialized.

A second factor should have called itself to the District Court's attention: the lack of information respecting the 225 citizens named on the county's voting list but unknown to the jury commissioners or their assistants. Entirely apart from the question whether the commissioners' failure to inquire into the eligibility of the 225 voters comported with their statutory duty to ensure that the jury list fairly represents a cross-section of the county's intelligent and upright citizens,[19] the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it.[20]

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[19] Ga. Code Ann. § 59–106 (Supp. 1968).

[20] See *Jones* v. *Georgia*, 389 U. S. 24, 25 (*per curiam*); *Coleman* v. *Alabama*, 389 U. S. 22, 23 (*per curiam*); *Avery* v. *Georgia*, 345 U. S. 559, 562–563; *Patton* v. *Mississippi*, 332 U. S. 463, 468–469; *Hill* v. *Texas*, 316 U. S. 400, 405–406; *Norris* v. *Alabama*, 294 U. S. 587, 594–596, 598.

The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' prima facie case.[21] So far the appellees have offered no explanation for the overwhelming percentage of Negroes disqualified as not "upright" or "intelligent," or for the failure to determine the eligibility of a substantial segment of the county's already registered voters. No explanation for this state of affairs appears in the record. The evidentiary void deprives the District Court's holding of support in the record as presently constituted. "If there is a 'vacuum' it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination." [22]

II

The appellants also urge that the limitation of school-board membership to freeholders violates the Equal Protection Clause of the Fourteenth Amendment.[23] The

[21] *Sims* v. *Georgia,* 389 U. S. 404, 407; *Whitus* v. *Georgia,* 385 U. S. 545, 551; *Eubanks* v. *Louisiana,* 356 U. S. 584, 587; *Hernandez* v. *Texas,* 347 U. S. 475, 481–482; *Avery* v. *Georgia, supra,* at 561; *Norris* v. *Alabama, supra,* at 598; cf. *Brown* v. *Allen,* 344 U. S. 443, 481.

[22] *Avery* v. *Georgia, supra,* at 562; cf. *Pierre* v. *Louisiana,* 306 U. S. 354, 361–362; *Norris* v. *Alabama, supra,* at 594–595, 598–599.

We reserve the question whether a State that for years has provided separate and inferior schools for Negroes may now disqualify them from jury service on the "impartial" ground of educational inadequacy, however defined. See *Gaston County* v. *United States,* 395 U. S. 285, 297.

[23] Georgia's contention that no appellant has standing to raise this claim is without merit. The appellant Calvin Turner is a freeholder, but the appellant Joseph Heath is not. Heath's motion to intervene was granted by the District Court for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of this issue. Georgia also argues that the question is not properly before us because the record is devoid

District Court rejected this claim, finding no evidence before it "to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise." 290 F. Supp., at 652.

Subsequent to the ruling of the District Court, this Court decided *Kramer* v. *Union Free School District,* 395 U. S. 621, and *Cipriano* v. *City of Houma,* 395 U. S. 701. The appellants urge that those decisions require Georgia to demonstrate a "compelling" interest in support of its freeholder requirement for school-board membership. The appellees reply that *Kramer* and *Cipriano* are inapposite because they involved exclusions from voting, not from office-holding. We find it unnecessary to resolve the dispute, because the Georgia freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective.[24]

We may assume that the appellants have no right to be appointed to the Taliaferro County board of education.[25] But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.[26] The State may not deny to some the privilege of holding public office that

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of evidence that the freeholder requirement actually has operated to exclude anyone from the Taliaferro County board of education. But the appellant Heath's allegation that he is not a freeholder is uncontested, and Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law.

[24] *McGowan* v. *Maryland,* 366 U. S. 420, 425–426; *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U. S. 552, 556.

[25] Cf. *Snowden* v. *Hughes,* 321 U. S. 1, 7.

[26] Cf. *Anderson* v. *Martin,* 375 U. S. 399, 402, 404; *Snowden* v. *Hughes, supra,* at 7–8.

it extends to others on the basis of distinctions that violate federal constitutional guarantees.[27]

Georgia concedes that "the desirability and wisdom of 'freeholder' requirements for State or county political office may indeed be open to question . . . ." But apart from its contention that prior decisions of this Court foreclose any challenge to the constitutionality of such "freeholder" requirements—a contention we think ill-founded [28]—the sole argument Georgia advances in support of its statute is that nothing in its constitution or laws specifies any minimum quantity or value for the real property the freeholder must own. Thus, says Georgia, anyone who seriously aspires to county school-board membership "would be able to obtain a conveyance of the single square inch of land he would require to become a 'freeholder.' "

If we take Georgia at its word, it is difficult to conceive of any rational state interest underlying its requirement. But even absent Georgia's own indication of the insubstantiality of its interest in preserving the freeholder requirement, it seems impossible to discern any interest the qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to

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[27] Cf. *Carrington* v. *Rash,* 380 U. S. 89, 91; *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50–51; *Pope* v. *Williams,* 193 U. S. 621, 632.

[28] Language to such effect may be found in *Strauder* v. *West Virginia,* 100 U. S. 303, 310. But the passage relied upon by Georgia is no more than dictum. Later decisions invoking *Strauder* fall in the same category. *Gibson* v. *Mississippi,* 162 U. S. 565, 580; *Neal* v. *Delaware,* 103 U. S. 370, 386. *Vought* v. *Wisconsin,* 217 U. S. 590, is hardly apposite; there we dismissed an appeal for want of a meritorious question in a case where the appellant challenged a judgment of conviction arising from an indictment returned by a grand jury selected by commissioners required by statute to be freeholders.

participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property.

Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold.[29] Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.[30] Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination.

The judgment below is vacated, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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[29] Cf. *Leary* v. *United States,* 395 U. S. 6, 32–36; *Tot* v. *United States,* 319 U. S. 463, 468.

[30] Cf. *Carrington* v. *Rash, supra,* at 95–96.

MOLINARO *v.* NEW JERSEY

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 663. Decided January 19, 1970

The Court, absent any contrary provision in the statute under which the appeal in this criminal case was made, declines to adjudicate the merits since appellant who was free on bail refused to surrender himself to state authorities and is now a fugitive from justice.

54 N. J. 246, 254 A. 2d 792, appeal dismissed.

Burrell Ives Humphreys for appellant.

PER CURIAM.

This case comes to the Court on appeal from the New Jersey state courts, which have affirmed appellant Molinaro's conviction for abortion and conspiracy to commit abortion. We are informed by both appellant's counsel and counsel for the State that Molinaro, who was free on bail, has failed to surrender himself to state authorities. His bail has been revoked, and the State considers him a fugitive from justice. Under these circumstances we decline to adjudicate his case.

The Court has faced such a situation before, in *Smith* v. *United States,* 94 U. S. 97 (1876), and *Bonahan* v. *Nebraska,* 125 U. S. 692 (1887). In each of those cases, which were before the Court on writs of error, the Court ordered the case removed from the docket upon receiving information that the plaintiff in error had escaped from custody. In *Smith,* the case was dismissed at the beginning of the following Term. See 18 Geo. Wash. L. Rev. 427, 430 (1950). In *Bonahan,* the case was stricken from the docket on the last day of the Term in which it arose. See also *National Union* v. *Arnold,* 348 U. S. 37, 43 (1954); *Eisler* v. *United States,* 338 U. S. 189 and 883 (1949); *Allen* v. *Georgia,* 166 U. S. 138

(1897). No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. In the absence of specific provision to the contrary in the statute under which Molinaro appeals, 28 U. S. C. § 1257 (2), we conclude, in light of the *Smith* and *Bonahan* decisions, that the Court has the authority to dismiss the appeal on this ground. The dismissal need not await the end of the Term or the expiration of a fixed period of time, but should take place at this time.

It is so ordered.

Mr. Justice Douglas concurs in the result.

Per Curiam

MARYLAND AND VIRGINIA ELDERSHIP OF THE CHURCHES OF GOD ET AL. *v.* CHURCH OF GOD AT SHARPSBURG, INC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

No. 414. Decided January 19, 1970

Since state court's resolution of property dispute between church bodies was made on basis of state law that did not involve inquiry into religious doctrine, the appeal involves no substantial federal question.

254 Md. 162, 254 A. 2d 162, appeal dismissed.

Alfred L. Scanlan, James H. Booser, and *Charles O. Fisher* for appellants.

Arthur G. Lambert for appellees.

PER CURIAM.

In resolving a church property dispute between appellants, representing the General Eldership, and appellees, two secessionist congregations, the Maryland Court of Appeals relied upon provisions of state statutory law governing the holding of property by religious corporations,[1] upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property. 254 Md. 162, 254 A. 2d 162 (1969).[2] Appellants argue primarily that the statute, as applied, deprived the General Elder-

[1] Md. Ann. Code, Art. 23, §§ 256–270 (1966 Repl. Vol.).

[2] The Maryland court reached the same decision in May 1968. 249 Md. 650, 241 A. 2d 691. This Court vacated and remanded the case "for further consideration in light of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church* . . . ." 393 U. S. 528 (1969).

ship of property in violation of the First Amendment. Since, however, the Maryland court's resolution of the dispute involved no inquiry into religious doctrine, appellees' motion to dismiss is granted, and the appeal is dismissed for want of a substantial federal question.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring.

I join the *per curiam* but add these comments. We held in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U. S. 440, 449 (1969), that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." It follows that a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.

Thus the States may adopt the approach of *Watson* v. *Jones,* 13 Wall. 679 (1872), and enforce the property decisions made within a church of congregational polity "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government," *id.,* at 724, and within a

church of hierarchical polity by the highest authority that has ruled on the dispute at issue,[1] unless "express terms" in the "instrument by which the property is held" condition the property's use or control in a specified manner.[2] Under *Watson* civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.[3] Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be

[1] Under the *Watson* definition, *supra,* at 722–723, congregational polity exists when "a religious congregation . . . , by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." Hierarchical polity, on the other hand, exists when "the religious congregation . . . is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."

[2] *Id.,* at 722. Except that "express terms" cannot be enforced if enforcement is constitutionally impermissible under *Presbyterian Church.* Any language in *Watson, supra,* at 722–723, that may be read to the contrary must be disapproved. Only express conditions that may be effected without consideration of doctrine are civilly enforceable.

[3] Except that civil tribunals may examine church rulings alleged to be the product of "fraud, collusion, or arbitrariness." *Gonzalez* v. *Roman Catholic Archbishop,* 280 U. S. 1, 16 (1929).

essential to the resolution of the controversy. In other words, the use of the *Watson* approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

"[N]eutral principles of law, developed for use in all property disputes," *Presbyterian Church, supra,* at 449, provide another means for resolving litigation over religious property. Under the "formal title" doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues. For example, provisions in deeds or in a denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced.[4]

A third possible approach is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies.[5] *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94 (1952).

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[4] Thus a State that normally resolves disputes over religious property by applying general principles of property law would have to use a different method in cases involving such provisions, perhaps that defined in *Watson.* By the same token, States following the *Watson* approach would have to find another ground for decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity.

[5] See, *e. g., Goodson* v. *Northside Bible Church,* 261 F. Supp. 99 (D. C. S. D. Ala. 1966), aff'd, 387 F. 2d 534 (C. A. 5th Cir. 1967).

COWGILL *v.* CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

No. 496. Decided January 19, 1970

274 Cal. App. 2d 923, 78 Cal. Rptr. 853, appeal dismissed.

Melville B. Nimmer and *Laurence R. Sperber* for appellant.

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Evelle J. Younger* for appellee.

PER CURIAM.

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

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN joins, concurring.

While I am of the view this appeal should be dismissed, I deem it appropriate to explain the basis for my conclusion since the issue tendered by appellant—whether symbolic expression by displaying a "mutilated" American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial. See *Street* v. *New York,* 394 U. S. 576, 594 (1969).

The record before us is not in my judgment suitable for considering this broad question as it does not adequately flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cut-up American flag. Such a question, not insubstantial of itself, has been pretermitted in the Court's previous so-called

"symbolic speech" cases where the communicative content of the conduct was beyond dispute. See *Tinker* v. *Des Moines School District,* 393 U. S. 503 (1969); *Gregory* v. *City of Chicago,* 394 U. S. 111 (1969); *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Bell* v. *Maryland,* 378 U. S. 226 (1964); *Garner* v. *Louisiana,* 368 U. S. 157, 201 (concurring in judgment) (1961); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 632 (1943); see generally Note, Symbolic Conduct, 68 Col. L. Rev. 1091 (1968). The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.*

While appellant contends that his conduct conveyed a symbolic message, the stipulated statement of facts on which this case comes to us suggests that the issue was not, in the first instance, determined as a factual matter by the trial court. Further, there is no indication that appellant either presented evidence on this question at trial or urged any standard at trial for determining that issue. I would therefore dismiss this appeal based on the inadequacy of the record for deciding the question presented. *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947); *DeBacker* v. *Brainard, ante,* p. 28.

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

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*Chief Justice Warren, writing for the majority in *United States* v. *O'Brien,* 391 U. S. 367, 376 (1968), said: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." The Court went on, however, to take judicial notice of the symbolic significance of draft-card burning which had become a recognized way of protesting the draft and American involvement in Vietnam.

MOSKOWITZ *v.* POWER ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 770. Decided January 19, 1970

Appeal dismissed.

Daniel G. Collins for appellant.

Louis J. Lefkowitz, pro se, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Philip Kahaner* and *Robert S. Hammer,* Assistant Attorneys General, for appellee the Attorney General of New York.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BLINCOE ET UX. *v.* WATSON, ASSESSOR, ET AL.

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

No. 808. Decided January 19, 1970

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.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF PROVIDENCE *v.* LANGTON, TAX ADMINISTRATOR

APPEAL FROM THE SUPREME COURT OF RHODE ISLAND

No. 288. Decided January 19, 1970

— R. I. —, 251 A. 2d 170, appeal dismissed and certiorari denied.

Max Winograd for appellant.

Herbert F. De Simone, Attorney General of Rhode Island, 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.

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

Syllabus

MILLS ET AL. *v.* ELECTRIC AUTO-LITE CO. ET AL.

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

No. 64. Argued November 13, 1969—Decided January 20, 1970

Petitioners, minority shareholders of respondent Electric Auto-Lite Co., brought this action derivatively and on behalf of minority shareholders as a class to set aside a merger of Auto-Lite and the Mergenthaler Linotype Co. (which before the merger owned over half of Auto-Lite's stock). Petitioners charged that the proxy solicitation for the merger by Auto-Lite's management was materially misleading and violated § 14 (a) of the Securities Exchange Act of 1934 and Rule 14a-9 thereunder in that the merger was recommended to Auto-Lite's shareholders by that company's directors without their disclosing that they were all nominees of and controlled by Mergenthaler. The District Court on petitioners' motion for summary judgment ruled that the claimed defect in the proxy statement was a material omission, and after a hearing concluded that without the votes of minority stockholders approval of the merger could not have been achieved and that a causal relationship had thus been shown between the finding of a § 14 (a) violation and the alleged injury to petitioners. The court referred the case to a master to consider appropriate relief. On interlocutory appeal, the Court of Appeals affirmed the conclusion that the proxy statement was materially deficient but held that the granting of summary judgment with respect to causation was erroneous and that it was necessary to resolve at trial whether there was a causal relationship between the deficiency in the proxy statement and the merger. Finding that causation could not be directly established because of the impracticalities of determining how many votes were affected, the court ruled that the issue was to be determined by proof of fairness of the merger; and if the respondents could prove fairness it could be concluded that a sufficient number of shareholders would have approved the merger regardless of the misrepresentation. *Held:*

1. Fairness of the merger terms does not constitute a defense to a private action for violation of § 14 (a) of the Act complaining of materially misleading solicitation of proxies that authorized a corporate merger. Pp. 381–385.

(a) Permitting liability to be foreclosed on the basis of a finding that the merger was fair would contravene the purpose of § 14 (a) by bypassing the stockholders. Pp. 381–382.

(b) Imposing on small shareholders the burden of rebutting the corporation's evidence of fairness would discourage them from the private enforcement of proxy rules that "provides a necessary supplement to Commission action." *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432. Pp. 382–383.

(c) The evidence submitted at the hearing as to the causal relationship between the proxy material and the merger was sufficient to establish petitioners' cause of action. P. 383.

(d) Where, as here, there was proof that the misstatement or omission in the proxy statement was material, this showing that the defect might have been considered important in shaping the shareholders' vote is sufficient without proof, which the Court of Appeals erroneously held was necessary, that its effect was decisive. Pp. 384–385.

2. In devising retrospective relief for violation of the proxy rules the federal courts should be guided by the principles of equity. Pp. 386–389.

(a) The fairness of the merger may be a relevant consideration in determining the appropriate relief, and the merger should be set aside only if a court of equity concludes from all the circumstances that it would be equitable to do so. Pp. 386–388.

(b) Damages should be recoverable here only to the extent that they can be proved. Pp. 388–389.

3. Petitioners, who have established a violation of the securities laws by their corporation and its officials, are entitled to an interim award of litigation expenses and reasonable attorneys' fees incurred in proving the violation, since the expenses petitioners incurred were for the benefit of the corporation and the other stockholders. The Court does not decide the further question of reimbursement for litigation expenses incurred in any ensuing proceedings. Pp. 389–397.

403 F. 2d 429, vacated and remanded.

Arnold I. Shure argued the cause for petitioners. With him on the briefs were *Robert A. Sprecher, Edward N. Gadsby,* and *Mozart G. Ratner.*

Albert E. Jenner, Jr., argued the cause for respondents. With him on the brief were *Jerold S. Solovy* and *John G. Stifler*.

Solicitor General Griswold, Lawrence G. Wallace, Philip A. Loomis, Jr., David Ferber, and *Meyer Eisenberg* filed a brief for the United States as *amicus curiae*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case requires us to consider a basic aspect of the implied private right of action for violation of § 14 (a) of the Securities Exchange Act of 1934,[1] recognized by this Court in *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964). As in *Borak* the asserted wrong is that a corporate merger was accomplished through the use of a proxy statement that was materially false or misleading. The question with which we deal is what causal relationship must be shown between such a statement and the merger to establish a cause of action based on the violation of the Act.

I

Petitioners were shareholders of the Electric Auto-Lite Company until 1963, when it was merged into Mergenthaler Linotype Company. They brought suit on the day before the shareholders' meeting at which the vote was to take place on the merger, against Auto-Lite, Mergenthaler, and a third company, American Manufacturing Company, Inc. The complaint sought an injunction against the voting by Auto-Lite's management of all proxies obtained by means of an allegedly misleading proxy solicitation; however, it did not seek a temporary restraining order, and the voting went ahead as scheduled the following day. Several months later

[1] 48 Stat. 895, as amended, 15 U. S. C. § 78n (a).

petitioners filed an amended complaint, seeking to have the merger set aside and to obtain such other relief as might be proper.

In Count II of the amended complaint, which is the only count before us,[2] petitioners predicated jurisdiction on § 27 of the 1934 Act, 15 U. S. C. § 78aa. They alleged that the proxy statement sent out by the Auto-Lite management to solicit shareholders' votes in favor of the merger was misleading, in violation of § 14 (a) of the Act and SEC Rule 14a–9 thereunder. (17 CFR § 240.14a–9.) Petitioners recited that before the merger Merganthaler owned over 50% of the outstanding shares of Auto-Lite common stock, and had been in control of Auto-Lite for two years. American Manufacturing in turn owned about one-third of the outstanding shares of Mergenthaler, and for two years had been in voting control of Mergenthaler and, through it, of Auto-Lite. Petitioners charged that in light of these circumstances the proxy statement was misleading in that it told Auto-Lite shareholders that their board of directors recommended approval of the merger without also informing them that all 11 of Auto-Lite's directors were nominees of Mergenthaler and were under the "control and domination of Mergenthaler." Petitioners asserted the right to complain of this alleged violation both derivatively on behalf of Auto-Lite and as representatives of the class of all its minority shareholders.

On petitioners' motion for summary judgment with respect to Count II, the District Court for the Northern District of Illinois ruled as a matter of law that the claimed defect in the proxy statement was, in light of the circumstances in which the statement was made, a material omission. The District Court concluded, from its reading of the *Borak* opinion, that it had to hold a hear-

[2] In the other two counts, petitioners alleged common-law fraud and that the merger was *ultra vires* under Ohio law.

ing on the issue whether there was "a causal connection between the finding that there has been a violation of the disclosure requirements of § 14 (a) and the alleged injury to the plaintiffs" before it could consider what remedies would be appropriate. (Unreported opinion dated February 14, 1966.)

After holding such a hearing, the court found that under the terms of the merger agreement, an affirmative vote of two-thirds of the Auto-Lite shares was required for approval of the merger, and that the respondent companies owned and controlled about 54% of the outstanding shares. Therefore, to obtain authorization of the merger, respondents had to secure the approval of a substantial number of the minority shareholders. At the stockholders' meeting, approximately 950,000 shares, out of 1,160,000 shares outstanding, were voted in favor of the merger. This included 317,000 votes obtained by proxy from the minority shareholders, votes that were "necessary and indispensable to the approval of the merger." The District Court concluded that a causal relationship had thus been shown, and it granted an interlocutory judgment in favor of petitioners on the issue of liability, referring the case to a master for consideration of appropriate relief. (Unreported findings and conclusions dated Sept. 26, 1967; opinion reported at 281 F. Supp. 826 (1967)).

The District Court made the certification required by 28 U. S. C. § 1292 (b), and respondents took an interlocutory appeal to the Court of Appeals for the Seventh Circuit.[3] That court affirmed the District Court's con-

[3] Petitioners cross-appealed from an order entered by the District Court two days after its summary judgment in their favor, deleting from that judgment a conclusion of law that "[u]nder the provisions of Section 29 (b) of the Securities Exchange Act of 1934, the merger effectuated through a violation of Section 14 of the Act is void." This deletion was apparently made for the purpose of avoiding any prejudice on the question of relief, which remained open for con-

clusion that the proxy statement was materially deficient, but reversed on the question of causation. The court acknowledged that, if an injunction had been sought a sufficient time before the stockholders' meeting, "corrective measures would have been appropriate." 403 F. 2d 429, 435 (1968). However, since this suit was brought too late for preventive action, the courts had to determine "whether the misleading statement and omission caused the submission of sufficient proxies," as a prerequisite to a determination of liability under the Act. If the respondents could show, "by a preponderance of probabilities, that the merger would have received a sufficient vote even if the proxy statement had not been misleading in the respect found," petitioners would be entitled to no relief of any kind. *Id.*, at 436.

The Court of Appeals acknowledged that this test corresponds to the common-law fraud test of whether the injured party relied on the misrepresentation. However, rightly concluding that "[r]eliance by thousands of individuals, as here, can scarcely be inquired into" (*id.*, at 436 n. 10), the court ruled that the issue was to be determined by proof of the fairness of the terms of the merger. If respondents could show that the merger had merit and was fair to the minority shareholders, the trial court would be justified in concluding that a sufficient number of shareholders would have approved the merger had there been no deficiency in the proxy statement. In that case respondents would be entitled to a judgment in their favor.

Claiming that the Court of Appeals has construed this Court's decision in *Borak* in a manner that frustrates the statute's policy of enforcement through private litigation, the petitioners then sought review in this

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sideration by the master. In light of its disposition of respondents' appeal, the Court of Appeals had no need to consider the cross-appeal.

Court. We granted certiorari, 394 U. S. 971 (1969), believing that resolution of this basic issue should be made at this stage of the litigation and not postponed until after a trial under the Court of Appeals' decision.[4]

II

As we stressed in *Borak,* § 14 (a) stemmed from a congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. The provision was intended to promote "the free exercise of the voting rights of stockholders" by ensuring that proxies would be solicited with "explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Id.,* at 14; S. Rep. No. 792, 73d Cong., 2d Sess., 12; see 377 U. S., at 431. The decision below, by permitting all liability to be foreclosed on the basis of a finding that the merger was fair, would allow the stockholders to be bypassed, at least where the only legal challenge to the merger is a suit for retrospective relief after the meeting has been held. A judicial appraisal of the merger's merits could be substituted for the actual and informed vote of the stockholders.

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[4] Respondents ask this Court to review the conclusion of the lower courts that the proxy statement was misleading in a material respect. Petitioners naturally did not raise this question in their petition for certiorari, and respondents filed no cross-petition. Since reversal of the Court of Appeals' ruling on this question would not dictate affirmance of that court's judgment, which remanded the case for proceedings to determine causation, but rather elimination of petitioners' rights thereunder, we will not consider the question in these circumstances. *United States* v. *American Ry. Exp. Co.,* 265 U. S. 425, 435 (1924); *Langnes* v. *Green,* 282 U. S. 531, 535–539 (1931); *Morley Constr. Co.* v. *Maryland Cas. Co.,* 300 U. S. 185, 191–192 (1937); R. Stern & E. Gressman, Supreme Court Practice 314, 315 (4th ed. 1969).

The result would be to insulate from private redress an entire category of proxy violations—those relating to matters other than the terms of the merger. Even outrageous misrepresentations in a proxy solicitation, if they did not relate to the terms of the transaction, would give rise to no cause of action under § 14 (a). Particularly if carried over to enforcement actions by the Securities and Exchange Commission itself, such a result would subvert the congressional purpose of ensuring full and fair disclosure to shareholders.

Further, recognition of the fairness of the merger as a complete defense would confront small shareholders with an additional obstacle to making a successful challenge to a proposal recommended through a defective proxy statement. The risk that they would be unable to rebut the corporation's evidence of the fairness of the proposal, and thus to establish their cause of action, would be bound to discourage such shareholders from the private enforcement of the proxy rules that "provides a necessary supplement to Commission action." *J. I. Case Co.* v. *Borak,* 377 U. S., at 432.[5]

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[5] The Court of Appeals' ruling that "causation" may be negated by proof of the fairness of the merger also rests on a dubious behavioral assumption. There is no justification for presuming that the shareholders of every corporation are willing to accept any and every fair merger offer put before them; yet such a presumption is implicit in the opinion of the Court of Appeals. That court gave no indication of what evidence petitioners might adduce, once respondents had established that the merger proposal was equitable, in order to show that the shareholders would nevertheless have rejected it if the solicitation had not been misleading. Proof of actual reliance by thousands of individuals would, as the court acknowledged, not be feasible, see R. Jennings & H. Marsh, Securities Regulation, Cases and Materials 1001 (2d ed. 1968); and reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove, see 3 L. Loss, Securities Regulation 1766 (2d ed. 1961). In practice, therefore, the objective fairness of the proposal

Such a frustration of the congressional policy is not required by anything in the wording of the statute or in our opinion in the *Borak* case. Section 14 (a) declares it "unlawful" to solicit proxies in contravention of Commission rules, and SEC Rule 14a–9 prohibits solicitations "containing any statement which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . ." Use of a solicitation that is materially misleading is itself a violation of law, as the Court of Appeals recognized in stating that injunctive relief would be available to remedy such a defect if sought prior to the stockholders' meeting. In *Borak,* which came to this Court on a dismissal of the complaint, the Court limited its inquiry to whether a violation of § 14 (a) gives rise to "a federal cause of action for rescission or damages," 377 U. S., at 428. Referring to the argument made by petitioners there "that the merger can be dissolved only if it was fraudulent or non-beneficial, issues upon which the proxy material would not bear," the Court stated: "But the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here. We therefore do not discuss this point further." *Id.,* at 431. In the present case there has been a hearing specifically directed to the causation problem. The question before the Court is whether the facts found on the basis of that hearing are sufficient in law to establish petitioners' cause of action, and we conclude that they are.

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would seemingly be determinative of liability. But, in view of the many other factors that might lead shareholders to prefer their current position to that of owners of a larger, combined enterprise, it is pure conjecture to assume that the fairness of the proposal will always be determinative of their vote. Cf. *Wirtz* v. *Hotel, Motel & Club Employees Union,* 391 U. S. 492, 508 (1968).

Where the misstatement or omission in a proxy statement has been shown to be "material," as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.[6] This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a–9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14 (a).

There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof

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[6] Cf. *List* v. *Fashion Park, Inc.*, 340 F. 2d 457, 462 (C. A. 2d Cir. 1965); *General Time Corp.* v. *Talley Industries, Inc.*, 403 F. 2d 159, 162 (C. A. 2d Cir. 1968); Restatement (Second) of Torts § 538 (2)(a) (Tent. Draft No. 10, 1964); 2 L. Loss, Securities Regulation 917 (2d ed. 1961); 6 *id.*, at 3534 (Supp. 1969).

In this case, where the misleading aspect of the solicitation involved failure to reveal a serious conflict of interest on the part of the directors, the Court of Appeals concluded that the crucial question in determining materiality was "whether the minority shareholders were sufficiently alerted to the board's relationship to their adversary to be on their guard." 403 F. 2d, at 434. An adequate disclosure of this relationship would have warned the stockholders to give more careful scrutiny to the terms of the merger than they might to one recommended by an entirely disinterested board. Thus, the failure to make such a disclosure was found to be a material defect "as a matter of law," thwarting the informed decision at which the statute aims, regardless of whether the terms of the merger were such that a reasonable stockholder would have approved the transaction after more careful analysis. See also *Swanson* v. *American Consumer Industries, Inc.*, 415 F. 2d 1326 (C. A. 7th Cir. 1969).

of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions. Cf. *Union Pac. R. Co.* v. *Chicago & N. W. R. Co.*, 226 F. Supp. 400, 411 (D. C. N. D. Ill. 1964); 2 L. Loss, Securities Regulation 962 n. 411 (2d ed. 1961); 5 *id.*, at 2929–2930 (Supp. 1969).[7]

[7] We need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority. Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement, see *Laurenzano* v. *Einbender*, 264 F. Supp. 356 (D. C. E. D. N. Y. 1966); cf. *Swanson* v. *American Consumer Industries, Inc.*, 415 F. 2d 1326, 1331–1332 (C. A. 7th Cir. 1969); *Eagle* v. *Horvath*, 241 F. Supp. 341, 344 (D. C. S. D. N. Y. 1965); *Globus, Inc.* v. *Jaroff*, 271 F. Supp. 378, 381 (D. C. S. D. N. Y. 1967); Comment, Shareholders' Derivative Suit to Enforce a Corporate Right of Action Against Directors Under SEC Rule 10b–5, 114 U. Pa. L. Rev. 578, 582 (1966). But see *Hoover* v. *Allen*, 241 F. Supp. 213, 231–232 (D. C. S. D. N. Y. 1965); *Barnett* v. *Anaconda Co.*, 238 F. Supp. 766, 770–774 (D. C. S. D. N. Y. 1965); *Robbins* v. *Banner Industries, Inc.*, 285 F. Supp. 758, 762–763 (D. C. S. D. N. Y. 1966). See generally 5 L. Loss, Securities Regulation 2933–2938 (Supp. 1969).

III

Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation implies nothing about the form of relief to which they may be entitled. We held in *Borak* that upon finding a violation the courts were "to be alert to provide such remedies as are necessary to make effective the congressional purpose," noting specifically that such remedies are not to be limited to prospective relief. 377 U. S., at 433, 434. In devising retrospective relief for violation of the proxy rules, the federal courts should consider the same factors that would govern the relief granted for any similar illegality or fraud. One important factor may be the fairness of the terms of the merger. Possible forms of relief will include setting aside the merger or granting other equitable relief, but, as the Court of Appeals below noted, nothing in the statutory policy "requires the court to unscramble a corporate transaction merely because a violation occurred." 403 F. 2d, at 436. In selecting a remedy the lower courts should exercise " 'the sound discretion which guides the determinations of courts of equity,' " keeping in mind the role of equity as "the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–330 (1944), quoting from *Meredith* v. *Winter Haven,* 320 U. S. 228, 235 (1943).

We do not read § 29 (b) of the Act,[8] which declares contracts made in violation of the Act or a rule there-

[8] Section 29 (b) provides in pertinent part: "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder . . . shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation,

under "void . . . as regards the rights of" the violator and knowing successors in interest, as requiring that the merger be set aside simply because the merger agreement is a "void" contract. This language establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party,[9] but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation. The lower federal courts have read § 29 (b), which has counterparts in the Holding Company Act, the Investment Company Act, and the Investment Advisers Act,[10] as rendering the contract merely voidable at the option of the innocent party. See, *e. g.*, *Greater Iowa Corp.* v. *McLendon,* 378 F. 2d 783, 792 (C. A. 8th Cir. 1967); *Royal Air Properties, Inc.* v. *Smith,* 312 F. 2d 210, 213 (C. A. 9th Cir. 1962); *Bankers Life & Cas. Co.* v. *Bellanca Corp.,* 288 F. 2d 784, 787 (C. A. 7th Cir. 1961); *Kaminsky* v. *Abrams,* 281 F. Supp. 501, 507 (D. C. S. D. N. Y. 1968); *Maher* v. *J. R. Williston & Beane, Inc.,* 280 F. Supp. 133, 138–139 (D. C. S. D. N. Y. 1967); cf. *Green* v. *Brown,* 276 F. Supp. 753, 757 (D. C. S. D. N. Y. 1967), remanded on other grounds, 398 F. 2d 1006 (C. A. 2d Cir. 1968) (Investment Company Act). See also 5 Loss, *supra,*

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shall have made . . . any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making . . . of such contract was in violation of any such provision, rule, or regulation . . . ." 15 U. S. C. § 78cc (b).

[9] See *Eastside Church of Christ* v. *National Plan, Inc.,* 391 F. 2d 357, 362–363 (C. A. 5th Cir. 1968); cf. *Goldstein* v. *Groesbeck,* 142 F. 2d 422, 426–427 (C. A. 2d Cir. 1944).

[10] See Public Utility Holding Company Act of 1935, § 26 (b), 49 Stat. 836, 15 U. S. C. § 79z (b); Investment Company Act of 1940, § 47 (b), 54 Stat. 846, 15 U. S. C. § 80a–46 (b); Investment Advisers Act of 1940, § 215 (b), 54 Stat. 856, 15 U. S. C. § 80b–15 (b).

at 2925–2926 (Supp. 1969); 6 *id.*, at 3866. This interpretation is eminently sensible. The interests of the victim are sufficiently protected by giving him the right to rescind; to regard the contract as void where he has not invoked that right would only create the possibility of hardships to him or others without necessarily advancing the statutory policy of disclosure.

The United States, as *amicus curiae,* points out that as representatives of the minority shareholders, petitioners are not parties to the merger agreement and thus do not enjoy a statutory right under § 29 (b) to set it aside.[11] Furthermore, while they do have a derivative right to invoke Auto-Lite's status as a party to the agreement, a determination of what relief should be granted in Auto-Lite's name must hinge on whether setting aside the merger would be in the best interests of the shareholders as a whole. In short, in the context of a suit such as this one, § 29 (b) leaves the matter of relief where it would be under *Borak* without specific statutory language—the merger should be set aside only if a court of equity concludes, from all the circumstances, that it would be equitable to do so. Cf. *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 456, 463–464 (1969).

Monetary relief will, of course, also be a possibility. Where the defect in the proxy solicitation relates to the specific terms of the merger, the district court might appropriately order an accounting to ensure that the shareholders receive the value that was represented as coming to them. On the other hand, where, as here, the

[11] If petitioners had submitted their own proxies in favor of the merger in response to the unlawful solicitation, as it does not appear they did, the language of § 29 (b) would seem to give them, as innocent parties to that transaction, a right to rescind their proxies. But it is clear in this case, where petitioners' combined holdings are only 600 shares, that such rescission would not affect the authorization of the merger.

misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, damages should be recoverable only to the extent that they can be shown. If commingling of the assets and operations of the merged companies makes it impossible to establish direct injury from the merger, relief might be predicated on a determination of the fairness of the terms of the merger at the time it was approved. These questions, of course, are for decision in the first instance by the District Court on remand, and our singling out of some of the possibilities is not intended to exclude others.

IV

Although the question of relief must await further proceedings in the District Court, our conclusion that petitioners have established their cause of action indicates that the Court of Appeals should have affirmed the partial summary judgment on the issue of liability.[12] The result would have been not only that respondents, rather than petitioners, would have borne the costs of the appeal, but also, we think, that petitioners would have been entitled to an interim award of litigation expenses and reasonable attorneys' fees. Cf. *Highway Truck Drivers Local 107* v. *Cohen,* 220 F. Supp. 735 (D. C. E. D. Pa. 1963). We agree with the position taken by petitioners, and by the United States as *amicus,* that petitioners, who have established a violation of the securities laws by their corporation and its officials,

[12] The Court of Appeals might have modified the judgment of the District Court to the extent that it referred the issue of relief to a master under Fed. Rule Civ. Proc. 53 (b). The Court of Appeals' opinion indicates doubt whether the referral was appropriate, 403 F. 2d, at 436. This issue is not before us.

should be reimbursed by the corporation or its survivor for the costs of establishing the violation.[13]

The absence of express statutory authorization for an award of attorneys' fees in a suit under § 14 (a) does not preclude such an award in cases of this type. In a suit by stockholders to recover short-swing profits for their corporation under § 16 (b) of the 1934 Act, the Court of Appeals for the Second Circuit has awarded attorneys' fees despite the lack of any provision for them in § 16 (b), "on the theory that the corporation which has received the benefit of the attorney's services should pay the reasonable value thereof." *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 241 (C. A. 2d Cir. 1943). The court held that Congress' inclusion in §§ 9 (e) and 18 (a) of the Act of express provisions for recovery of attorneys' fees in certain other types of suits [14] "does not impinge [upon] the result we reach in the absence of statute, for those sections merely enforce an additional penalty against the wrongdoer." *Ibid.*

We agree with the Second Circuit that the specific provisions in §§ 9 (e) and 18 (a) should not be read as denying to the courts the power to award counsel fees

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[13] We believe that the question of reimbursement for these expenses has a sufficiently close relationship to the determination of what constitutes a cause of action under § 14 (a) that it is appropriate for decision at this time. The United States urges the Court to consider also whether petitioners will be entitled to recoup expenses reasonably incurred in further litigation on the question of relief. We are urged to hold that such expenses should be reimbursed regardless of whether petitioners are ultimately successful in obtaining significant relief. However, the question of reimbursement for future expenses should be resolved in the first instance by the lower courts after the issue of relief has been litigated and a record has been established concerning the need for a further award. We express no view on the matter at this juncture.

[14] These provisions deal, respectively, with manipulation of security prices and with misleading statements in documents filed with the Commission. See 15 U. S. C. §§ 78i (e), 78r (a).

in suits under other sections of the Act when circumstances make such an award appropriate, any more than the express creation by those sections of private liabilities negates the possibility of an implied right of action under § 14 (a). The remedial provisions of the 1934 Act are far different from those of the Lanham Act, § 35, 60 Stat. 439, 15 U. S. C. § 1117, which have been held to preclude an award of attorneys' fees in a suit for trademark infringement. *Fleischmann Corp.* v. *Maier Brewing Co.,* 386 U. S. 714 (1967). Since Congress in the Lanham Act had "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed," the Court in *Fleischmann* concluded that the express remedial provisions were intended "to mark the boundaries of the power to award monetary relief in cases arising under the Act." 386 U. S., at 719, 721. By contrast, we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies. Cf. *Bakery Workers Union* v. *Ratner,* 118 U. S. App. D. C. 269, 274–275, 335 F. 2d 691, 696–697 (1964). The Act makes no provision for private recovery for a violation of § 14 (a), other than the declaration of "voidness" in § 29 (b), leaving the courts with the task, faced by this Court in *Borak,* of deciding whether a private right of action should be implied. The courts must similarly determine whether the special circumstances exist that would justify an award of attorneys' fees, including reasonable expenses of litigation other than statutory costs.[15]

While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations

[15] Cf. Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216, 1229 and n. 68 (1967).

indicate the need for such a recovery.[16] A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. See *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U. S., at 718–719. To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. This suit presents such a situation. The dissemination of misleading proxy solicitations was a "deceit practiced on the stockholders as a group," *J. I. Case Co.* v. *Borak*, 377 U. S., at 432, and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders.

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.[17] "[T]he foundation for the historic

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[16] Many commentators have argued for a more thoroughgoing abandonment of the rule. See, *e. g.*, Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation? 49 Iowa L. Rev. 75 (1963); 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 U. Colo. L. Rev. 202 (1966); Note, *supra*, n. 15.

[17] See *Trustees* v. *Greenough*, 105 U. S. 527, 531–537 (1882); *Central R. R. & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885);

practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic Nat. Bank,* 307 U. S. 161, 166 (1939). This Court in *Sprague* upheld the District Court's power to grant reimbursement for a plaintiff's litigation expenses even though she had sued only on her own behalf and not for a class, because her success would have a *stare decisis* effect entitling others to recover out of specific assets of the same defendant. Although those others were not parties before the court, they could be forced to contribute to the costs of the suit by an order reimbursing the plaintiff from the defendant's assets out of which their recoveries later would have to come. The Court observed that "the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation." *Id.,* at 167.

Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a sub-

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Hornstein, The Counsel Fee in Stockholder's Derivative Suits, 39 Col. L. Rev. 784 (1939).

Even in the original "fund" case in this Court, it was recognized that the power of equity to award fees was not restricted to the court's ability to provide reimbursement from the fund itself: "It would be very hard on [the successful plaintiff] to turn him away without any allowance . . . . It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." *Trustees* v. *Greenough,* 105 U. S., at 532.

stantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor.[18] For example, awards have been sustained in suits by stockholders complaining that shares of their corporation had been issued wrongfully for an inadequate consideration.[19] A successful suit of this type, resulting in cancellation of the shares, does not bring a fund into court or add to the assets of the corporation, but it does benefit the holders of the remaining shares by enhancing their value. Similarly, holders of voting trust certificates have been allowed reimbursement of their expenses from the corporation where they succeeded in terminating the voting trust and obtaining for all certificate holders the right to vote their shares.[20] In these cases there

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[18] See, *e. g., Holthusen* v. *Edward G. Budd Mfg. Co.,* 55 F. Supp. 945 (D. C. E. D. Pa. 1944); *Runswick* v. *Floor,* 116 Utah 91, 208 P. 2d 948 (1949); cases cited n. 22, *infra.* See generally Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 669–679 (1956); Smith, Recovery of Plaintiff's Attorney's Fees in Corporate Litigation, 40 L. A. Bar Bull. 15 (1964).

[19] *Hartman* v. *Oatman Gold Mining & Milling Co.,* 22 Ariz. 476, 198 P. 717 (1921); *Greenough* v. *Coeur D'Alenes Lead Co.,* 52 Idaho 599, 18 P. 2d 288 (1932); cf. *Riverside Oil & Refining Co.* v. *Lynch,* 114 Okla. 198, 243 P. 967 (1925).

[20] *Allen* v. *Chase Nat. Bank,* 180 Misc. 259, 40 N. Y. S. 2d 245 (Sup. Ct. 1943), sequel to *Allen* v. *Chase Nat. Bank,* 178 Misc. 536, 35 N. Y. S. 2d 958 (Sup. Ct. 1942).

was a "common fund" only in the sense that the court's jurisdiction over the corporation as nominal defendant made it possible to assess fees against all of the shareholders through an award against the corporation.[21]

In many of these instances the benefit conferred is capable of expression in monetary terms, if only by estimating the increase in market value of the shares attributable to the successful litigation. However, an increasing number of lower courts have acknowledged that a corporation may receive a "substantial benefit" from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature.[22] A leading case is *Bosch* v. *Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 101 N. W. 2d 423 (1960), in which a stockholder was reimbursed for his expenses in obtaining a judicial declaration that the

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[21] Cf. Note, Allowance of Counsel Fees Out of a "Fund in Court": The New Jersey Experience, 17 Rutgers L. Rev. 634, 638–643 (1963).

[22] See *Schechtman* v. *Wolfson*, 244 F. 2d 537, 540 (C. A. 2d Cir. 1957); *Grant* v. *Hartman Ranch Co.*, 193 Cal. App. 2d 497, 14 Cal. Rptr. 531 (1961); *Treves* v. *Servel, Inc.*, 38 Del. Ch. 483, 154 A. 2d 188 (Del. Sup. Ct. 1959); *Saks* v. *Gamble*, 38 Del. Ch. 504, 154 A. 2d 767 (1958); *Yap* v. *Wah Yen Ki Tuk Tsen Nin Hue*, 43 Haw. 37, 42 (1958); *Berger* v. *Amana Society*, 253 Iowa 378, 387, 111 N. W. 2d 753, 758 (1962); *Bosch* v. *Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 101 N. W. 2d 423 (1960); *Eisenberg* v. *Central Zone Property Corp.*, 1 App. Div. 2d 353, 149 N. Y. S. 2d 840 (Sup. Ct. 1956), aff'd *per curiam*, 3 N. Y. 2d 729, 143 N. E. 2d 516 (1957); *Martin Foundation* v. *Phillip-Jones Corp.*, 283 App. Div. 729, 127 N. Y. S. 2d 649 (Sup. Ct. 1954); *Abrams* v. *Textile Realty Corp.*, 197 Misc. 25, 93 N. Y. S. 2d 808 (Sup. Ct. 1949); 97 N. Y. S. 2d 492 (op. of Referee); *Long Park, Inc.* v. *Trenton-New Brunswick Theatres Co.*, 274 App. Div. 988, 84 N. Y. S. 2d 482 (Sup. Ct. 1948), aff'd *per curiam*, 299 N. Y. 718, 87 N. E. 2d 126 (1949); Smith, *supra*, n. 18; Shareholder Suits: Pecuniary Benefit Unnecessary for Counsel Fee Award, 13 Stan. L. Rev. 146 (1960).

election of certain of the corporation's directors was invalid. The Supreme Court of Minnesota stated:

> "Where an action by a stockholder results in a substantial benefit to a corporation he should recover his costs and expenses. . . . [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." *Id.*, at 366–367, 101 N. W. 2d, at 426–427.

In many suits under § 14 (a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. Cf. *Bakery Workers Union* v. *Ratner,* 118 U. S. App. D. C. 269, 274, 335 F. 2d 691, 696 (1964). Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort "involve corporate therapeutics," [23] and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.[24] To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose

[23] *Murphy* v. *North American Light & Power Co.,* 33 F. Supp. 567, 570 (D. C. S. D. N. Y. 1940).

[24] Cf. Hornstein, *supra,* n. 18, at 659, 662–663.

them on the class that has benefited from them and that would have had to pay them had it brought the suit.

For the foregoing reasons we conclude that the judgment of the Court of Appeals should be vacated and the case remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I substantially agree with Parts II and III of the Court's opinion holding that these stockholders have sufficiently proved a violation of § 14 (a) of the Securities Exchange Act of 1934 and are thus entitled to recover whatever damages they have suffered as a result of the misleading corporate statements, or perhaps to an equitable setting aside of the merger itself. I do not agree, however, to what appears to be the holding in Part IV that stockholders who hire lawyers to prosecute their claims in such a case can recover attorneys' fees in the absence of a valid contractual agreement so providing or an explicit statute creating such a right of recovery. The courts are interpreters, not creators, of legal rights to recover and if there is a need for recovery of attorneys' fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by this Court.

TURNER *v.* UNITED STATES

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

No. 190. Argued October 15, 1969—Decided January 20, 1970

Narcotics agents stopped a car in which petitioner was riding and found a package, which petitioner had thrown away, containing about 15 grams of a cocaine and sugar mixture, 5% of which was cocaine, and a package in the car weighing about 48 grams consisting of a total of 275 glassine bags containing a heroin mixture, 15.2% of which was heroin. Petitioner was indicted and convicted of four narcotics violations: (1) knowingly receiving, concealing, and facilitating the transportation and concealment of heroin knowing the heroin had been illegally imported into the United States, in violation of 21 U. S. C. § 174; (2) knowingly purchasing, possessing, dispensing, and distributing heroin not in or from the original stamped package, in violation of 26 U. S. C. § 4704 (a); (3) same as the first offense with regard to the cocaine seized; and (4) same as the second offense with regard to the cocaine. At the trial the Government presented evidence of the seizure of the packages but offered no evidence on the origin of the drugs, and petitioner did not testify. Section 174 provides that when a "defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." Section 4704 (a) states that: "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection . . . ." With respect to the first and third offenses, the trial judge charged the jury in accord with § 174 that it could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew the drugs had been illegally imported. With respect to the second and fourth offenses, the trial judge read to the jury the prima facie evidence provision of § 4704 (a). In the Court of Appeals petitioner argued that the judge's instructions on the inferences that the jury might draw from unexplained possession of the drugs violated his privilege

against self-incrimination by penalizing him for not testifying. The Court of Appeals rejected this claim and affirmed, finding that the inferences were permissible under prior decisions. *Held:*

1. The trial court's instructions on the inference that might be drawn under § 174 with respect to petitioner's possession of heroin did not violate his right to be convicted only on a finding of guilt beyond a reasonable doubt and did not place impermissible pressure on him to testify in his own defense. Pp. 405–418.

(a) Since it is abundantly clear that little, if any, heroin is made in this country and that therefore virtually all heroin consumed in the United States is illegally imported, § 174 is valid insofar as it permits a jury to infer that heroin possessed here is a smuggled drug, whether judged by the more-likely-than-not standard applied in *Leary* v. *United States,* 395 U. S. 6, or by the more exacting reasonable-doubt standard. Pp. 408–416.

(b) While there is no proof that petitioner knew who smuggled his heroin or how the smuggling was done, he, like others who sell or distribute the drug, was undoubtedly aware of the "high probability" that the heroin in his possession originated in a foreign country. Pp. 416–418.

2. The presumption under § 174 will not support petitioner's conviction with respect to the possession of cocaine, as the facts show that much more cocaine is lawfully produced in, than is smuggled into, this country and that the amount of cocaine stolen from legal sources is sufficiently large to negate the inference that petitioner's cocaine came from abroad or that he must have known that it did. Pp. 418–419.

3. The conviction under § 4704 (a) with respect to heroin is affirmed. Pp. 419–422.

(a) The evidence that petitioner possessed the heroin packaged in 275 glassine bags without revenue stamps attached established that the heroin was in the process of being distributed, an act proscribed by the statute. P. 420.

(b) When a jury returns a guilty verdict on a count charging several acts in the conjunctive, as here, the verdict normally stands if evidence is sufficient with respect to any one of the acts charged. P. 420.

(c) The conviction can also be sustained on the basis of the inference in § 4704 (a) of purchasing the heroin not in or from a stamped package, as there is no reasonable doubt that the possessor of heroin, who presumably purchased it, did not pur-

chase it in or from an original stamped package in view of the fact that no lawfully manufactured or lawfully imported heroin is found in this country. Pp. 421–422.

4. Petitioner's conviction with respect to cocaine based on the § 4704 (a) inference is not based upon sufficient evidence. Pp. 422–424.

(a) Petitioner's bare possession of a small quantity of a cocaine and sugar mixture does not establish that he was dispensing or distributing the drug. P. 423.

(b) The possibility that petitioner either stole the cocaine in or from a stamped package or obtained it from a stamped package in the possession of a thief is sufficiently real that a conviction cannot be rested solely upon the presumption. Pp. 423–424.

(c) To the extent that *Casey* v. *United States,* 276 U. S. 413, gives general approval to the § 4704 (a) presumption, it is limited by this decision. P. 424.

404 F. 2d 782, affirmed in part and reversed in part.

Josiah E. DuBois, Jr., by appointment of the Court, 395 U. S. 973, argued the cause and filed a brief for petitioner.

Lawrence G. Wallace argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Sidney M. Glazer.*

Steven R. Rivkin argued the cause and filed a brief for Cleveland Burgess as *amicus curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner was found guilty by a jury on four counts charging violations of the federal narcotics laws. The issue before us is the validity of the provisions of § 2 of the Act of February 9, 1909, 35 Stat. 614, as amended, 21 U. S. C. § 174, and 26 U. S. C. § 4704 (a) which authorize an inference of guilt from the fact of possession of narcotic drugs, in this case heroin and cocaine.

The charges arose from seizures by federal narcotics agents of two packages of narcotics. On June 1, 1967, Turner and two companions were arrested in Weehawken, New Jersey, shortly after their automobile emerged from the Lincoln Tunnel. While the companions were being searched but before Turner was searched, the arresting agents saw Turner throw a package to the top of a nearby wall. The package was retrieved and was found to be a foil package weighing 14.68 grams and containing a mixture of cocaine hydrochloride and sugar, 5% of which was cocaine. Government agents thereafter found a tinfoil package containing heroin under the front seat of the car. This package weighed 48.25 grams and contained a mixture of heroin, cinchonal alkaloid, mannitol, and sugar, 15.2% of the mixture being heroin. Unlike the cocaine mixture, the heroin mixture was packaged within the tinfoil wrapping in small double glassine bags; in the single tinfoil package there were 11 bundles of bags, each bundle containing 25 bags (a total of 275 bags). There were no federal tax stamps affixed to the package containing the cocaine or to the glassine bags or outer wrapper enclosing the heroin.

Petitioner was indicted on two counts relating to the heroin and two counts relating to the cocaine. The first count charged that Turner violated 21 U. S. C. § 174 [1]

[1] Insofar as here relevant, this section provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize

by receiving, concealing, and facilitating the transportation and concealment of heroin while knowing that the heroin had been unlawfully imported into the United States. The third count charged the same offense with regard to the cocaine seized. The second count charged that petitioner purchased, possessed, dispensed, and distributed heroin not in or from the original stamped package in violation of 26 U. S. C. § 4704 (a).[2] The fourth count made the same charge with regard to the cocaine.

At the trial, the Government presented the evidence of the seizure of the packages containing heroin and cocaine but presented no evidence on the origin of the drugs possessed by petitioner. Petitioner did not testify. With regard to Counts 1 and 3, the trial judge charged the jury in accord with the statute that the jury could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew that the drugs he possessed had been unlawfully imported. With regard to Counts 2 and 4, the trial judge read to the jury the statutory provision making possession of drugs not in a stamped package "prima facie evidence" that the defendant purchased, sold, dispensed, or dis-

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conviction unless the defendant explains the possession to the satisfaction of the jury."

Heroin, a derivative of opium, and cocaine, a product of coca leaves, are within the meaning of the term "narcotic drug" as used in 21 U. S. C. § 174. See 21 U. S. C. § 171 (which refers to § 3228 (g) of Int. Rev. Code of 1939, now 26 U. S. C. § 4731 (a)).

[2] "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

The term "narcotic drugs" is defined to include derivatives of opium and products of coca leaves. 26 U. S. C. § 4731 (a).

tributed the drugs not in or from a stamped package. The jury returned a verdict of guilty on each count. Petitioner was sentenced to consecutive terms of 10 years' imprisonment on the first and third counts; a five-year term on the second count was to run concurrently with the term on the first count and a five-year term on the fourth count was to run concurrently with the term on the third count.

On appeal to the Court of Appeals for the Third Circuit, petitioner argued that the trial court's instructions on the inferences that the jury might draw from unexplained possession of the drugs constituted violations of his privilege against self-incrimination by penalizing him for not testifying about his possession of the drugs. The Court of Appeals rejected this claim and affirmed, finding that the inferences from possession authorized by the statutes were permissible under prior decisions of this Court and that therefore there was no impermissible penalty imposed on petitioner's exercise of his right not to testify. 404 F. 2d 782 (1968). After the Court of Appeals' decision in this case, this Court held that a similar statutory presumption applicable to the possession of marihuana was unconstitutional as not having a sufficient rational basis. *Leary* v. *United States,* 395 U. S. 6 (1969). We granted a writ of certiorari in this case to reconsider in light of our decision in *Leary* whether the inferences authorized by the statutes here at issue are constitutionally permissible when applied to the possession of heroin and cocaine. 395 U. S. 933.

I

The statutory inference created by § 174 has been upheld by this Court with respect to opium and heroin, *Yee Hem* v. *United States,* 268 U. S. 178 (1925); *Roviaro* v. *United States,* 353 U. S. 53 (1957), as well as by an

unbroken line of cases in the courts of appeals.[3] Similarly, in a case involving morphine, this Court has rejected a constitutional challenge to the inference authorized by § 4704 (a). *Casey* v. *United States,* 276 U. S. 413 (1928).

Leary v. *United States, supra,* dealt with a statute, 21 U. S. C. § 176a, providing that possession of marihuana, unless explained to the jury's satisfaction, "shall be deemed sufficient evidence to authorize conviction" for smuggling, receiving, concealing, buying, selling, or facilitating the transportation, concealment, or sale of the drug, knowing that it had been illegally imported. Referring to prior cases[4] holding that a statute authorizing the inference of one fact from the proof of another in criminal cases must be subjected to scrutiny by the courts to prevent "conviction upon insufficient proof," 395 U. S., at 37, the Court read those cases as

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[3] Decisions of the courts of appeals accepting application of the presumption to persons found in possession of opium, morphine, or heroin include *Gee Woe* v. *United States,* 250 F. 428 (C. A. 5th Cir.), cert. denied, 248 U. S. 562 (1918) (smoking opium); *Charley Toy* v. *United States,* 266 F. 326 (C. A. 2d Cir.), cert. denied, 254 U. S. 639 (1920) (smoking opium); *Copperthwaite* v. *United States,* 37 F. 2d 846 (C. A. 6th Cir. 1930) (morphine); *United States* v. *Liss,* 105 F. 2d 144 (C. A. 2d Cir. 1939) (morphine); *Dear Check Quong* v. *United States,* 82 U. S. App. D. C. 8, 160 F. 2d 251 (1947) (unspecified narcotics); *Cellino* v. *United States,* 276 F. 2d 941 (C. A. 9th Cir. 1960) (heroin); *Walker* v. *United States,* 285 F. 2d 52 (C. A. 5th Cir. 1960) (heroin); *United States* v. *Savage,* 292 F. 2d 264 (C. A. 2d Cir.), cert. denied, 368 U. S. 880 (1961) (heroin); *United States* v. *Gibson,* 310 F. 2d 79 (C. A. 2d Cir. 1962) (heroin); *Lucero* v. *United States,* 311 F. 2d 457 (C. A. 10th Cir. 1962), cert. denied *sub nom. Maestas* v. *United States,* 372 U. S. 936 (1963) (heroin); *Garcia* v. *United States,* 373 F. 2d 806 (C. A. 10th Cir. 1967) (heroin).

[4] Especially *Tot* v. *United States,* 319 U. S. 463 (1943), *United States* v. *Gainey,* 380 U. S. 63 (1965), and *United States* v. *Romano,* 382 U. S. 136 (1965).

requiring the invalidation of the statutorily authorized inference "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36. Since, judged by this standard, the inference drawn from the possession of marihuana was invalid, it was unnecessary to "reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable-doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." 395 U. S., at 36 n. 64.

We affirm Turner's convictions under §§ 174 and 4704 (a) with respect to heroin (Counts 1 and 2) but reverse the convictions under these sections with respect to cocaine (Counts 3 and 4).

II

We turn first to the conviction for trafficking in heroin in violation of § 174. Count 1 charged Turner with (1) knowingly receiving, concealing, and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. See *Harris* v. *United States,* 359 U. S. 19, 23 (1959). For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt. The jury was so instructed and Turner was found guilty.

The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here,[5] he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case. The trial judge, noting that there was no other evidence of im-

[5] See *infra,* nn. 12, 13.

portation or of Turner's knowledge that his heroin had come from abroad, followed the usual practice and instructed the jury—as § 174 permits but does not require—that possession of a narcotic drug is sufficient evidence to justify conviction of the crime defined in § 174.[6]

The jury, however, even if it believed Turner had possessed heroin, was not required by the instructions to find him guilty. The jury was instructed that it was the sole judge of the facts and the inferences to be drawn therefrom, that all elements of the crime must be proved beyond a reasonable doubt, and that the inference authorized by the statute did not require the defendant to present evidence. To convict, the jury was informed, it "must be satisfied by the totality of the evidence irre-

[6] Under prior decisions, principally *United States* v. *Gainey*, 380 U. S. 63 (1965), such statutory provisions authorize but do not require the trial judge to submit the case to the jury when the Government relies on possession alone, authorize but do not require an instruction to the jury based on the statute, and authorize but do not require the jury to convict based on possession alone. The defendant is free to challenge either the inference of illegal importation or the inference of his knowledge of that fact, or both. *Harris* v. *United States*, 359 U. S. 19, 23 (1959); *Roviaro* v. *United States*, 353 U. S. 53, 63 (1957); *Yee Hem* v. *United States*, 268 U. S. 178, 185 (1925); *United States* v. *Peeples*, 377 F. 2d 205 (C. A. 2d Cir. 1967); *Chavez* v. *United States*, 343 F. 2d 85 (C. A. 9th Cir. 1965); *Griego* v. *United States*, 298 F. 2d 845 (C. A. 10th Cir. 1962). Even when the defendant challenges the validity of the inference as applied to his case, the instruction on the statutory inference is normally given. See, *e. g.*, *McIntyre* v. *United States*, 380 F. 2d 746 (C. A. 9th Cir.), cert. denied, 389 U. S. 952 (1967); *United States* v. *Peeples*, *supra*; *Vick* v. *United States*, 113 U. S. App. D. C. 12, 304 F. 2d 379 (1962); *Griego* v. *United States*, *supra*; *Walker* v. *United States*, 285 F. 2d 52 (C. A. 5th Cir. 1960); *United States* v. *Feinberg*, 123 F. 2d 425 (C. A. 7th Cir. 1941), cert. denied, 315 U. S. 801 (1942). See also *Erwing* v. *United States*, 323 F. 2d 674 (C. A. 9th Cir. 1963); *Caudillo* v. *United States*, 253 F. 2d 513 (C. A. 9th Cir.), cert. denied *sub nom. Romero* v. *United States*, 357 U. S. 931 (1958).

spective of the source from which it comes of the guilt of the defendant . . . ." The jury was obligated by its instructions to assess for itself the probative force of possession and the weight, if any, to be accorded the statutory inference. If it is true, as the Government contends, that heroin is not produced in the United States and that any heroin possessed here must have originated abroad, the jury, based on its own store of knowledge, may well have shared this view and concluded that Turner was equally well informed. Alternatively, the jury may have been without its own information concerning the sources of heroin, and may have convicted Turner in reliance on the inference permitted by the statute, perhaps reasoning that the statute represented an official determination that heroin is not a domestic product.[7]

Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from proof of possession alone. Since the jury might have relied heavily on the inferences authorized by the statute and included in the court's instructions, our primary focus is on the validity of the evidentiary rule contained in § 174.[8]

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[7] In *United States* v. *Peeples, supra,* the jury, after deliberating for a time, asked the judge about the percentage of heroin in the United States that is produced illegally in this country. "As there was no evidence in the record concerning areas of the world where heroin is produced, the judge declined to answer the . . . inquiry . . . ." 377 F. 2d, at 208. The defendant was found guilty by the jury; however, the Court of Appeals reversed for reasons not directly related to the trial judge's treatment of the question about the origins of heroin possessed in this country.

[8] See *Leary* v. *United States,* 395 U. S. 6, 31–32 (1969); *United States* v. *Romano, supra,* at 138–139 (1965); *Bailey* v. *Alabama,* 219 U. S. 219, 234–235 (1911).

Arguably, in declaring possession to be ample evidence to convict for trafficking in illegally imported drugs, Congress in effect has

We conclude first that the jury was wholly justified in accepting the legislative judgment—if in fact that is what the jury did—that possession of heroin is equivalent to possessing imported heroin. We have no reasonable doubt that at the present time heroin is not produced in this country and that therefore the heroin Turner had was smuggled heroin.

Section 174 or a similar provision has been the law since 1909.[9] For 60 years defendants charged under the

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made possession itself a crime as an incident to its power over foreign commerce. Cf. *Ferry* v. *Ramsey*, 277 U. S. 88 (1928). But the crime defined by the statute is not possession and the Court has rejected this basis for sustaining this and similar statutory inferences. *Leary* v. *United States, supra,* at 34, 37; *United States* v. *Romano, supra,* at 142–144; *Harris* v. *United States, supra,* at 23; *Roviaro* v. *United States, supra,* at 62–63; *Tot* v. *United States, supra,* at 472.

The Court has also refused to accept the suggestion that since the source of his drugs is perhaps more within the defendant's knowledge than the Government's, it violates no rights of the defendant to permit conviction based on possession alone when the defendant refuses to demonstrate a legal source for his drugs. *Leary* v. *United States, supra,* at 32–34. See also *Tot* v. *United States, supra,* at 469–470. The difficulties with the suggested approach are obvious: if the Government proves only possession and if possession is itself insufficient evidence of either importation or knowledge, but the statute nevertheless permits conviction where the defendant chooses not to explain, the Government is clearly relieved of its obligation to prove its case, unaided by the defendant, and the defendant is made to understand that if he fails to explain he can be convicted on less than sufficient evidence to constitute a prima facie case. See *Tot* v. *United States, supra,* at 469.

[9] The original provision, applicable to opium and derivatives, was contained in the Act of February 9, 1909, § 2, 35 Stat. 614. It was revised and extended to cover cocaine and coca leaves by the Act of May 26, 1922, § 1, 42 Stat. 596. The provision establishing the presumption was adopted without extended discussion or debate; it was consciously modeled on a provision of § 3082

statute have known that the section authorizes an inference of guilt from possession alone, that the inference is rebuttable by evidence that their heroin originated here, and that the inference itself is subject to challenge for lack of sufficient connection between the proved fact of possession and the presumed fact that theirs was smuggled merchandise. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43 (1910). Given the statutory inference and absent rebuttal evidence, as far as a defendant is concerned the § 174 crime is the knowing possession of heroin. Hence, if he is to avoid conviction, he faces the urgent necessity either to rebut or to challenge successfully the possession inference by demonstrating the fact or the likelihood of a domestic source for heroin, not necessarily by his own testimony but through the testimony of others who are familiar with the traffic in drugs, whether government agents or private experts. Over the years, thousands of defendants, most of them represented by retained or appointed counsel, have been convicted under § 174. Although there was opportunity in every case to challenge or rebut the inference based on possession, we are cited to no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light. Instead, the inference authorized by the section, although frequently challenged, has been upheld in this Court and in countless cases in the district courts and courts of appeals, these cases implicitly reflecting the prevailing judicial view that heroin is not made in this country but rather is imported from abroad. If this view is erroneous and heroin is or has

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of the Revised Statutes (now in 18 U. S. C. § 545), originating in the Smuggling Act of 1866, § 4, 14 Stat. 179. See H. R. Rep. No. 1878, 60th Cong., 2d Sess., 1–2 (1909); H. R. Rep. No. 2003, 60th Cong., 2d Sess., 1 (1909). See also Sandler, The Statutory Presumption in Federal Narcotics Prosecutions, 57 J. Crim. L. C. & P. S. 7 (1966).

been produced in this country in commercial quantities, it is difficult to believe that resourceful lawyers with adversary proceedings at their disposal would not long since have discovered the truth and placed it on record.

This view is supported by other official sources. In 1956, after extensive hearings, the Senate Committee on the Judiciary found no evidence that heroin is produced commercially in this country.[10] The President's Commission on Law Enforcement and Administration of Justice stated in 1967 that "[a]ll the heroin that reaches the American user is smuggled into the country from

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[10] In 1955 the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary held hearings throughout the country on the illicit narcotics traffic in this country. The subcommittee heard 345 witnesses, including government officials, law enforcement officers, and addicts and narcotics law violators; the testimony heard covers several thousand pages. Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (hereinafter cited as 1955 Senate Hearings). The evidence gathered in these hearings was the basis of S. 3760, 84th Cong., 2d Sess. (1956). The Senate bill contained a section (proposed § 1402, Tit. 18) very similar to § 174 but applicable exclusively to heroin; this proposed section included the § 174 presumption. Another proposed section (proposed § 1403, Tit. 18, enacted with minor changes and now codified in 21 U. S. C. § 176b) authorized special, severe penalties for the sale of unlawfully imported heroin to juveniles; this section contained a provision that possession of heroin was sufficient to prove that the heroin had been illegally imported. See S. Rep. No. 1997, 84th Cong., 2d Sess., 30 (1956) (proposed §§ 1402, 1403). The presumption that heroin found in this country has been illegally imported was based on findings of the Committee that foreign sources supply all important quantities of heroin circulating in this country, *id.*, at 3–7; and these findings were in turn based on ample evidence presented to the Subcommittee on Improvements in the Federal Criminal Code. See 1955 Senate Hearings 90 (testimony of Commissioner Anslinger of the Federal Bureau of Narcotics).

abroad, the Middle East being the reputed primary point of origin." [11]

The factors underlying these judgments may be summarized as follows: First, it is plain enough that it is illegal both to import heroin into this country [12] and to manufacture it here; [13] heroin is contraband and is subject to seizure.[14]

Second, heroin is a derivative of opium and can be manufactured from opium or from morphine or codeine,

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[11] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 3 (1967) (hereinafter cited as Task Force Report). See also U. N. Commission on Narcotic Drugs, Report of the Eighteenth Session, U. N. Doc. E/CN.7/455, p. 15 (1963); S. Jeffee, Narcotics—An American Plan 12–14, 63–71 (1966).

[12] Title 21 U. S. C. § 173 makes it unlawful to import any narcotic drug except amounts of crude opium and coca leaves necessary to provide for medical and legitimate uses. In addition, for more than 45 years, it has been unlawful to import opium for the purpose of manufacturing heroin. Act of June 7, 1924, 43 Stat. 657 (now codified in 21 U. S. C. § 173). Though 21 U. S. C. § 513 permits the Secretary of the Treasury to authorize the importation of any narcotic drug for delivery to governmental officials or to any person licensed to use the drugs for scientific purposes, the Secretary has never authorized the importation of any heroin under this provision. Brief for the United States 18 n. 12.

[13] The Narcotics Manufacturing Act of 1960, 74 Stat. 55, 21 U. S. C. §§ 501–517, prohibits the manufacture of narcotic drugs except under a license issued by the Secretary of the Treasury for the production of an approved drug. Since heroin is not considered useful for medical purposes, no production for medical use has been authorized; heroin used in scientific experimentation is supplied entirely from quantities seized by law enforcement officials. Brief for the United States 17 n. 10.

[14] 21 U. S. C. § 173. See S. Rep. No. 1997, 84th Cong., 2d Sess., 7 (1956). In 1956, all heroin then lawfully outstanding was required to be surrendered. Act of July 18, 1956, § 201, 70 Stat. 572 (codified as 18 U. S. C. § 1402).

which are also derived from opium.[15] Whether heroin can be synthesized is disputed, but there is no evidence that it is being synthesized in this country.[16]

Third, opium is derived from the opium poppy which cannot be grown in this country without a license.[17] No licenses are outstanding for commercial cultivation [18] and

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[15] The clandestine manufacture of heroin from opium or morphine is said in one report to be "child's play." Vaille & Bailleul, Clandestine Heroin Laboratories, 5 U. N. Bulletin on Narcotics, No. 4, Oct.-Dec. 1953, pp. 1, 6. The possibility of producing heroin from codeine (with a yield of about 22%) was first reported in Rapoport, Lovell, & Tolbert, The Preparation of Morphine-N-methyl-C^{14}, 73 J. Am. Chem. Soc. 5900 (1951), and was verified in Gates & Tschudi, The Synthesis of Morphine, 74 J. Am. Chem. Soc. 1109 (1952). The Bureau of Narcotics and Dangerous Drugs reports that conversion of codeine into morphine (from which heroin may be produced) is relatively simple and requires inexpensive equipment but produces an extremely noxious and penetrating odor which would make concealment of such conversion operations virtually impossible. Supplemental Memorandum for the United States 2.

[16] The Bureau of Narcotics and Dangerous Drugs reports that it knows of no case in which synthetic heroin has been produced; it reports that experiments indicate that production of synthetic morphine would be extremely difficult. Brief for the United States 20 n. 17. *Amicus* Burgess suggests the possibility of synthetic production of heroin but cites in support only a case involving an unsuccessful attempt to synthesize morphine, *United States* v. *Liss*, 137 F. 2d 995 (C. A. 2d Cir.), cert. denied, 320 U. S. 773 (1943). Brief for Cleveland Burgess as *Amicus Curiae* 11.

[17] Opium Poppy Control Act of 1942, 56 Stat. 1045, 21 U. S. C. §§ 188–188n.

[18] The regulations provide that a license to produce opium poppies shall be issued only when it is determined by the Director of the Bureau of Narcotics and Dangerous Drugs that the medical and scientific needs of the country cannot be met by the importation of crude opium. 21 CFR § 303.5 (a). Imports of crude opium have been sufficient to meet all domestic medical and scientific needs and the United States is therefore not an opium-

there is no evidence that the opium poppy is illegally grown in the United States.[19]

Fourth, the law forbids the importation of any opium product except crude opium required for medical and scientific purposes;[20] importation of crude opium for the purpose of making heroin is specifically forbidden.[21] Sizable amounts of crude opium are legally imported and used to make morphine and codeine.[22]

Fifth, the flow of legally imported opium and of legally manufactured morphine and codeine is controlled too tightly to permit any significant possibility that heroin is manufactured or distributed by those legally licensed to deal in opium, morphine, or codeine.[23]

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producing country. Blum & Braunstein, Mind-Altering Drugs and Dangerous Behavior: Narcotics, in Task Force Report App. A–2, at 40. See also Brief for the United States 23 n. 25.

[19] The most recent reported case involving a prosecution for unlawful production of opium poppies is *Az Din* v. *United States*, 232 F. 2d 283 (C. A. 9th Cir.), cert. denied, 352 U. S. 827 (1956). Unlike the case of marihuana, see *Leary, supra,* at 42–43, there are no reports of the discovery in this country of fields of opium poppies requiring destruction. This fact together with the facts that opium poppies are hard to conceal because of their color and that the harvesting of opium is only economically feasible in countries with an abundant supply of cheap labor justifies a conclusion that little if any opium poppy production is going on in this country. See Brief for the United States 21–23.

[20] 21 U. S. C. § 173.

[21] *Ibid.* See *supra,* n. 12.

[22] In 1966, the United States imported 173,951 kilograms of crude opium; in the same year, 715 kilograms of morphine and 30,662 kilograms of codeine were produced from imported opium. U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967, p. 41 (1968).

[23] The manufacture of narcotic drugs is very carefully controlled and monitored under the Narcotics Manufacturing Act of 1960, 74 Stat. 55, 21 U. S. C. §§ 501–517. The subsequent distribution of

Sixth, there are recurring thefts of opium, morphine, and codeine from legal channels which could be used for the domestic, clandestine production of heroin.[24] It is extremely unlikely that heroin would be made from codeine since the process involved produces an unmanageable, penetrating stench which it would be very difficult to conceal.[25] Clandestine manufacture of heroin from opium and morphine would not be subject to this difficulty; but, even on the extremely unlikely assumption that all opium and morphine stolen each year is used to manufacture heroin, the heroin so produced would amount to only a tiny fraction (less than 1%) of the illicit heroin illegally imported and marketed here.[26] Moreover, a clandestine laboratory man-

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narcotic drugs is controlled and monitored under the laws enforcing the taxes imposed on those dealing in narcotic drugs. 26 U. S. C. §§ 4701–4707, 4721–4736, 4771–4776.

[24] Because of the controls and reporting requirements applicable to those handling narcotic drugs, see *supra,* n. 23, the Bureau of Narcotics and Dangerous Drugs can compile accurate figures on the quantities of narcotic drugs stolen from legitimate channels. From 1964 through 1968, total thefts of medical opium per year ranged from 9.6 kilograms to 12.9 kilograms; thefts of morphine for the same period ranged from 6.7 kilograms to 10.2 kilograms per year; annual thefts of codeine for the same years ran between 30.0 kilograms and 81.8 kilograms. Brief for the United States 44. On the possibility of clandestine manufacture of heroin from opium, morphine, and codeine, see *supra,* n. 15.

[25] See *supra,* n. 15.

[26] Using figures on the number of known addicts and the average daily dose, federal agencies estimate that roughly 1,500 kilograms of heroin are smuggled into the United States each year. Task Force Report 6. The Bureau of Narcotics and Dangerous Drugs estimates that no more than about one kilogram of heroin could have been produced if all the opium stolen in any recent year had been clandestinely converted into heroin. The largest total amount of morphine stolen in a recent year would have yielded

ufacturing heroin has not been discovered in many years.[27]

Concededly, heroin could be made in this country, at least in tiny amounts. But the overwhelming evidence is that the heroin consumed in the United States

about 10.2 kilograms of heroin if it had all been converted into heroin. Brief for the United States 19 n. 15.

If it were assumed that all stolen codeine is converted into heroin, the figure for the possible clandestine domestic production of heroin would be well over 1% of the total heroin marketed in this country. Codeine can be made to yield about 22% heroin. See *supra,* n. 15. Applying this conversion rate to the largest annual amount of codeine stolen in the last five years (81.8 kilograms, see *supra,* n. 24) would give a figure of about 18 kilograms for the maximum amount of heroin that might have been produced from stolen codeine in any recent year. On the assumption that all stolen opium, morphine, and codeine is converted into heroin, the amount of heroin domestically produced from stolen opium and its derivatives would amount to no more than about 30 kilograms, only about 2% of the 1,500 kilograms of heroin estimated to be illegally imported each year. Whether such a percentage, rather than the figure of less than 1% obtained by excluding codeine from consideration, would alter our conclusions need not be discussed, for the fact that the conversion process creates a stench makes it unrealistic to assume that stolen codeine is clandestinely converted into heroin. See *supra,* n. 15.

[27] Statement by the United States Delegation on the Illicit Traffic to the Twenty-third Session of the U. N. Commission on Narcotic Drugs, January 1969, U. N. Doc. SD/E/CN.7/131, Annex A, p. 3. One respected work on narcotics makes the claim, without further elaboration, that "recent information" leads to the conclusion that some illicit laboratories used for the conversion of opium or morphine into heroin are located in the United States. D. Maurer & V. Vogel, Narcotics and Narcotic Addiction 64 (3d ed. 1967). However, the same statement, without elaboration, appears in the 1954 edition of the work, D. Maurer & V. Vogel, Narcotics and Narcotics Addiction 50, and this fact together with the absence of any cited basis for the claim and the lack of supporting evidence elsewhere in the literature leads us to believe that the statement, if it was ever correct, is no longer accurate.

is illegally imported. To possess heroin *is* to possess imported heroin. Whether judged by the more-likely-than-not standard applied in *Leary* v. *United States, supra,* or by the more exacting reasonable-doubt standard normally applicable in criminal cases, § 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug. If the jury relied on the § 174 instruction, it was entitled to do so.[28]

Given the fact that little if any heroin is made in the United States, Turner doubtless knew that the heroin he had came from abroad. There is no proof that he had specific knowledge of who smuggled his heroin or when or how the smuggling was done, but we are confident that he was aware of the "high probability" that the heroin in his possession had originated in a foreign country. Cf. *Leary* v. *United States, supra,* at 45–53.[29]

It may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart.[30] Such

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[28] It is, of course, possible for the situation to change either through the development of a simple method of synthesizing heroin or through the creation of substantial clandestine operations utilizing opium or morphine which has been illegally imported or which, though legally here, has been stolen.

[29] The Court in *Leary,* 395 U. S., at 46 n. 93, employed the definition of "knowledge" in Model Penal Code § 2.02 (7) (Proposed Official Draft, 1962):

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

[30] Though the federal narcotics laws are in terms applicable to most possessors of illicit drugs regardless of whether the possessor is a user or a dealer, the enforcement efforts of the Bureau of Narcotics and Dangerous Drugs are directed to the development of

people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling process. The price, supply, and quality vary widely;[31] the market fluctuates with the ability of smugglers to outwit customs and narcotics agents at home and abroad.[32] The facts concerning heroin are available from many sources, frequently in the popular media. "Common sense" (*Leary* v. *United States, supra,* at 46) tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled,[33] unless they practice a studied ignorance to which they are not entitled.[34] We therefore have little doubt that the inference of knowledge from the fact of possessing smuggled heroin is a sound one; hence the court's instructions on the inference did not violate the right of Turner to be convicted only on a finding of guilt

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evidence against "major sources of supply, wholesale peddlers, interstate and international violators." Hearings on the Narcotic Rehabilitation Act of 1966 before a Special Subcommittee of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 448 (1966) (hereinafter cited as 1966 Senate Hearings) (testimony of Commissioner Giordano of the Federal Bureau of Narcotics). The undisputed evidence that Turner possessed 275 glassine bags of heroin clearly shows that Turner was more than a mere user of heroin and was engaged in the distribution of the drug.

[31] See Task Force Report 3. See also 1955 Senate Hearings 3889, 4219.

[32] For example, a seizure of a large amount of pure heroin in Montreal, Canada, caused a "panic" in New York City that lasted almost three months. 1966 Senate Hearings 87.

[33] Such a conclusion is also justified with regard to those users and addicts who frequently purchase supplies of heroin on the retail market. Such persons are of course aware of the variations in price and availability of the drug and of the fact that the success of anti-smuggling efforts of law enforcement officials affects the supply of heroin on the market. See *supra,* this page and nn. 31, 32.

[34] See *Griego* v. *United States,* 298 F. 2d 845, 849 (C. A. 10th Cir. 1962).

beyond a reasonable doubt and did not place impermissible pressure upon him to testify in his own defense.[35] His conviction on Count 1 must be affirmed.

III

Turning to the same § 174 presumption with respect to cocaine, we reach a contrary result. In *Erwing* v. *United States,* 323 F. 2d 674 (C. A. 9th Cir. 1963), a case involving a prosecution for dealing in cocaine, two experts had testified, one for the Government and one for the defense. It was apparent from the testimony that while it is illegal to import cocaine, coca leaves, from which cocaine is prepared, are legally imported for processing into cocaine to be used for medical purposes. There was no evidence that sizable amounts of cocaine are either legally imported or smuggled. The trial court instructed on the § 174 presumption and conviction followed, but the Court of Appeals for the Ninth Circuit reversed, finding the presumption insufficiently sound to permit conviction.

Supplementing the facts presented in *Erwing, supra,* the United States now asserts that substantial amounts of cocaine are smuggled into the United States. However, much more cocaine is lawfully produced in this country than is smuggled into this country.[36] The United States

[35] "The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." *Yee Hem* v. *United States,* 268 U. S. 178, 185 (1925).

[36] In 1966, 609 kilograms of cocaine were produced. U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967,

concedes that thefts from legal sources, though totaling considerably less than the total smuggled,[37] are still sufficiently large to make the § 174 presumption invalid as applied to Turner's possession of cocaine.[38] Based on our own examination of the facts now before us, we reach the same conclusion. Applying the more-likely-than-not standard employed in *Leary, supra,* we cannot be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did. The judgment on Count 3 must be reversed.[39]

IV

26 U. S. C. § 4704 (a)[40] makes it unlawful to purchase, sell, dispense, or distribute a narcotic drug not in or from the original package bearing tax stamps. In this case, Count 2 charged that Turner knowingly purchased, dispensed, and distributed heroin hydrochloride not in or

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p. 42 (1968). Annual seizures of cocaine at ports and borders for the years 1963 through 1967 ranged from 1.44 kilograms to 17.71 kilograms; the Bureau of Narcotics and Dangerous Drugs estimates that no more than about 10% of cocaine that is attempted to be smuggled into the United States is discovered and seized at ports and borders. Brief for the United States 31 n. 31.

[37] From 1963 through 1968, the amount of cocaine stolen from legal channels annually ranged from 2.8 kilograms to 6.2 kilograms. Brief for the United States 44.

[38] Brief for the United States 28–32.

[39] Since the illegal possessor's only source of domestic cocaine is that which is stolen, the United States urges that the § 174 presumption may be valid with respect to sellers found with much larger amounts of cocaine than Turner had, amounts which, it is claimed, are too large to have been removed from legal channels and which must therefore have been smuggled. Brief for the United States 31. We find it unnecessary to deal with these problems and postpone their consideration to another day, hopefully until after the facts have been presented in an adversary context in the district courts.

[40] See *supra,* n. 2.

from the original stamped package.[41] Count 4 made the identical charge with respect to cocaine. Section 4704 (a) also provides that the absence of appropriate tax stamps shall be prima facie evidence of a violation by the person in whose possession the drugs are found. This provision was read by the trial judge to the jury.

The conviction on Count 2 with respect to heroin must be affirmed. Since the only evidence of a violation involving heroin was Turner's possession of the drug, the jury to convict must have believed this evidence. But part and parcel of the possession evidence and indivisibly linked with it, was the fact that Turner possessed some 275 glassine bags of heroin without revenue stamps attached. This evidence, without more, solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute. The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.[42] Here the evidence proved Turner was distributing heroin. The status of the case with respect to the other allegations is irrelevant to the

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[41] The indictment charged Turner with *possessing* heroin as well as purchasing, dispensing, and distributing the drug. The instructions to the jury made the same error. No objection was made in the trial court and the issue was not raised in the Court of Appeals or in this Court. The error was harmless in any event since the possession evidence proved that Turner was distributing heroin. See *infra,* this page.

[42] *Crain* v. *United States,* 162 U. S. 625, 634–636 (1896); *Smith* v. *United States,* 234 F. 2d 385, 389–390 (C. A. 5th Cir. 1956); *Price* v. *United States,* 150 F. 2d 283 (C. A. 5th Cir. 1945), cert. denied, 326 U. S. 789 (1946). See also *Claassen* v. *United States,* 142 U. S. 140 (1891); *The Confiscation Cases,* 20 Wall. 92, 104 (1874).

validity of Turner's conviction. So, too, the instruction on the presumption is beside the point, since even if invalid, it was harmless error; the jury must have believed the possession evidence which in itself established a distribution barred by the statute.

Moreover, even if the evidence as to possession is viewed as not in itself proving that Turner was distributing heroin, his conviction must be affirmed. True, the statutory inference, which on this assumption would assume critical importance, could not be sustained insofar as it authorized an inference of dispensing or distributing (or of selling if that act had been charged), for the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts. Cf. *Tot* v. *United States,* 319 U. S. 463 (1943); *United States* v. *Romano,* 382 U. S. 136 (1965). But the inference of *purchasing* in or from an unstamped package is another matter.

Those possessing heroin have secured it from some source. The act of possessing is itself sufficient proof that the possessor has not received it in or from the original stamped package, since it is so extremely unlikely that a package containing heroin would ever be legally stamped. All heroin found in this country is illegally imported. Those handling narcotics must register;[43] registered persons do not deal in heroin and only registered importers and manufacturers are permitted to purchase stamps.[44] For heroin to be found in a stamped package, stamps would have to be stolen and fixed to the heroin container and even then the stamps would immunize the transactions in the drug only from prosecution under § 4704 (a); all other laws against transactions in heroin would be unaffected by the presence of the stamps.

[43] 26 U. S. C. §§ 4721, 4722. See also 26 U. S. C. § 4702 (a) (2) (C).

[44] 26 CFR §§ 151.130, 151.41.

There can thus be no reasonable doubt that one who possesses heroin did not obtain it from a stamped package.

Even so, obtaining heroin other than in the original stamped package is not a crime under § 4704 (a). Of the various ways of acquiring heroin, *e. g.*, by gift, theft, bailment or purchase, only purchasing is proscribed by the section. Since heroin is a high-priced product,[45] it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. The same may be said for those who sell, dispense, or distribute the drug. There is no reasonable doubt that a possessor of heroin who has purchased it did not purchase the heroin in or from the original stamped package. We thus would sustain the conviction on Count 2 on the basis of a purchase not in or from a stamped package even if the evidence of packaging did not point unequivocally to the conclusion that Turner was distributing heroin not in a stamped package.

V

Finally, we consider the validity of the § 4704 (a) presumption with respect to cocaine. The evidence was that while in the custody of the police, Turner threw away a tinfoil package containing a mixture of cocaine and sugar, which, according to the Government, is not the form in which cocaine is distributed for medicinal purposes.[46] Unquestionably, possession was amply proved by the evidence, which the jury must have believed since it returned a verdict of guilty. But the

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[45] Heroin is reported to sell for around $5 per "bag" or packet. Task Force Report 3.

[46] Brief for the United States 33.

evidence with respect to Turner's possession of cocaine does not so surely demonstrate that Turner was in the process of distributing this drug. Would the jury automatically and unequivocally know that Turner was distributing cocaine simply from the fact that he had 14.68 grams of a cocaine and sugar mixture? True, his possession of heroin proved that he was dealing in drugs, but having a small quantity of a cocaine and sugar mixture is itself consistent with Turner's possessing the cocaine not for sale but exclusively for his personal use.

Since Turner's possession of cocaine did not constitute an act of purchasing, dispensing, or distributing, the instruction on the statutory inference becomes critical. As in the case of heroin, bare possession of cocaine is an insufficient predicate for concluding that Turner was dispensing or distributing. As for the remaining possible violation, purchasing other than in or from the original stamped package, the presumption, valid as to heroin, is infirm as to cocaine.

While one can be confident that cocaine illegally manufactured from smuggled coca leaves or illegally imported after manufacturing would not appear in a stamped package at any time, cocaine, unlike heroin, is legally manufactured in this country;[47] and we have held that sufficient amounts of cocaine are stolen from legal channels to render invalid the inference authorized in § 174 that any cocaine possessed in the United States is smuggled cocaine. *Supra,* at 418–419. Similar reasoning undermines the § 4704 (a) presumption that a defendant's possession of unstamped cocaine is prima facie evidence that the drug was purchased not in or from the original stamped container. The thief who steals cocaine very probably obtains it in or from a stamped package. There is a reasonable possibility that Turner

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[47] See *supra,* n. 36.

either stole the cocaine himself or obtained it from a stamped package in possession of the actual thief. The possibility is sufficiently real that a conviction resting on the § 4704 (a) presumption cannot be deemed a conviction based on sufficient evidence. To the extent that *Casey* v. *United States,* 276 U. S. 413 (1928), is read as giving general approval to the § 4704 (a) presumption, it is necessarily limited by our decision today. Turner's conviction on Count 4 must be reversed.

For the reasons stated above, we affirm the judgment of conviction as to Counts 1 and 2 and reverse the judgment of conviction as to Counts 3 and 4.

It is so ordered.

MR. JUSTICE MARSHALL, concurring in the judgment.

I concur in the judgment of the Court, affirming petitioner's conviction on Counts 1 and 2 and reversing his conviction on Counts 3 and 4. In so doing, however, I can agree with the majority on Count 2 only insofar as it concludes that evidence of possession of 275 glassine bags of heroin proved beyond a reasonable doubt that Turner was distributing heroin in violation of 26 U. S. C. § 4704 (a). That same evidence does not establish that he had *purchased* the heroin in violation of that statute.

The opinion of the Court establishes convincingly the virtual certainty that the heroin in Turner's possession had been illegally imported into the country. It was thus proper with regard to Count 1 for the trial judge to instruct the jurors in effect that if they found that Turner did indeed possess the drug, they could infer that the heroin had been illegally imported and impute knowledge of that fact to Turner. However, the instruction that possession is prima facie evidence of a violation of § 4704 (a) is quite different. It may be true that most persons who possess heroin have purchased it not in or from a stamped package. However, Turner

himself may well have obtained the heroin involved here in any of a number of ways—for example, by stealing it from another distributor, or by manufacturing or otherwise acquiring it abroad and smuggling it into this country. Given the dangers that are inherent in any statutory presumption or inference, some of which are set out in the dissenting opinion of MR. JUSTICE BLACK, I cannot agree with the wholly speculative and conjectural holding that because Turner possessed heroin he must have purchased it in violation of § 4704 (a).

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in United States courts. Among the accused's Bill of Rights' guarantees that the Court today weakens are:

1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;

2. The right to be informed of the nature and cause of the accusation against him;

3. The right not to be compelled to be a witness against himself;

4. The right not to be deprived of life, liberty, or property without due proess of law;

5. The right to be confronted with the witnesses against him;

6. The right to compulsory process for obtaining witnesses for his defense;

7. The right to counsel; and

8. The right to trial by an impartial jury.

The foregoing rights are among those that the Bill of Rights specifically spells out and that due process

requires that a defendant charged with crime must be accorded. The Framers of our Constitution and Bill of Rights were too wise, too pragmatic, and too familiar with tyranny to attempt to safeguard personal liberty with broad, flexible words and phrases like "fair trial," "fundamental decency," and "reasonableness." Such stretchy, rubberlike terms would have left judges constitutionally free to try people charged with crime under will-o'-the-wisp standards improvised by different judges for different defendants. Neither the Due Process Clause nor any other constitutional language vests any judge with such power. Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power. Rather, our Constitution was fashioned to perpetuate liberty and justice by marking clear, explicit, and lasting constitutional boundaries for trials. One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law—that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" or "decent." I wholly, completely, and permanently reject the so-called "activist" philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of "fairness and decency" as they see it. This case and the Court's holding in it illustrate the dangers inherent in such an "activist" philosophy.

Commercial traffic in deadly mind-, soul-, and body-destroying drugs is beyond doubt one of the greatest evils of our time. It cripples intellects, dwarfs bodies, paralyzes the progress of a substantial segment of

our society, and frequently makes hopeless and sometimes violent and murderous criminals of persons of all ages who become its victims. Such consequences call for the most vigorous laws to suppress the traffic as well as the most powerful efforts to put these vigorous laws into effect. Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct. That is exactly the course I think the Court is sanctioning today. I shall now set out in more detail why I believe this to be true.

Count 1 of the indictment against Turner, as the Court's opinion asserts, and as I agree,

> "charged Turner with (1) knowingly receiving, concealing, and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. . . . For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt." *Ante,* at 405.

The Court in the above statement is merely reaffirming the fundamental constitutional principle that the accused is presumed innocent until he is proved guilty and that the Government, before it can secure a conviction, must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense. This basic principle is clearly reflected in several provisions of the Bill of Rights. The Fifth and Sixth Amendments provide that as a part of due process of law a person held for criminal prosecution shall be charged on a presentment or indictment of a grand jury and that the defendant shall "be informed of the nature and cause of the accusation." The purpose of these requirements

is obviously to compel the Government to state and define specifically what it must prove in order to convict the defendant so that he can intelligently prepare to defend himself on each of the essential elements of the charge. And to aid the accused in making his defense to the charges thus defined, the Bill of Rights provides the accused explicit guarantees—the privilege against self-incrimination, the right to counsel, the right to confront witnesses against him, and to call witnesses in his own behalf—all designed to assure that the jury will as nearly as humanly possible be able to consider fully all the evidence and determine the truth of every case.

Having invoked the above principles, however, the Court then proceeds to uphold Turner's conviction under Count 1 despite the fact that the prosecution introduced absolutely no evidence at trial on two of the three essential elements of the crime. To show this I think one need look no further than the Court's own opinion. The Court says:

> "The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here, he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case." *Ante,* at 405.
>
> "Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from *proof of possession alone.*" *Ante,* at 407. (Emphasis added.)

These passages show that the Government wholly failed to meet its burden of proof at trial on two of the elements Congress deemed essential to the crime it defined. The prosecution introduced *no* evidence to prove either

(1) that the heroin involved was illegally imported or (2) that Turner knew the heroin was illegally imported. The evidence showed only that Turner was found in possession of heroin.

I do not think a reviewing court should permit to stand a conviction as wholly lacking in evidentiary support as is Turner's conviction under Count 1. *Bozza* v. *United States,* 330 U. S. 160 (1947). See also *Thompson* v. *Louisville,* 362 U. S. 199 (1960). When the evidence of a crime is insufficient as a matter of law, as the evidence here plainly is, a reversal of the conviction is in accord with the historic principle that "independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have power to set aside convictions." *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 19 (1955). I would therefore reverse Turner's conviction under Count 1 without further ado. Moreover, as the majority opinion and the record in this case indicate, petitioner's convictions under Counts 3 and 4 are also based upon totally insufficient evidence, for as in Count 1 the prosecution failed to introduce any evidence to support certain essential elements of the crimes charged under these counts. They, too, should be reversed for lack of evidence.

The Court attempts to take the stark nakedness of the evidence against Turner on these counts and clothe it in "presumptions" or "inferences" authorized by 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a). Apparently the Court feels that the Government can be relieved of the constitutional burden of proving the essential elements of its case by a mere congressional declaration that certain evidence shall be deemed sufficient to convict. Such an idea seems to me to be totally at variance with what the Constitution requires. Congress can undoubtedly create crimes and define their elements, but it cannot under our Constitution even partially remove

from the prosecution the burden of proving at trial each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the statutory presumptions of guilt found in 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a). And each of the weapons given by the Bill of Rights to the criminal accused to defend his innocence—the right to counsel, the right to confront the witnesses against him and to subpoena witnesses in his favor, the privilege against self-incrimination—is nullified to the extent that the Government to secure a conviction does not have to introduce any evidence to support essential allegations of the indictment it has brought. It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from governmental abuses if the Government could by some sleight-of-hand trick with presumptions make nullities of those precautions. Such a result would completely frustrate the purpose of the Founders to establish a system of criminal justice in which the accused—even the poorest and most humble—would be able to protect himself from wrongful charges by a big and powerful government. It is little less than fantastic even to imagine that those who wrote our Constitution and the Bill of Rights intended to have a government that could create crimes of several separate and independent parts and then relieve the government of proving a portion of them. Of course, within certain broad limits it is not necessary for Congress to define a crime to include any particular set of elements. *But if it does,* constitutional due process requires the Government to prove each element beyond a reasonable doubt before it can convict the accused of the crime it deliberately and clearly defined. Turner's trial therefore reminds me more of Daniel being cast into the lion's den than it does of a constitutional proceeding. The Bible

tells us Daniel was saved by a miracle, but when this Court says its final word in this case today, we cannot expect a miracle to save petitioner Turner.

I would have more hesitation in setting aside these jury verdicts for insufficiency of the evidence were I confident that the jury had been allowed to make a free and unhampered determination of guilt or innocence as the jury trial provisions of Article III of the Constitution and the Sixth Amendment require. The right to trial by jury includes the right to have the jury and the jury alone find the facts of the case, including the crucial fact of guilt or innocence. See, *e. g., United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 15–19 (1955). This right to have the jury determine guilt or innocence necessarily includes the right to have that body decide whether the evidence presented at trial is sufficient to convict. Turner's convictions on each count were secured only after the jury had been explicitly instructed by the trial judge that proof of Turner's mere possession of heroin and cocaine "shall be deemed sufficient evidence to authorize conviction" under 21 U. S. C. § 174, and "shall be prima facie evidence of a violation" of 26 U. S. C. § 4704 (a). App. 15–18. In my view, these instructions to the jury impermissibly interfered with the defendant's Sixth Amendment right to have the jury determine when evidence is sufficient to justify a finding of guilt beyond a reasonable doubt.

The instructions directing the jury to presume guilt in this case were not, of course, the trial judge's own inspiration. Congress, in enacting the statutory presumptions purporting to define and limit the quantum of evidence necessary to convict, has injected its own views and controls into the guilt-determining, fact-finding process vested by our Constitution exclusively in the Judicial Branch of our Government. The Fifth Amendment's command that cases be tried according to due

process of law includes the accused's right to have his case tried by a judge and a jury in a court of law without legislative constraint or interference. These statutory presumptions clearly violate the command of that Amendment. Congress can declare a crime, but it must leave the trial of that crime to the courts. See *Leary* v. *United States,* 395 U. S. 6, 55 (1969) (concurring in result); and *United States* v. *Gainey,* 380 U. S. 63, 84–85 (1965) (dissenting opinion).

It is my belief that these statutory presumptions are totally unconstitutional for yet another reason, and it is a critically important one. As discussed earlier, the Constitution requires that the defendant in a criminal case be presumed innocent and it places the burden of proving guilt squarely on the Government. Statutory presumptions such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving that he is not guilty. The presumption in 21 U. S. C. § 174 makes this shift in the burden of proof explicit. It provides that possession of narcotic drugs shall be deemed sufficient evidence to justify a conviction "unless the defendant explains the possession to the satisfaction of the jury." However, so far as robbing the defendant of his presumption of innocence is concerned, it makes no difference whether the statute explicitly says the defendant can rebut the presumption of guilt (as does the provision of 21 U. S. C. § 174 just quoted), or whether the statute simply uses the language of "prima facie case" and leaves implicit the possibility of the defendant's rebutting the presumption (as does 26 U. S. C. § 4704 (a)). Presumptions of both forms tend to coerce and compel the defendant into taking the witness stand in his own behalf, in clear violation of the accused's Fifth Amendment privilege against self-incrimination. This privilege has been consistently interpreted to establish

the defendant's absolute right not to testify at his own trial unless he freely chooses to do so. As we observed in *Malloy* v. *Hogan,* 378 U. S. 1, 8 (1964), the privilege is fulfilled only when the person is guaranteed "the right . . . to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . ." The defendant's right to a free and unfettered choice in whether or not to testify is effectively destroyed by the coercive effect of the statutory presumptions found in 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a). See *United States* v. *Gainey,* 380 U. S. 63, 71–74, 87 (1965) (dissenting opinions). Moreover, when the defendant declines to testify and the trial judge states to the jury as he did in this case that evidence of possession of narcotics shall be deemed sufficient to convict "unless the defendant explains the possession to the satisfaction of the jury," such an instruction is nothing less than judicial comment upon the defendant's failure to testify, a practice that we held violative of the Self-Incrimination Clause in *Griffin* v. *California,* 380 U. S. 609 (1965).

How does the Court respond to the grave constitutional problems raised by these presumptions of guilt? It says only that these presumptions are, in its view, "reasonable" or factually supportable "beyond a reasonable doubt." In other words, the Court has concluded that the presumptions are "fair" and apparently thinks that is a sufficient answer. It matters not to today's majority that the evidence that it cites to show the factual basis of the presumptions was never introduced at petitioner's trial, and that petitioner was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion. Nor does it apparently matter to the Court that the fact-finding role it undertakes today is constitutionally vested not in this Court but in the jury. If Congress wants to make simple possession of

narcotics an offense, I believe it has power to do so. But this Court has no such constitutional power. Nor has Congress the power to relieve the prosecution of the burden of proving all the facts that it as a legislative body deems crucial to the offenses it creates.

For the reasons stated here, I would without hesitation reverse petitioner's convictions under Counts 1, 2, 3, and 4.

Syllabus

EVANS ET AL. *v.* ABNEY ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 60. Argued November 12–13, 1969—Decided January 26, 1970

By his 1911 will Senator Bacon conveyed a tract of land in Macon to the city for the creation of a park for the exclusive use of white people. This Court held, in *Evans* v. *Newton,* 382 U. S. 296, that the park could not continue to be operated on a racially discriminatory basis. The Georgia Supreme Court then held "that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated," and remanded the case to the trial court, which held the doctrine of *cy pres* to be inapplicable since the park's segregated character was an essential and inseparable part of the testator's plan. The trial court ruled that the trust failed and that the property reverted to Senator Bacon's heirs, and the Georgia Supreme Court affirmed. *Held:*

1. The state courts did no more than apply well-settled principles of Georgia law to determine the meaning and effect of a Georgia will. Pp. 439–443.

2. The Georgia Supreme Court's action declaring the trust terminated did not violate any constitutionally protected rights. Pp. 443–446.

(a) The termination of the trust was not the imposition of a drastic "penalty," the "forfeiture" of the park merely because of the city's compliance with the constitutional mandate of *Evans* v. *Newton, supra,* but was the result of the construction of Senator Bacon's will to the effect that Senator Bacon would rather have had the trust terminated than have had the park integrated. P. 444.

(b) This is a case where the racial restrictions were solely the product of the testator's social philosophy, not that of the State or its agents. The decision below eliminated discrimination against Negroes in the park by eliminating the park, a loss shared equally by both races. *Shelley* v. *Kraemer,* 334 U. S. 1, distinguished. P. 445.

(c) There is no violation of the Fourteenth Amendment where a state court applies without any racial animus its normal

principles of construction to determine the testator's true intent in establishing a charitable trust and concludes, because of neutral and nondiscriminatory state trust laws, that everyone is to be deprived of the benefits of the trust. Pp. 445–446.

(d) The trust "failed" under Georgia law, not because of the unspoken premise that the presence of Negroes would destroy the desirability of the park for whites, but because the testator intended that the park remain forever for the exclusive use of white people. P. 447.

224 Ga. 826, 165 S. E. 2d 160, affirmed.

James M. Nabrit III argued the cause for petitioners. With him on the brief were *William H. Alexander, Jack Greenberg, Charles L. Black, Jr.,* and *Anthony G. Amsterdam.*

Frank C. Jones argued the cause for respondents. With him on the brief was *Charles M. Cork.*

Deputy Solicitor General Claiborne, by special leave of Court, argued the cause for the United States as *amicus curiae* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Once again this Court must consider the constitutional implications of the 1911 will of United States Senator A. O. Bacon of Georgia which conveyed property in trust to Senator Bacon's home city of Macon for the creation of a public park for the exclusive use of the white people of that city. As a result of our earlier decision in this case which held that the park, Baconsfield, could not continue to be operated on a racially discriminatory basis, *Evans* v. *Newton,* 382 U. S. 296 (1966), the Supreme Court of Georgia ruled that Senator Bacon's intention to provide a park for whites only had become impossible to fulfill and that accordingly the trust had failed and the parkland and other trust property had reverted by operation of Georgia law to the heirs of the Senator. 224 Ga. 826, 165 S. E. 2d 160 (1968).

Petitioners, the same Negro citizens of Macon who have sought in the courts to integrate the park, contend that this termination of the trust violates their rights to equal protection and due process under the Fourteenth Amendment. We granted certiorari because of the importance of the questions involved. 394 U. S. 1012 (1969). For the reasons to be stated, we are of the opinion that the judgment of the Supreme Court of Georgia should be, and it is, affirmed.

The early background of this litigation was summarized by MR. JUSTICE DOUGLAS in his opinion for the Court in *Evans* v. *Newton*, 382 U. S., at 297–298:

> "In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as 'a park and pleasure ground' for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that 'in their social relations the two races (white and negro) should be forever separate.' The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.
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> "Thereupon, individual members of the Board of Managers of the park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city

answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

"Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

"The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573."

The Court in *Evans* v. *Newton, supra,* went on to reverse the judgment of the Georgia Supreme Court and to hold that the public character of Baconsfield "requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." 382 U. S., at 302. Thereafter, the Georgia Supreme Court interpreted this Court's reversal of its decision as requiring that Baconsfield be henceforth operated on a nondiscriminatory basis. "Under these circumstances," the state high court

held, "we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated." *Evans* v. *Newton,* 221 Ga. 870, 871, 148 S. E. 2d 329, 330 (1966). Without further elaboration of this holding, the case was remanded to the Georgia trial court to consider the motion of Guyton G. Abney and others, successor trustees of Senator Bacon's estate, for a ruling that the trust had become unenforceable and that accordingly the trust property had reverted to the Bacon estate and to certain named heirs of the Senator. The motion was opposed by petitioners and by the Attorney General of Georgia, both of whom argued that the trust should be saved by applying the *cy pres* doctrine to amend the terms of the will by striking the racial restrictions and opening Baconsfield to all the citizens of Macon without regard to race or color. The trial court, however, refused to apply *cy pres.* It held that the doctrine was inapplicable because the park's segregated, whites-only character was an essential and inseparable part of the testator's plan. Since the "sole purpose" of the trust was thus in irreconcilable conflict with the constitutional mandate expressed in our opinion in *Evans* v. *Newton,* the trial court ruled that the Baconsfield trust had failed and that the trust property had by operation of law reverted to the heirs of Senator Bacon. On appeal, the Supreme Court of Georgia affirmed.

We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will. At the time Senator Bacon made his will Georgia cities and towns were, and they still are, authorized to accept devises of property for the establishment and preservation of "parks and pleasure grounds" and to hold the property thus received in

charitable trust for the exclusive benefit of the class of persons named by the testator. Ga. Code Ann., c. 69–5 (1967); Ga. Code Ann. §§ 108–203, 108–207 (1959). These provisions of the Georgia Code explicitly authorized the testator to include, if he should choose, racial restrictions such as those found in Senator Bacon's will. The city accepted the trust with these restrictions in it. When this Court in *Evans* v. *Newton, supra,* held that the continued operation of Baconsfield as a segregated park was unconstitutional, the particular purpose of the Baconsfield trust as stated in the will failed under Georgia law. The question then properly before the Georgia Supreme Court was whether as a matter of state law the doctrine of *cy pres* should be applied to prevent the trust itself from failing. Petitioners urged that the *cy pres* doctrine allowed the Georgia courts to strike the racially restrictive clauses in Bacon's will so that the terms of the trust could be fulfilled without violating the Constitution.

The Georgia *cy pres* statutes upon which petitioners relied provide:

> "When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." Ga. Code Ann. § 108–202 (1959).
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> "A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator." Ga. Code Ann. § 113–815 (1959).

The Georgia courts have held that the fundamental purpose of these *cy pres* provisions is to allow the court to carry out the general charitable intent of the testator where this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. *Moss* v. *Youngblood,* 187 Ga. 188, 200 S. E. 689 (1938). But this underlying logic of the *cy pres* doctrine implies that there is a certain class of cases in which the doctrine cannot be applied. Professor Scott in his treatise on trusts states this limitation on the doctrine of *cy pres* which is common to many States [1] as follows:

> "It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable." 4 A. Scott, The Law of Trusts § 399, p. 3085 (3d ed. 1967).

In this case, Senator Bacon provided an unusual amount of information in his will from which the Georgia courts could determine the limits of his charitable purpose. Immediately after specifying that the park should be for "the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon," the Senator stated that "the said property under no circumstances . . . (is) to be . . . at any time for any reason

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[1] See, *e. g., First Universalist Society* v. *Swett,* 148 Me. 142, 90 A. 2d 812 (1952); *LaFond* v. *City of Detroit,* 357 Mich. 362, 98 N. W. 2d 530 (1959).

devoted to any other purpose or use excepting so far as herein specifically authorized." And the Senator continued:

> "I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.
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> "I am, however, without hesitation in the opinion that in their social relations the two races . . . should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

The Georgia courts, construing Senator Bacon's will as a whole, *Yerbey* v. *Chandler,* 194 Ga. 263, 21 S. E. 2d 636 (1942), concluded from this and other language in the will that the Senator's charitable intent was not "general" but extended only to the establishment of a segregated park for the benefit of white people. The Georgia trial court found that "Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield." App. 519. Since racial separation was found to be an inseparable part of the testator's intent, the Georgia courts held that the State's *cy pres* doctrine could not be used to alter the will to permit racial integration. See *Ford* v. *Thomas,* 111 Ga. 493, 36 S. E. 841 (1900); *Adams* v. *Bass,* 18 Ga. 130 (1855). The Baconsfield trust was therefore held to have failed, and, under Georgia law, "[w]here a trust is expressly created, but [its] uses . . . fail from any cause, a resulting trust

is implied for the benefit of the grantor, or testator, or his heirs." Ga. Code Ann. § 108–106 (4) (1959).[2] The Georgia courts concluded, in effect, that Senator Bacon would have rather had the whole trust fail than have Baconsfield integrated.

When a city park is destroyed because the Constitution requires it to be integrated, there is reason for everyone to be disheartened. We agree with petitioners that in such a case it is not enough to find that the state court's result was reached through the application of established principles of state law. No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of

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[2] Although Senator Bacon's will did not contain an express provision granting a reverter to any party should the trust fail, § 108–106 (4) of the Georgia Code quoted in the text makes such an omission irrelevant under state law. At one point in the Senator's will he did grant "all remainders and reversions" to the city of Macon, but the Supreme Court of Georgia showed in its opinion that this language did not relate in any way to what should happen upon a failure of the trust but was relevant only to the initial vesting of the property in the city. The Georgia court said:

"Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the intervenors appears in the following provision of the will: 'When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc.' This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision." 224 Ga. 826, 831, 165 S. E. 2d 160, 165.

any proceeding or transaction to determine if the Constitution has been violated. *Presbyterian Church* v. *Hull Church,* 393 U. S. 440 (1969); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). Here, however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will.

Petitioners first argue that the action of the Georgia court violates the United States Constitution in that it imposes a drastic "penalty," the "forfeiture" of the park, merely because of the city's compliance with the constitutional mandate expressed by this Court in *Evans* v. *Newton.* Of course, *Evans* v. *Newton* did not speak to the problem of whether Baconsfield should or could continue to operate as a park; it held only that its continued operation as a park had to be without racial discrimination. But petitioners now want to extend that holding to forbid the Georgia courts from closing Baconsfield on the ground that such a closing would penalize the city and its citizens for complying with the Constitution. We think, however, that the will of Senator Bacon and Georgia law provide all the justification necessary for imposing such a "penalty." The construction of wills is essentially a state-law question, *Lyeth* v. *Hoey,* 305 U. S. 188 (1938), and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs.

A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation. In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will. Nor is there any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes. *Supra,* at 439–440. On the contrary, the language of the Senator's will shows that the racial restrictions were solely the product of the testator's own full-blown social philosophy. Similarly, the situation presented in this case is also easily distinguishable from that presented in *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.

Petitioners also contend that since Senator Bacon did not expressly provide for a reverter in the event

that the racial restrictions of the trust failed, no one can know with absolute certainty that the Senator would have preferred termination of the park rather than its integration, and the decision of the Georgia court therefore involved a matter of choice. It might be difficult to argue with these assertions if they stood alone, but then petitioners conclude: "Its [the court's] choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a 'guess,' an item in 'social philosophy,' or anything else at all." We do not understand petitioners to be contending here that the Georgia judges were motivated either consciously or unconsciously by a desire to discriminate against Negroes. In any case, there is, as noted above, absolutely nothing before this Court to support a finding of such motivation. What remains of petitioners' argument is the idea that the Georgia courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favor of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Another argument made by petitioners is that the decision of the Georgia courts holding that the Baconsfield trust had "failed" must rest logically on the unspoken premise that the presence or proximity of Negroes in Baconsfield would destroy the desirability of the park for whites. This argument reflects a rather fundamental misunderstanding of Georgia law. The Baconsfield trust "failed" under that law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together but, rather, because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people.

Petitioners also advance a number of considerations of public policy in opposition to the conclusion which we have reached. In particular, they regret, as we do, the loss of the Baconsfield trust to the City of Macon, and they are concerned lest we set a precedent under which other charitable trusts will be terminated. It bears repeating that our holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts. Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule. More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

In their lengthy and learned briefs, the petitioners and the Solicitor General as *amicus curiae* have ad-

vanced several arguments which we have not here discussed. We have carefully examined each of these arguments, however, and find all to be without merit.

The judgment is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

Bacon's will did not leave any remainder or reversion in "Baconsfield" to his heirs. He left "all remainders and reversions and every estate in the same of whatsoever kind" to the City of Macon. He further provided that the property "under no circumstances, or by any authority whatsoever" should "be sold or alienated or disposed of, or at any time for any reason" be "devoted to any other purpose or use excepting so far as herein specifically authorized."

Giving the property to the heirs, rather than reserving it for some municipal use, does therefore as much violence to Bacon's purpose as would a conversion of an "all-white" park into an "all-Negro" park.

No municipal use is of course possible where the beneficiaries are members of one race only. That was true in 1911 when Bacon made his will. *Plessy* v. *Ferguson,* 163 U. S. 537, decided in 1896, had held that while "separate" facilities could be supplied each race, those facilities had to be "equal." The concept of "equal" in this setting meant not just another park for Negroes but one equal in quality and service to that municipal facility which is furnished the whites. See *Sweatt* v. *Painter,* 339 U. S. 629, 633–634. It is apparent that Bacon's will projected a municipal use which at the time was not constitutionally permissible unless like accommodations were made for the Negro race.

So far as this record reveals, the day the present park was opened to whites it may, constitutionally speaking, also have been available to Negroes.

The Supreme Court of Georgia stated that the sole purpose for which the trust was created had become impossible. But it was impossible in those absolute terms even under the regime of *Plessy* v. *Ferguson.* As to *cy pres,* the Georgia statute provides:

> "When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." Ga. Code Ann. § 108–202 (1959).

The Georgia court held that the doctrine of *cy pres* "can not be applied to establish a trust for an entirely different purpose from that intended by the testator." 224 Ga. 826, 830, 165 S. E. 2d 160, 164. That, however, does not state the issue realistically. No proposal to bar use of the park by whites has ever been made, except the reversion ordered to the heirs. Continuation of the use of the property as a municipal park or for another municipal purpose carries out a larger share of Bacon's purpose than the complete destruction of such use by the decree we today affirm.

The purpose of the will was to dedicate the land for some municipal use. That is still possible. Whatever that use, Negroes will of course be admitted, for such is the constitutional command. But whites will also be admitted. Letting both races share the facility is closer to a realization of Bacon's desire than a complete destruction of the will and the abandonment of Bacon's desire that the property be used for some municipal purpose.

Bacon, in limiting the use of this park property "to white people," expressed the view that "in their social

relations the two races (white and negro) should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common." Can we possibly say that test puts a curse on each and every municipal use—music festivals, medical clinics, hospitals?

Moreover, putting the property in the hands of the heirs will not necessarily achieve the racial segregation that Bacon desired. We deal with city real estate. If a theatre is erected, Negroes cannot be excluded. If a restaurant is opened, Negroes must be served. If office or housing structures are erected, Negro tenants must be eligible. If a church is erected, mixed marriage ceremonies may be performed. If a court undertook to attach a racial-use condition to the property once it became "private," that would be an unconstitutional covenant or condition.

Bacon's basic desire can be realized only by the repeal of the Fourteenth Amendment. So the fact is that in the vicissitudes of time there is no constitutional way to assure that this property will not serve the needs of Negroes.

The Georgia decision, which we today approve, can only be a gesture toward a state-sanctioned segregated way of life, now *passé*. It therefore should fail as the imposition of a penalty for obedience to a principle of national supremacy.

MR. JUSTICE BRENNAN, dissenting.

For almost half a century Baconsfield has been a public park. Senator Bacon's will provided that upon the death of the last survivor among his widow and two daughters title to Baconsfield would vest in the Mayor and Council of the City of Macon and their successors forever. Pursuant to the express provisions of the will, the Mayor and City Council appointed a Board of Man-

agers to supervise the operation of the park, and from time to time these same public officials made appointments to fill vacancies on the Board. Senator Bacon also bequeathed to the city certain bonds which provided income used in the operation of the park.

The city acquired title to Baconsfield in 1920 by purchasing the interests of Senator Bacon's surviving daughter and another person who resided on the land. Some $46,000 of public money was spent over a number of years to pay the purchase price. From the outset and throughout the years the Mayor and City Council acted as trustees, Baconsfield was administered as a public park. T. Cleveland James, superintendent of city parks during this period, testified that when he first worked at Baconsfield it was a "wilderness . . . nothing there but just undergrowth everywhere, one road through there and that's all, one paved road." He said there were no park facilities at that time. In the 1930's Baconsfield was transformed into a modern recreational facility by employees of the Works Progress Administration, an agency of the Federal Government. WPA did so upon the city's representation that Baconsfield was a public park. WPA employed men daily for the better part of a year in the conversion of Baconsfield to a park. WPA and Mr. James and his staff cut underbrush, cleared paths, dug ponds, built bridges and benches, planted shrubbery, and, in Mr. James' words, "just made a general park out of it." Other capital improvements were made in later years with both federal and city money. The Board of Managers also spent funds to improve and maintain the park.

Although the Board of Managers supervised operations, general maintenance of Baconsfield was the responsibility of the city's superintendent of parks. Mr. James was asked whether he treated Baconsfield about the same as other city parks. He answered, "Yes, included in my

appropriation . . . ." The extent of the city's services to Baconsfield is evident from the increase of several thousand dollars in the annual expenses incurred for maintenance by the Board of Managers after the Mayor and City Council withdrew as trustees in 1964.

The city officials withdrew after suit was brought in a Georgia court by individual members of the Board of Managers to compel the appointment of private trustees on the ground that the public officials could not enforce racial segregation of the park. The Georgia court appointed private trustees, apparently on the assumption that they would be free to enforce the racially restrictive provision in Senator Bacon's will. In *Evans* v. *Newton,* 382 U. S. 296 (1966), we held that the park had acquired such unalterable indicia of a public facility that for the purposes of the Equal Protection Clause it remained "public" even after the city officials were replaced as trustees by a board of private citizens. Consequently, Senator Bacon's discriminatory purpose could not be enforced by anyone. This Court accordingly reversed the Georgia court's acceptance of the city officials' resignations and its appointment of private trustees. On remand the Georgia courts held that since Senator Bacon's desire to restrict the park to the white race could not be carried out, the trust failed and the property must revert to his heirs. The Court today holds that that result and the process by which it was reached do not constitute a denial of equal protection. I respectfully dissent.

No record could present a clearer case of the closing of a public facility for the sole reason that the public authority that owns and maintains it cannot keep it segregated. This is not a case where the reasons or motives for a particular action are arguably unclear, cf. *Palmer* v. *Thompson,* 419 F. 2d 1222 (C. A. 5th Cir. 1969) (en banc), nor is it one where a discriminatory

purpose is one among other reasons, cf. *Johnson* v. *Branch,* 364 F. 2d 177 (C. A. 4th Cir. 1966), nor one where a discriminatory purpose can be found only by inference, cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). The reasoning of the Georgia Supreme Court is simply that Senator Bacon intended Baconsfield to be a segregated public park, and because it cannot be operated as a segregated public park any longer, *Watson* v. *Memphis,* 373 U. S. 526 (1963); see *Mayor & City Council of Baltimore* v. *Dawson,* 350 U. S. 877 (1955), the park must be closed down and Baconsfield must revert to Senator Bacon's heirs. This Court agrees that this "city park is [being] destroyed because the Constitution require[s] it to be integrated . . . ." No one has put forward any other reason why the park is reverting from the City of Macon to the heirs of Senator Bacon. It is therefore quite plain that but for the constitutional prohibition on the operation of segregated public parks, the City of Macon would continue to own and maintain Baconsfield.

I have no doubt that a public park may constitutionally be closed down because it is too expensive to run or has become superfluous, or for some other reason, strong or weak, or for no reason at all. But under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility. In *Griffin* v. *County School Board,* 377 U. S. 218, 231 (1964), we said, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." In this context what is true of public schools is true of public parks. When it is as starkly clear as it is in this case that a public facility would remain open but for the constitutional command that it be operated on a nonsegregated basis, the closing of that facility conveys an

unambiguous message of community involvement in racial discrimination. Its closing for the sole and unmistakable purpose of avoiding desegregation, like its operation as a segregated park, "generates [in Negroes] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954). It is no answer that continuing operation as a segregated facility is a constant reminder of a public policy that stigmatizes one race, whereas its closing occurs once and is over. That difference does not provide a constitutional distinction: state involvement in discrimination is unconstitutional, however short-lived.

The Court, however, affirms the judgment of the Georgia Supreme Court on the ground that the closing of Baconsfield did not involve state action. The Court concedes that the closing of the park by the city "solely to avoid the effect of a prior court order directing that the park be integrated" would be unconstitutional. However, the Court finds that in this case it is not the State or city but "a private party which is injecting the racially discriminatory motivation," *ante,* at 445. The exculpation of the State and city from responsibility for the closing of the park is simply indefensible on this record. This discriminatory closing is permeated with state action: at the time Senator Bacon wrote his will Georgia statutes expressly authorized and supported the precise kind of discrimination provided for by him; in accepting title to the park, public officials of the City of Macon entered into an arrangement vesting in private persons the power to enforce a reversion if the city should ever incur a constitutional obligation to desegregate the park; it is a *public* park that is being closed for a discriminatory reason after having been operated for nearly

half a century as a segregated *public* facility; and it is a state court that is enforcing the racial restriction that keeps apparently willing parties of different races from coming together in the park. That is state action in overwhelming abundance. I need emphasize only three elements of the state action present here.

First, there is state action whenever a State enters into an arrangement that creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official, for example the official action involved in Macon's acceptance of the gift of Baconsfield. The State's involvement in the creation of such a right is also involvement in its enforcement; the State's assent to the creation of the right necessarily contemplates that the State will enforce the right if called upon to do so. Where, as in this case, the State's enforcement role conflicts with its obligation to comply with the constitutional command against racial segregation the attempted enforcement must be declared repugnant to the Fourteenth Amendment.

Moreover, a State cannot divest itself by contract of the power to perform essential governmental functions. *E. g., Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* 245 U. S. 20 (1917); *Stone* v. *Mississippi,* 101 U. S. 814 (1880). Thus a State cannot bind itself not to operate a public park in accordance with the Equal Protection Clause, upon pain of forfeiture of the park. The decision whether or not a public facility shall be operated in compliance with the Constitution is an essentially *governmental* decision. An arrangement that purports to prevent a State from complying with the Constitution cannot be carried out, *Evans* v. *Newton, supra;* see *Pennsylvania* v. *Board of Directors,* 353 U. S.

230 (1957). Nor can it be enforced by a reversion; a racial restriction is simply invalid when intended to bind a public body and cannot be given any effect whatever, cf. *Pennsylvania* v. *Brown,* 392 F. 2d 120 (C. A. 3d Cir. 1968).

Initially the City of Macon was willing to comply with its constitutional obligation to desegregate Baconsfield. For a time the city allowed Negroes to use the park, "taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis." *Evans* v. *Newton, supra,* at 297. But the Mayor and Council reneged on their constitutional duty when the present litigation began, and instead of keeping Baconsfield desegregated they sought to sever the city's connection with it by resigning as trustees and telling Superintendent James to stop maintaining the park. The resolution of the Mayor and Council upon their resignation as trustees makes it very clear that the probability of a reversion had induced them to abandon desegregation. Private interests of the sort asserted by the respondents here cannot constitutionally be allowed to control the conduct of public affairs in that manner.

A finding of discriminatory state action is required here on a second ground. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), stands at least for the proposition that where parties of different races are willing to deal with one another a state court cannot keep them from doing so by enforcing a privately devised racial restriction. See also *Sweet Briar Institute* v. *Button,* 280 F. Supp. 312 (D. C. W. D. Va. 1967) (state attorney general enjoined from enforcing privately devised racial restriction). Nothing in the record suggests that after our decision in *Evans* v. *Newton, supra,* the City of Macon retracted its previous willingness to manage Baconsfield on a nonsegregated basis, or that the white beneficiaries of Senator Bacon's generosity were unwilling to share it with

Negroes, rather than have the park revert to his heirs. Indeed, although it may be that the city would have preferred to keep the park segregated, the record suggests that, given the impossibility of that goal, the city wanted to keep the park open. The resolution by which the Mayor and Council resigned as trustees prior to the decision in *Evans* v. *Newton, supra,* reflected, not opposition to the admission of Negroes into the park, but a fear that if Negroes were admitted the park would be lost to the city. The Mayor and Council did not participate in this litigation after the decision in *Evans* v. *Newton.* However, the Attorney General of Georgia was made a party after remand from this Court, and, acting "as parens patriae in all legal matters pertaining to the administration and disposition of charitable trusts in the State of Georgia in which the rights of beneficiaries are involved," he opposed a reversion to the heirs and argued that Baconsfield should be maintained "as a park for all the citizens of the State of Georgia." Thus, so far as the record shows, this is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of the Georgia courts thus, under *Shelley* v. *Kraemer,* constitutes state action denying equal protection.

Finally, a finding of discriminatory state action is required on a third ground. In *Reitman* v. *Mulkey,* 387 U. S. 369 (1967), this Court announced the basic principle that a State acts in violation of the Equal Protection Clause when it singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law, even though the State does not itself impose or compel segregation. This approach to the analysis of state action was foreshadowed in MR. JUSTICE WHITE'S separate opinion in *Evans* v. *Newton, supra.* There MR. JUSTICE WHITE comprehensively reviewed the law of trusts as that law stood

in Georgia in 1905, prior to the enactment of §§ 69–504 and 69–505 of the Georgia Code. He concluded that prior to the enactment of those statutes "it would have been extremely doubtful" whether Georgia law authorized "a trust for park purposes when a portion of the public was to be excluded from the park." 382 U. S., at 310. Sections 69–504 and 69–505 removed this doubt by expressly permitting dedication of land to the public for use as a park open to one race only. Thereby Georgia undertook to facilitate racial restrictions as distinguished from all other kinds of restriction on access to a public park. *Reitman* compels the conclusion that in doing so Georgia violated the Equal Protection Clause.

In 1911, only six years after the enactment of §§ 69–504 and 69–505, Senator Bacon, a lawyer, wrote his will. When he wrote the provision creating Baconsfield as a public park open only to the white race, he was not merely expressing his own testamentary intent, but was taking advantage of the special power Georgia had conferred by §§ 69–504 and 69–505 on testators seeking to establish racially segregated public parks. As MR. JUSTICE WHITE concluded in *Evans* v. *Newton*, " 'the State through its regulations has become involved to such a significant extent' in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction 'must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment.' " 382 U. S., at 311. This state-encouraged testamentary provision is the sole basis for the Georgia courts' holding that Baconsfield must revert to Senator Bacon's heirs. The Court's finding that it is not the State of Georgia but "a private party which is injecting the racially discriminatory motivation" inexcusably disregards the State's role in enacting the statute without which Senator Bacon could not have written the discriminatory provision.

This, then, is not a case of private discrimination. It is rather discrimination in which the State of Georgia is "significantly involved," and enforcement of the reverter is therefore unconstitutional. Cf. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); *Robinson* v. *Florida,* 378 U. S. 153 (1964).

I would reverse the judgment of the Supreme Court of Georgia.

BREEN *v.* SELECTIVE SERVICE LOCAL BOARD NO. 16 ET AL.

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

No. 65. Argued November 19, 1969—Decided January 26, 1970

Petitioner, an undergraduate student with a student deferment, surrendered his draft registration card, solely to protest the war in Vietnam, at a public gathering. His local draft board declared him "delinquent" for failing to have the card in his possession, and reclassified him I–A (available for military service). He filed this suit in the District Court seeking to enjoin possible induction into the Armed Forces, on the ground that his delinquency reclassification was invalid. The respondent local board moved to dismiss for want of jurisdiction, relying on § 10 (b) (3) of the Military Selective Service Act of 1967, which provides that there shall be no pre-induction judicial review of a registrant's classification or processing, such review being limited to a defense in a criminal prosecution. The District Court granted the motion to dismiss and the Court of Appeals affirmed. *Held:*

1. Section 10 (b) (3) of the Act does not bar pre-induction judicial review of petitioner's delinquency reclassification which deprived him of a deferment to which he was entitled under the Act. *Oestereich* v. *Selective Service Board,* 393 U. S. 233. Pp. 463–468.

2. Section 6 (h) (1) of the Act makes undergraduate student deferments mandatory where the student, as here, has met the statutory criteria, and the reference in that section to "rules and regulations" only authorizes such additional administrative procedures as necessary to ensure that qualified students are given deferment. P. 464.

3. Congress did not authorize induction by local boards as a penalty for violations of administrative regulations. *Gutknecht* v. *United States, ante,* p. 295. Pp. 465–466.

4. In the context of this case there is no meaningful distinction between "exemption" and "deferment," and a registrant with either type of classification cannot be inducted. Pp. 466–467.

406 F. 2d 636, reversed and remanded.

Emanuel Margolis argued the cause for petitioner. With him on the brief were *Lawrence P. Weisman* and *Melvin L. Wulf.*

Assistant Attorney General Ruckelshaus argued the cause for respondents. With him on the brief were *Attorney General Mitchell, Assistant Attorney General Wilson, Morton Hollander,* and *Ralph A. Fine.*

George Soll and *Joseph B. Robison* filed a brief for the American Jewish Congress as *amicus curiae* urging reversal.

MR. JUSTICE BLACK delivered the opinion the Court.

This case raises a question concerning the right of a young man ordered to report for induction into the Armed Forces to challenge the legality of that order prior to reporting for duty. Petitioner Breen, while enrolled in the Berklee School of Music in Boston, Massachusetts, was given a II–S student classification by his local draft board, and deferred from military service pursuant to the provisions of the Military Selective Service Act of 1967, 81 Stat. 100, 50 U. S. C. App. § 451 *et seq.* (1964 ed. and Supp. IV). According to an agreed stipulation of facts, in November 1967 he surrendered his draft registration card to a minister at a public gathering "for the sole purpose of protesting United States involvement in the war in Vietnam." Shortly thereafter his local draft board declared he was "delinquent" for failing to have his draft card in his possession and at the same time reclassified him I–A—available for military service.[1] He appealed this reclassification to the appropriate Selective Service Appeal Board, and while that appeal was pending filed this suit

[1] This reclassification was undertaken pursuant to 32 CFR § 1642.12.

in the United States District Court in February 1968, seeking an injunction against any possible induction into the Armed Forces on the ground that his delinquency reclassification was invalid. The respondent local board moved to dismiss the suit for want of jurisdiction, relying on § 10 (b)(3) of the Act which provides that:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ." [2] 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. IV).

The District Court granted the motion to dismiss and Breen appealed that decision to the Court of Appeals.[3] While the appeal was pending, we rendered our decision in *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233 (1968), holding that § 10 (b)(3) did not bar pre-induction judicial review in the circumstances presented in that case. Although Breen argued that *Oestereich* controlled his own case, the Court of Appeals affirmed the District Court's dismissal of the suit, with one judge dissenting, holding that *Oestereich* did not cover this case and § 10 (b)(3) therefore required dismissal of the suit. 406 F. 2d 636 (C. A. 2d Cir. 1969). We granted

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[2] Although this provision would appear to preclude judicial review by habeas corpus after the registrant submitted to induction, we have already construed the statute to allow such review. *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233, 235, 238 (1968).

[3] During the pendency of that appeal the Appeal Board upheld the reclassification and the local board then ordered Breen to report for induction. The induction order has been stayed pending decision in this case.

a petition for certiorari, 394 U. S. 997 (1969), and, because we conclude that *Oestereich* does control this case, we reverse the judgment of the Court of Appeals.

In *Oestereich* a student preparing for the ministry surrendered his draft registration card in protest against the war in Vietnam and was reclassified as a "delinquent." He then filed suit seeking to enjoin his induction, claiming that he was being inducted contrary to the clear statutory requirement that students preparing for the ministry "shall be exempt from training and service" under the Act, 50 U. S. C. App. § 456 (g). We held in that case that since Congress had unambiguously said that students preparing for the ministry were not to be drafted and, since there was no indication in the statute that such exemptions could be denied for "delinquency," Oestereich's induction was unlawful and in such a case § 10 (b)(3) would not be interpreted to bar preinduction judicial review and thereby force the registrant to submit to an illegal induction or risk the possibility of a criminal prosecution to regain his exempt status.

In the present case petitioner Breen argues that he, like Oestereich, should not be inducted and he relies on § 6 (h)(1) of the Act, which provides that:

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment." 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. IV).

In his complaint Breen alleged that he was a 20-year-old student and argued that he was clearly qualified for a student deferment. The Government has never con-

tested Breen's factual allegations concerning his student status, nor has it argued that he is not qualified for such a deferment for any reason except the alleged "delinquency." As in *Oestereich,* we do not find any indication that Congress intended to allow the draft boards to deprive otherwise qualified students of their deferments for the reasons relied upon in this case.

In concluding that *Oestereich* did not control this case, the Court of Appeals felt that the reference in § 6 (h)(1) to "such rules and regulations as [the President] may prescribe" was an indication that Congress authorized revocation of student deferments for violations of the delinquency regulations. 406 F. 2d, at 638. That conclusion must be rejected for several reasons. The explicit language of the Act provides that the President "shall" provide for the deferment of undergraduate students except as otherwise provided by the terms of the Act itself, and Congress then set forth the specific conditions that a student must meet to qualify for such a deferment.[4] The reference to "rules and regulations" is clearly intended only to authorize such additional administrative procedures as the President may find necessary to insure that all qualified students are given the deferment that Congress provided in § 6. There is nothing in the language of the Act itself that indicates a congressional desire to allow the President to add to or subtract from the factors specified in the statute

[4] The Act also provides that student deferment status may be lost under certain conditions.

"A deferment granted to any person under [this provision] shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs." 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. IV). There is no contention raised here that Breen has lost his deferred status for any of these statutory reasons.

for determining when students would be deferred.[5] The legislative history of § 6 (h)(1) clearly indicates that Congress intended that only the conditions specified in that section need be met to warrant a student deferment. Prior to the 1967 Act the draft law stated that student deferments were provided only according to presidential regulation and in practice such deferments were subject to the discretion of the local draft boards.[6] The committee reports and floor debates on the 1967 Act show that a primary purpose of the amendments was to eliminate this local option and provide clear, uniform standards for undergraduate student deferments.[7] When Congress thus acted to replace discretionary standards with explicit requirements for student deferments, it did not specifically provide or in any way indicate that such deferred status could be denied because the registrant failed to possess his registration certificate.[8] Finally, any contention that "delinquency" induction is proper in this case must be

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[5] The Act does allow the President to restrict student deferments on a finding that the needs of the Armed Forces require such action, 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. IV), but he has not made any such finding at this time.

[6] See Selective Service Act of 1948, § 6 (h), 62 Stat. 611, as amended. The regulations promulgated pursuant to this authority permitted student deferments in the discretion of the local boards with certain suggested guidelines. See 32 CFR §§ 1622.25, 1622.25a (1967 ed.).

[7] H. R. Rep. No. 267, 90th Cong., 1st Sess., 25–26 (1967); H. R. Conf. Rep. No. 346, 90th Cong., 1st Sess., reprinted in U. S. Code Cong. & Admin. News, 90th Cong., 1st Sess., 1352, 1356–1359 (1967); 113 Cong. Rec. 14093, 14095, 16434 (1967).

[8] The suggestion that the fleeting reference to "delinquents" in § 6 (h)(1) of the Act, 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. IV), authorizes delinquency inductions must be rejected for the reasons set forth in *Oestereich, supra,* at 236–237, and in *Gutknecht* v. *United States, ante,* at 302.

rejected for the reasons set forth in our decision in *Gutknecht* v. *United States, ante,* p. 295, holding that induction pursuant to the delinquency regulations has not been authorized by Congress.

The Attorney General advances another argument for distinguishing this case from *Oestereich, supra.* He points out that Oestereich met the requirements for a statutory "exemption" from military service, while Breen is at best qualified only for a statutory "deferment." On the basis of this observation he urges that the provisions of § 10 (b)(3) preclude pre-induction judicial review in all cases of deferments and that *Oestereich* provides an exception only in certain cases where an exemption is claimed. We fail to see any relevant practical or legal differences between exemptions and deferments. The effect of either type of classification is that the registrant cannot be inducted as long as he remains so classified. Congress has specifically said that the only persons who may be inducted into the Armed Forces are those "who are liable for such training and service and who at the time of selection are registered and classified, *but not deferred or exempted.*" 50 U. S. C. App. § 455 (a)(1) (1964 ed., Supp. IV).[9] (Emphasis added.) Thus it is clear that the crucial distinction in draft classifications is between individuals presently subject to induction and those who are not so subject, either because of deferment or exemption.

The Attorney General also argues that a rational distinction exists in the statutory scheme between deferments which merely postpone the time when a registrant will serve and exemptions which place the registrant "outside the manpower pool." Brief for the Respondents 20–21. A careful reading of the entire Act indicates that no such consistent distinction is preserved. Con-

[9] This statutory directive is implemented by 32 CFR § 1631.7.

gress has provided that "[n]o . . . exemption or deferment . . . shall continue after the cause therefor ceases to exist." 50 U. S. C. App. § 456 (k). Many of the "exemptions" are not absolute, as the Attorney General implies, but conditioned on certain factors. Thus an exempt ministerial student like Oestereich will lose that exempt status if he withdraws from study in preparation for the ministry. Similarly exempt veterans can be inducted into the Armed Forces if Congress declares a war or national emergency. 50 U. S. C. App. § 456 (b). On the other hand there is absolutely no assurance that an individual who is simply deferred will only have his military obligation postponed. So long as a registrant remains in a deferred classification he cannot be inducted, and deferment past the maximum age of draft liability would effectively exempt the registrant from compulsory military service. Although a registrant like Breen cannot be deferred as an undergraduate student past his 24th birthday,[10] he may continue to be deferred on the basis of extreme hardship to dependents or employment in the national interest. 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. IV). There is thus no statutory scheme to permanently exempt certain individuals while only deferring service for others. Both deferments and exemptions accomplish the same congressional purpose, that of not inducting certain registrants at a particular time.

We are consequently unable to distinguish this case from *Oestereich.* In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a "clear departure by the Board from its statutory mandate," *Oestereich, supra,* at 238, and in both cases § 10 (b)(3)

[10] See n. 4, *supra.*

of the Act should not have been construed to require the registrants to submit to induction or risk criminal prosecution to test the legality of the induction order. The judgment below is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

While I fully agree with today's holding that pre-induction review is available to the petitioner here, and subscribe to much of the Court's opinion, I would rest the holding on a different footing.

The Court's opinion here, as in *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233 (1968), appears to make the availability of pre-induction review turn on the lawfulness of the draft board's action or, to put it another way, on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification. On the other hand, under the test put forward in my separate opinion in *Oestereich,* 393 U. S., at 239–245, the availability of pre-induction review turns, not on what amounts to an advance decision on the merits, but rather on the nature of the challenge being made.

In *Oestereich,* the registrant sought pre-induction review of claims that the delinquency procedure employed by the board was "not authorized by any statute," was "inconsistent with his statutory exemption," and was "facially unconstitutional," 393 U. S., at 239. I pointed out that judicial scrutiny of such legal contentions, unlike the review of "factual and discretionary decisions" pertaining to a board's classification of a particular registrant, presented no "opportunity for protracted delay" in the operations of the Selective Service

System—the primary congressional concern in enacting § 10 (b)(3), 393 U. S., at 241. To avoid the "serious constitutional problems" implicit in depriving a registrant of "his liberty without the prior opportunity to present to *any* competent forum" his claims that the delinquency procedure was invalid, 393 U. S., at 243, I therefore interpreted § 10 (b)(3) not to preclude pre-induction judicial review. Viewed from the perspective of my opinion in *Oestereich,* this case is indistinguishable, for the petitioner here, as in *Oestereich,* makes legal challenges to the delinquency procedure that do not require review of a factual and discretionary decision of a board.

As to the merits of petitioner's challenges, I agree, for the reasons stated by the majority, that it makes no difference that through the operation of the delinquency regulations Breen lost a II–S student deferment whereas Oestereich lost a IV–D exemption as a divinity student preparing for the ministry. More generally, the delinquency regulations used here have now been held to be unauthorized by statute, *Gutknecht* v. *United States, ante,* p. 295.

On this basis, I concur in the reversal of the judgment below.

MR. JUSTICE BRENNAN, concurring.

In *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968), I joined MR. JUSTICE STEWART's dissent expressing the view that § 10 (b)(3) was designed to permit judicial review of draft classifications only in connection with criminal prosecutions or habeas corpus proceedings. 393 U. S., at 245. But continued adherence to that construction is foreclosed by the Court's holding in that case that § 10 (b)(3) did not preclude pre-induction judicial review of the case of a registrant entitled to a statutory

exemption. Therefore, because I too "fail to see any relevant practical or legal differences between exemptions and deferments," I join the opinion of the Court.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring in part.

For the reasons expressed by MR. JUSTICE BRENNAN, I join the opinion of the Court insofar as it holds that the District Court had jurisdiction to entertain the petitioner's suit and should have granted him the injunction he sought. I do not, however, join the Court's opinion insofar as it holds that the delinquency regulations have not been authorized by Congress. See *Gutknecht* v. *United States*, *ante*, p. 314 (concurring in judgment).

Syllabus

GOLDSTEIN, AKA PIETRARU, ET AL. *v.* COX ET AL.

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

No. 66. Argued November 17, 1969—Decided January 26, 1970

Section 2218 of the New York Surrogate's Court Procedure Act authorizes the surrogate to order an alien's share of a New York estate paid into court when it appears that the alien "would not have the benefit or use or control of the money or property" constituting the share. Appellants, who live in Romania and are beneficiaries of New York decedents' estates and whose shares were paid into court for their benefit under § 2218, filed a complaint challenging its constitutionality and seeking temporary and permanent injunctive relief against its operation. In the three-judge District Court which was convened, appellants moved for summary judgment, contending that under *Zschernig* v. *Miller*, 389 U. S. 429, § 2218 is unconstitutional on its face and as applied, and requesting "the relief prayed for in the complaint." Appellants filed no separate application for a preliminary injunction and have not urged the appropriateness of temporary relief for the release of the court-held funds. The District Court denied summary judgment but did not dismiss the complaint as urged by appellees, surrogates of several New York counties. Appellants appealed to this Court from the order denying summary judgment, claiming that this Court has jurisdiction by virtue of 28 U. S. C. § 1253, which in pertinent part provides for an appeal "to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action . . . required by an Act of Congress to be heard and determined by a district court of three judges." *Held:* The only interlocutory orders that this Court has power to review under § 1253 are those granting or denying *preliminary* injunctions, and therefore this Court lacks jurisdiction to review the District Court's interlocutory order, which involved no question of preliminary injunctive relief. Pp. 475–479.

299 F. Supp. 1389, appeal dismissed.

John R. Vintilla argued the cause for appellants. With him on the brief were *Emanuel Eschwege* and *Novak N. Marku.*

Daniel M. Cohen, Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

Martin Popper filed briefs for Wolf Popper Ross Wolf & Jones as *amicus curiae.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellants are beneficiaries of New York decedents' estates who live in Romania. Their shares of these estates have not been distributed to them, but have been paid into court for their benefit under § 2218 of the New York Surrogate's Court Procedure Act. Section 2218 authorizes the surrogate to order an alien's share of a New York estate paid into court when it appears that the alien "would not have the benefit or use or control of the money or other property" constituting the share.[1]

In 1966, appellants filed a complaint in the United States District Court for the Southern District of New York, challenging what is now § 2218 on the grounds that it denied them due process and equal protection, that it unconstitutionally intruded upon the Federal Government's conduct of foreign relations, and that it conflicted

[1] Section 2218 (Supp. 1969), formerly § 269–a of the New York Surrogate's Court Act, reads as follows:

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon

with federal regulations permitting the payment of federal funds to persons in Romania. Appellants prayed for both temporary and permanent injunctive relief against further operation of the statute, and therefore requested the impaneling of a three-judge court. A single district judge declined to request a three-judge court on the ground that the constitutional questions raised were frivolous, and the Court of Appeals for the Second Circuit affirmed. This Court granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in the light of *Zschernig* v. *Miller,* 389 U. S. 429, decided the same day. 389 U. S. 581 (1968). On remand, the Court of Appeals reversed the original order of the District Court, and remanded the case for consideration by a three-judge court. 391 F. 2d 586 (C. A. 2d Cir. 1968).

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order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

"(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

"2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

"3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

Appellants then moved for summary judgment, urging that § 2218 was unconstitutional, either on its face or as applied, under the principles of *Zschernig* v. *Miller, supra.* In their motion they requested "the relief demanded in the complaint." They accompanied their motion with an affidavit, largely consisting of a memorandum of law arguing that the application of § 2218 by the New York courts ran afoul of *Zschernig.*

Appellees, surrogates of several New York counties, opposed the motion for summary judgment and further requested that the action be dismissed. In their accompanying affidavit, they argued that § 2218 was constitutional on its face and that there was at least a triable issue of fact whether it was being constitutionally applied.

The District Court denied summary judgment, but did not dismiss the action. 299 F. Supp. 1389 (D. C. S. D. N. Y. 1968). In its opinion it held that § 2218 was not unconstitutional on its face under *Zschernig,* and that the only reported post-*Zschernig* construction of the statute, *Matter of Leikind,* 22 N. Y. 2d 346, 239 N. E. 2d 550 (1968), app. docketed, No. 68, O. T. 1969, did not show unconstitutional application.

From the order denying summary judgment, appellants took an appeal to this Court, claiming that we had jurisdiction under 28 U. S. C. § 1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Appellees did not oppose jurisdiction, but rather filed a motion to affirm. We noted probable jurisdiction, 394

U. S. 996 (1969), and received briefs and heard argument confined to the merits. Further examination of the case since oral argument has for the first time raised the question of our jurisdiction, and we have concluded that we lack jurisdiction of the appeal.

A preliminary question is whether the District Court's order denying summary judgment to a plaintiff who has requested injunctive relief is "an order . . . denying . . . an . . . injunction" within the meaning of § 1253. In construing the analogous provision giving the courts of appeals jurisdiction to hear appeals from interlocutory orders granting or denying injunctions, 28 U. S. C. § 1292 (a)(1), this Court has ruled that a denial of summary judgment is not an appealable order denying an injunction, at least where the denial is based upon the existence of a triable issue of fact. *Switzerland Assn.* v. *Horne's Market,* 385 U. S. 23 (1966).[2] However we need not decide whether the same treatment should be given to denials of summary judgment under § 1253, for we conclude that the only interlocutory orders that we have power to review under that provision are orders granting or denying *preliminary* injunctions. Since in our view

[2] The Second Circuit originally took the view that denial of summary judgment, where an injunction had been prayed for, was an appealable order denying an injunction under § 1292 (a)(1), *Federal Glass Co.* v. *Loshin,* 217 F. 2d 936 (1954) (L. Hand, J.; Frank, J., concurring; Clark, J., dissenting). This was contrary to the majority view that such orders were not appealable, a view best represented by *Morgenstern Chemical Co.* v. *Schering Corp.,* 181 F. 2d 160 (C. A. 3d Cir. 1950). The Second Circuit, even before this Court's decision in *Switzerland Assn., supra,* had reversed its position. *Chappell & Co.* v. *Frankel,* 367 F. 2d 197 (1966) (en banc). See also 6 J. Moore, Federal Practice ¶ 56.21 [2], at 2791–2792 (2d ed. 1966).

In *Switzerland Assn., supra,* this Court left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the existence of a triable issue of fact.

the District Court here decided no question of preliminary injunctive relief, we cannot review its order.

Section 1253, along with the other provisions concerning three-judge district courts, 28 U. S. C. §§ 2281–2284 (a collectivity hereinafter referred to as the Three-Judge Court Act), derives from § 266 of the Judicial Code of 1911, 36 Stat. 1162, which in turn derived from § 17 of the Mann-Elkins Act of 1910, 36 Stat. 557. As originally enacted, the Three-Judge Court Act required that no *interlocutory* injunction restraining the operation of any state statute on constitutional grounds could be issued, except by a three-judge court, and provided that "[a]n appeal may be taken directly to the Supreme Court of the United States from the order granting or denying . . . an interlocutory injunction in such case." 36 Stat. 557. The Act grew out of the public furor over what was felt to be the abuse by federal district courts of their injunctive powers in cases involving state economic and social legislation. While broad and radical proposals were made to deal with the problem, including proposals to deprive the federal courts of all jurisdiction to enjoin state officers, Congress compromised on a provision that would deal with what was felt to be the worst abuse—the issuance of temporary restraining orders and preliminary injunctions against state statutes, either *ex parte* or merely upon affidavits, and subject to limited and ineffective appellate review. See *Phillips* v. *United States,* 312 U. S. 246, 250 (1941); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 803–810 (1934); Note, The Three-Judge District Court and Appellate Review, 49 Va. L. Rev. 538, 539–543 (1963).

Until 1925, the Act required a three-judge court only on application for an interlocutory (or, as we would say, preliminary) injunction. In that year, the Act was amended to carry the three-judge requirement forward to the issuance of a permanent injunction, 43 Stat. 938,

"in order to avoid the anomalous result of having a single judge review the decree of three judges at the final hearing." Note, 49 Va. L. Rev., *supra,* at 543. The provision governing appeal to this Court was correspondingly amended to allow direct appeal from "a final decree granting or denying a permanent injunction . . . ." 43 Stat. 938.

Thus, as of 1925, the provisions of the Three-Judge Court Act relating to appeal to this Court, set out in the Judicial Code, as amended, read as follows:

> "An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an *interlocutory injunction* in such case. . . ." 36 Stat. 557.
>
> ". . . and a direct appeal to the Supreme Court may be taken from a *final decree* granting or denying a permanent injunction in such suit." 43 Stat. 938. (Emphasis added.)

As clearly as language can, this language confined this Court's review of three-judge court action to (1) final judgments granting or denying permanent injunctions, and (2) interlocutory orders granting or denying preliminary injunctions.

In 1948, the present Judicial Code was enacted, including § 1253 as it now stands. As the language now reads, the Court has appellate jurisdiction over any three-judge court order "granting or denying . . . an interlocutory or permanent injunction." On its face, this language is subject to the construction that interlocutory orders denying permanent as well as preliminary injunctions can be appealed to this Court. However, such a construction would involve an expansion of this Court's mandatory appellate jurisdiction over that granted by the clear language of the prior statute. The Reviser's Note to § 1253 indicates no intent to make such a sub-

stantive change; indeed, it refers to the section as merely a consolidation of prior provisions in Title 28, themselves derived from the statute as adopted and amended by Congress.[3]

This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since "any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." *Phillips* v. *United States, supra,* at 250. See *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 375 (1949); *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 321 (1926). That canon of construction must be applied with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court. In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored, *Switzerland Assn.* v. *Horne's Market, supra,* at 24, and this Court above all others must limit its review of interlocutory orders. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258 (1916). In light of these factors, and the history of the statute as set out above, we cannot but conclude that our jurisdiction over interlocutory orders under § 1253 is confined to orders granting or denying a preliminary injunction.

As we read the record, this is not such an order. Appellants did, in their original complaint, pray for preliminary as well as permanent injunctive relief. And in moving for summary judgment, they requested "the relief demanded in the complaint." However, they took

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[3] The 1948 revision of the Judicial Code did make one substantive change in the Three-Judge Court Act; it eliminated the requirement, imposed by the 1925 amendment, that a three-judge court should be required to hear an application for a permanent injunction only where an application for a preliminary injunction had originally been made. Reviser's Note, 28 U. S. C. § 2281.

no practical step toward obtaining such relief. They filed no separate application for a preliminary injunction. In none of their papers, in the District Court or in this Court, have they urged the appropriateness of temporary relief. The District Court in its opinion in no way adverted to the possibility of such relief being granted. Indeed, in the nature of the case, preliminary injunctive relief could never have been a practical possibility. Appellants are seeking the release of funds held in court in New York to beneficiaries outside the jurisdiction of the United States. Any injunction granting relief of this sort must necessarily have been final in its effect, and could hardly have been awarded in the absence of a final determination on the merits in appellants' favor. Since the order here in question is an interlocutory one, and is not an order granting or denying a preliminary injunction, we must dismiss the appeal from that order for want of jurisdiction.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

If summary judgment [1] had been granted to appellants there would be no question but that this Court would have jurisdiction under 28 U. S. C. § 1253 over an appeal from that judgment, as it would constitute an "order granting . . . an interlocutory or permanent injunction." Similarly, there seems little room for argument that the denial of summary judgment to appellants constitutes an order "denying . . . an interlocutory or permanent injunction," since such injunctive relief was requested

[1] The appellants' motion for summary judgment was as follows: "Plaintiffs move the court as follows:

"1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled

in appellants' complaint.[2] The majority opinion relies on *Switzerland Assn.* v. *Horne's Market,* 385 U. S. 23, as authority for dismissing this appeal for want of jurisdiction under 28 U. S. C. § 1253. In that case, however, the denial of summary judgment was based solely on the existence of a triable issue of fact; [3] the summary judg-

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to a judgment as a matter of law; and, especially, in the light of *Zschernig* v. *Miller,* 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

"The Affidavit of John R. Vintilla is attached hereto in support of this motion."

[2] The "relief demanded in the complaint" included:

"That [the District Court] issue *a permanent injunction* forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly situated the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that the defendants, and each of them, their agents, and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from these plaintiffs and others similarly situated.

"That *pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction,* restraining the defendants and each of them, their agents, and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled." (Emphasis added.)

[3] *Switzerland Assn.* involved an action for unfair competition under the federal trademark laws, 60 Stat. 427, 15 U. S. C. § 1051 *et seq.* The sole claim was that defendant's actions in selling cheese labeled as "imported Swiss cheese" which had been imported into the United States from a country other than Switzerland were illegal under the trademark laws. The defense was that "imported Swiss cheese" had come to have an accepted meaning in the trade of Swiss cheese that had been imported from any country. The District Court found that the meaning in the trade of "imported Swiss cheese" was an issue of fact as to which there was a genuine dispute, and therefore denied the plaintiffs' motion for summary judgment.

The request for injunctive relief therefore had to await a jury trial on the facts.

ment did not concern in any way the merits of the case. This case involves more. Appellants claimed that § 2218 of the New York Surrogate's Court Procedure Act was unconstitutional on its face. The denial of summary judgment constituted a rejection of this claim on the merits, as well as a denial of injunctive relief based on that claim. On this basis, I would find jurisdiction under 28 U. S. C. § 1253 to decide this appeal on the merits.

SIGLER, WARDEN *v.* PARKER

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

No. 743. Decided January 26, 1970

Respondent, who was convicted of murder in 1956 in a Nebraska state court, petitioned the federal District Court for a writ of habeas corpus. That court, relying on state-court findings in a 1965 post-conviction proceeding, concluded that respondent's confessions were voluntary and dismissed the petition. The Court of Appeals reversed, finding that the trial judge had not found the confessions voluntary before admitting them into evidence, contrary to *Jackson* v. *Denno,* 378 U. S. 368; that this procedural violation had tainted all later findings of voluntariness; and, after examining the record, that the confessions were involuntary. *Held:* When a federal court finds a *Jackson* v. *Denno* error in a state proceeding, it must allow the State a reasonable time to make an error-free determination on the voluntariness of the confessions.

Certiorari granted; 413 F. 2d 459, vacated and remanded.

Clarence A. H. Meyer, Attorney General of Nebraska, and *Ralph H. Gillan,* Assistant Attorney General, for petitioner.

Richard J. Bruckner for respondent.

PER CURIAM.

In 1956 respondent was found guilty in a Nebraska court of first-degree murder; he was sentenced to life imprisonment. After exhausting his post-conviction remedies under Nebraska law, respondent petitioned the United States District Court for the District of Nebraska for a writ of habeas corpus. After an evidentiary hearing, the District Court dismissed the petition. One of the issues presented to the District Court was the voluntariness of confessions used against respondent at his trial. Relying on the findings of the state court in a

1965 post-conviction proceeding, the District Court concluded that the confessions were voluntarily given and hence admissible. The Court of Appeals for the Eighth Circuit, without reaching the other issues before it, reversed on the ground that respondent's confessions were involuntary. 413 F. 2d 459 (1969). The court first found that the opinion of the Nebraska Supreme Court affirming respondent's conviction indicated that the trial judge had not found the confessions voluntary before admitting them into evidence. The court then found that this violation of the procedural rule of *Jackson* v. *Denno,* 378 U. S. 368 (1964), had tainted all subsequent findings of voluntariness in the Nebraska courts and in the District Court. Since it seemed "unlikely that either party has any additional substantial evidence on the voluntariness issue," 413 F. 2d, at 463, the Court of Appeals chose to evaluate the confessions itself rather than to remand the case to allow the State to make an untainted determination on the voluntariness question. After examining the record of the trial and the post-conviction proceedings, the court held that the confessions could on no view of the evidence be deemed voluntary. On the basis of this determination, the court directed that the writ of habeas corpus should be granted unless within a reasonable time respondent was given a new trial from which the confessions were excluded.

We agree with the Court of Appeals that the record of proceedings in the trial court and the opinion of the Nebraska Supreme Court affirming respondent's conviction do not justify a conclusion that the trial judge made his own determination of voluntariness as required by *Jackson* v. *Denno, supra.* See *Sims* v. *Georgia,* 385 U. S. 538 (1967). In addition, we accept the Court of Appeals' determination that all subsequent findings of voluntariness were made at least in part in reliance on the first, procedurally defective, determination of the

admissibility of the confessions.* However, as indicated in our opinion in *Jackson* v. *Denno, supra,* at 391–396, the appropriate remedy when a federal court finds a *Jackson* v. *Denno* error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. Hence it was error for the Court of Appeals to pass judgment on the voluntariness of respondent's confessions without first permitting a Nebraska court to make such an evaluation uninfluenced by the apparent finding of voluntariness at the 1956 trial.

The writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

This Court in *Jackson* v. *Denno,* 378 U. S. 368 (1964), held over my dissent that the question of the voluntariness of a defendant's alleged confession must be made by the trial judge in a separate proceeding prior to the submission of the confession to the jury, and that insofar

*After a hearing in 1965 under the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29–3001 to 29–3004 (Cum. Supp. 1967), the state trial court found that the record and exhibits indicated that the confessions were voluntary. The Court of Appeals may have deemed this conclusion unsatisfactory because the state court's finding on the voluntariness question was followed immediately by a reference to the original determination, at trial and on appeal from the conviction, as to the admissibility of the confessions. The Court of Appeals' view is supported by the fact that the Nebraska Supreme Court relied heavily on the apparent finding of voluntariness at the original trial and on appeal in affirming the trial court's denial of collateral relief. *State* v. *Parker,* 180 Neb. 707, 144 N. W. 2d 525 (1966).

as federal questions concerning coercion under the Fifth Amendment were involved the decision of the trial judge forecloses the jury from passing upon the voluntariness question. In my dissent I said:

> "Whatever might be a judge's view of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is, in my judgment, entitled to hear and determine voluntariness of a confession along with other factual issues on which its verdict must rest." *Id.*, at 401.

I adhere to that dissent and hope that at some future time this Court will restore to defendants their right to have the voluntariness of alleged confessions determined by the jury as the Sixth Amendment requires.

I would not object if the Court were remanding the case for a new and complete retrial in which a Nebraska jury of the defendant's peers could determine after hearing the evidence whether the alleged confessions had been voluntarily given. Clearly, when a jury passes upon the truthfulness of a confession, as it must do when a confession is offered, the jury must also be allowed to determine whether the confession was caused by police coercion or whether it was freely given. *Jackson* v. *Denno* thus took away a defendant's traditional right to have the jury decide for itself whether a confession was tainted and probably untrue because it was coerced. The vital importance of this issue to defendants tried in this country is a sufficient reason for me to continue my protest against the Court's holding in *Jackson* v. *Denno*.

MR. JUSTICE DOUGLAS, dissenting.

Respondent was convicted of murder and he was sentenced to life imprisonment on June 2, 1956, nearly 14 years ago. On appeal, his conviction was affirmed.

Parker v. *State,* 164 Neb. 614, 83 N. W. 2d 347, and we denied certiorari, 356 U. S. 933.

In 1962 respondent filed a petition for writ of error *coram nobis* in the trial court which was dismissed. The dismissal was affirmed on appeal. *Parker* v. *State,* 178 Neb. 1, 131 N. W. 2d 678.

In 1963 respondent sought post-conviction relief in the Nebraska court, alleging that the confessions obtained from him and used at the trial were involuntary and in violation of the Federal Constitution. The court after an evidentiary hearing denied relief and the Supreme Court of Nebraska affirmed. *State* v. *Parker,* 180 Neb. 707, 144 N. W. 2d 525.

In 1966 respondent filed the present petition for habeas corpus in the Federal District Court, again challenging the voluntariness of the confessions. Again a full evidentiary hearing was held and the petition was denied. That was on June 27, 1968. On July 18, 1969, the Court of Appeals reversed, 413 F. 2d 459, saying:

> "The interest of justice would not be served by remanding this case for a hearing upon the voluntariness of the confession[s] if the factual background in the present case is such that in event the state court again found the confession[s] voluntary, a determination that such finding was not warranted would be required. In both the state and federal post conviction hearings reliance was placed upon the extensive record made on voluntariness at the trial, and no additional evidence was introduced. Thus it would seem unlikely that either party has any additional substantial evidence on the voluntariness issue." *Id.,* at 463.

The issue of voluntariness *vel non* of the confessions is a much-plowed field. If the federal courts were coming to this question without prior state opportunity to

act, I would agree that the federal courts should not act until the state tribunal first had the opportunity to try the issue. Moreover, it would be more appropriate, as MR. JUSTICE BLACK says, to remand the case so that there might be a new trial before a jury. But if this issue is to be resolved in a habeas corpus proceeding, where traditionally a jury does not sit,* then we should affirm the Court of Appeals. The issue as to the voluntary character of the confessions has been hotly contested and the facts thoroughly exposed in the state proceedings. And the conclusion by the Court of Appeals that the confessions were not voluntary is a responsible one. Moreover, the observation of the Supreme Court of Nebraska that there is no evidence of "a real miscarriage of justice," *State* v. *Parker,* 180 Neb., at 714, 144 N. W. 2d, at 529, though popular in some legal circles, is irrelevant. For under our presumably civilized constitutional procedures, a conviction on a coerced confession, even of one whom we despise, is intolerable.

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*The rule that there is no right to jury trial in habeas corpus cases has been codified in the federal statute, 28 U. S. C. § 2243:

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Section 2243 does not preclude the use of an advisory jury pursuant to Fed. Rule Civ. Proc. 39 (c). See 5 J. Moore, Federal Practice 265–269 (1969); cf. W. Church, A Treatise on the Writ of Habeas Corpus 256 (2d ed. 1893). Yet the use of an advisory jury is discretionary only. See *Barry* v. *White,* 62 App. D. C. 69, 70, 64 F. 2d 707, 708 (1933). "[T]he court should not utilize an advisory jury, if to do so would delay the hearing of the habeas corpus proceeding; and as a matter of sound practice the advisory jury should be used, if at all, only in the rare and exceptional case." Moore, *supra,* at 268–269.

SHAPIRO, WELFARE COMMISSIONER OF CONNECTICUT *v.* DOE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 805. Decided January 26, 1970

302 F. Supp. 761, appeal dismissed.

Robert K. Killian, Attorney General of Connecticut, and *Francis J. MacGregor,* Assistant Attorney General, for appellant.

Lee A. Albert for appellee.

PER CURIAM.

The motion of the appellee for leave to proceed *in forma pauperis* is granted. The motion to dismiss is also granted and the appeal is dismissed for failure to docket the case within the time prescribed by Rule 13.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In this case a three-judge United States District Court invalidated a Connecticut state welfare regulation requiring the mother of an illegitimate child to reveal the name of the child's father as a precondition to receiving welfare assistance on the ground that the regulation imposed an additional condition of welfare eligibility not required or authorized by the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. §§ 601–610 (1964 ed. and Supp. IV). The case comes to this Court on direct appeal taken by Connecticut welfare officials pursuant to the authorization in 28 U. S. C. § 1253. There can be no doubt about the fact that this appeal presents a federal question which should be decided here and that

this Court has jurisdiction over the appeal since appellee's statutory claim was initially joined with a constitutional attack upon the Connecticut regulation. *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73 (1960). Yet, the Court today dismisses this appeal on the ground that it was not timely docketed in accordance with Rule 13 (1) of the Rules of the United States Supreme Court. Rule 13 (1) provides that in cases appealed pursuant to 28 U. S. C. § 1253 the time limit for docketing the appeal shall be 60 days from the filing of the notice of the appeal. In this case the notice of appeal was properly filed pursuant to 28 U. S. C. § 2101 (b) on September 2, 1969. The 60-day time limit thus expired on November 1, 1969, but appellants did not docket the appeal until November 3, 1969, two days later, one of which was a Sunday. It is because of this minor and essentially technical infraction of its own Rules that the Court today dismisses this important appeal. I cannot agree with such a result. Time defects such as this one involving only a failure to comply with the Rules of this Court do not rise to jurisdictional proportions and can be waived by the Court when the interests of justice so require. *Taglianetti* v. *United States,* 394 U. S. 316, n. 1 (1969). Given the importance of the issue in this case and the harmless, undoubtedly inadvertent nature of appellant's error, this case seems to me an altogether appropriate one for the waiver of Rule 13 (1). The Court hardly puts its best foot forward when it dismisses so substantial an appeal on so technical a ground. I would waive the time defect, note probable jurisdiction, and consider the issue presented in this appeal on the merits.

FLORIDA *v.* ALABAMA ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 37, Orig. Decided January 28, 1970

State of Florida's motion for leave to file complaint invoking Court's original jurisdiction fails to state claim warranting exercise of such jurisdiction.

Motion denied.

Claude R. Kirk, Jr., Governor of Florida, and *Gerald Mager* on the motion.

PER CURIAM.

On January 23, 1970, the plaintiff filed a motion for leave to file a complaint invoking the original jurisdiction of this Court naming 49 other States and Robert Finch, as Secretary of the Department of Health, Education, and Welfare, as parties defendant.

The alleged emergent nature of the claims for relief led the Court to give expedited consideration to the motion and proffered complaint and, having examined the complaint, we conclude it fails to state a claim against any of the defendants warranting the exercise of the original jurisdiction of this Court.

Accordingly, the motion to accelerate the time for responses to the proffered complaint and the motion for leave to file the proffered complaint are denied.

Syllabus

UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 28. Argued October 21, 1969—Decided February 2, 1970*

In 1967 the Interstate Commerce Commission (ICC) approved a merger plan filed by the Great Northern Railway Co. (GN) and the Northern Pacific Railway Co. (NP) (collectively the Northern Lines), and three of their subsidiaries, the Pacific Coast Railroad Co., the Chicago, Burlington & Quincy Railroad Co. (Burlington), and the Spokane, Portland & Seattle Railway Co. (SP&S). The Northern Lines operate largely west from St. Paul, Minneapolis, and Duluth, across the Northern Tier of States to Spokane, Tacoma, and Portland. NP, with about 6,200 miles of track, runs generally to the south of GN, which operates about 8,200 miles of track. The Northern Lines jointly own and control the Burlington and the SP&S. The Burlington has 8,648 miles of track extending from Chicago to the Twin Cities and southwesterly to Missouri, Kansas, Colorado, and Montana, and by its subsidiaries reaches Houston and Galveston. The SP&S has more than 500 miles of mainline road in Oregon and Washington which provides the most direct route from Spokane to Portland and is of strategic importance to the Northern Lines. Rail competition in the Northern Lines' area is provided by GN and NP (the principal competitors), and the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (Milwaukee), which has not been an effective long-haul competitor, never having had adequate access to the Pacific Northwest gateways. Truck competition, present in the area for some time, is growing. GN's and NP's merger efforts span three-quarters of a century. The present merger plan was disapproved by the ICC in 1966 by a vote of 6 to 5, the ICC finding that: although the estimated annual savings would approximate $25 million by the tenth year after merger, a significant source of

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*Together with No. 38, *Brundage et al.* v. *United States et al.*, No. 43, *City of Auburn* v. *United States et al.*, and No. 44, *Livingston Anti-Merger Committee* v. *Interstate Commerce Commission et al.*, on appeal from the same court.

the savings would be the elimination of jobs; the merger would eliminate substantial competition between GN and NP; even with protective conditions for the benefit of the Milwaukee, it would remain a weak competitor; and the plan did not afford benefits of such scope and importance as to outweigh the lessening of rail competition in the Northern Tier. The ICC reopened the proceedings in 1967 and considered new evidence on savings to be realized from the merger, and the additional evidence resulting in the changed position of some of the major objectors to the plan. The ICC found that: the savings would be more than $40 million a year by the tenth year; agreements with the employees had removed union objections to the merger and provided that no jobs would be eliminated except by attrition; and the applicants had accepted all protective conditions sought by Milwaukee; and acknowledged that it had failed to give appropriate weight to § 5 of the Interstate Commerce Act to facilitate rail mergers "consistent with the public interest." The ICC then re-examined the anticompetitive effects of the merger, weighing them against the savings and benefits to the public, shippers, and the roads, and, emphasizing the strengthened position of the Milwaukee, approved the plan because its benefits outweighed its anticompetitive effects. The three-judge District Court sustained the ICC, holding that the ICC was guided by the applicable legal principles and that its findings were supported by substantial evidence. Four appeals were taken: (1) the United States, through the Antitrust Division of the Department of Justice, argues that the ICC did not properly apply the standard of § 5 in determining that the merger was consistent with the public interest. It contends that when a merger will substantially diminish competition between two financially healthy, competing roads, the anticompetitive effects should preclude approval absent a clear showing that a serious transportation need will be met or important public benefits will be provided beyond the normal savings and efficiencies deriving from a merger; (2) the Northern Pacific Stockholders' Protective Committee challenges the exchange ratios agreed upon by the companies for their stock on the basis that NP's land holdings were insufficiently valued; (3) the City of Auburn, Washington (the western terminus for NP's transcontinental trains whose yard would be closed if the merger were approved), supports the Department of Justice's brief, and contends that the ICC failed to assess adequately the impact of the merger on affected communities; and (4) the Livingston Anti-Merger Committee urges that the ICC had no authority to

approve the merger because the NP, the successor by purchase in 1896 to the Northern Pacific Railroad Co. (Railroad) does not own the franchise and right of way involved in the merger as Congress did not authorize the sale as required by Railroad's charter, and Railroad is not a party to the merger; and that if it is held that NP does own the franchise, no merger can take place without approval of Congress. *Held:*

1. The ICC's conclusion that the merger, as conditioned, comported with the public interest under the standards of § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, is supported by the findings which the ICC made on the basis of substantial evidence after measuring the competitive consequences of the merger against its resulting benefits. Pp. 506–516.

(a) Congress intended by the 1940 amendments "to facilitate merger and consolidation in the national transportation system," and that the industry "proceed toward an integrated transportation system" (*County of Marin* v. *United States,* 356 U. S. 412, 416, 418), and the congressional objective is not to be read as confining mergers to situations where weak carriers are preserved by combining with those that are strong. Pp. 508–511.

(b) Congress vested in the ICC the task of "apprais[ing] the effects of the curtailment of competition which will result from [a] proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87. Pp. 511–513.

(c) The ICC's determination that the conditions agreed to by the applicants, the attrition agreements with the employees, the enhanced savings, and manifold service improvements to shippers and the public, outweighed the loss of competition between the Northern Lines, is supported by substantial evidence. Pp. 513–516.

2. The ICC's determination that the stock exchange ratio applicable to Northern Pacific stockholders and Great Northern stockholders, which was established, after protracted arm's-length negotiations, with the approval of the companies and the large majority of their stockholders, is just and reasonable, is supported by substantial evidence, and the ICC's refusal to reopen the record for evidence to update it was not an abuse of discretion. Pp. 516–522.

3. The ICC found on the basis of substantial evidence that the merger's long-run effect would benefit the Northern Tier communities, including Auburn, even if that city's yard closed if the merger was approved. Since it now appears that the Auburn yard will remain open, the anticipated principal harm to the city because of the merger has disappeared, and *a fortiori* the ICC's refusal to take further evidence on the merger's impact on the city was not an abuse of its discretion. Pp. 522–524.

4. The ICC did not err in refusing to disapprove the merger because of the Livingston Anti-Merger Committee's contention that acquisition by NP of its railroad property resulted from invalid foreclosure proceedings, as the ICC could, for purposes of the merger proceeding, properly rely on "existing judicial records supplemented by opinions of two Attorneys General" on the title question which were adverse to the Committee's challenge; nor do the charter provisions of NP's predecessor in interest foreclose the ICC's approval of the merger. Pp. 524–530.

296 F. Supp. 853, affirmed.

Assistant Attorney General McLaren argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Deputy Solicitor General Springer,* and *Howard E. Shapiro. Louis B. Dailey* argued the cause for appellants in No. 38. With him on the briefs was *Harry Tyson Carter. Valentine B. Deale* argued the cause and filed briefs for appellant in No. 44. *Robert L. Wald* and *Joel E. Hoffman* filed a brief for appellant in No. 43.

Fritz R. Kahn argued the cause for appellee Interstate Commerce Commission in all cases. With him on the brief were *Robert W. Ginnane* and *Jerome Nelson. Hugh B. Cox* argued the cause for appellees Great Northern Railway Co. et al. in all cases. With him on the briefs were *Ray Garrett, D. Robert Thomas, Lee B. McTurnan, Michael Boudin, Anthony Kane, Louis E. Torinus, Earl F. Requa, Frank S. Farrell, Eldon Martin, R. T. Cubbage,* and *Richard J. Flynn. Fred H. Tolan*

argued the cause for appellees Pacific Northwest Shippers in No. 28. With him on the brief was *Alan F. Wohlstetter*. *Raymond K. Merrill* argued the cause for appellee Chicago, Milwaukee, St. Paul & Pacific Railroad Co. in No. 28. With him on the brief were *Edwin O. Schiewe, Warren H. Ploeger, Thomas H. Ploss,* and *Edward H. Foley*. *Lee Johnson,* Attorney General of Oregon, and *Richard W. Sabin,* Assistant Attorney General, filed a brief for appellee Public Utility Commissioner of Oregon in No. 28.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The Interstate Commerce Commission orders that give rise to these appeals grow out of applications seeking approval of a merger plan filed by the Great Northern Railway Company and the Northern Pacific Railway Company (collectively the Northern Lines), and three of their subsidiaries—the Pacific Coast Railroad Company, the Chicago, Burlington & Quincy Railroad Company (Burlington), and the Spokane, Portland & Seattle Railway Company (SP&S). The Commission approved the merger and a three-judge Federal District Court for the District of Columbia affirmed the orders of the Commission.[1] We affirm the judgment of the District Court.

The factual and historical setting of the merger is important to an understanding of our disposition of these appeals. Great Northern operates some 8,200 miles of road located in 10 States and two Canadian provinces. Northern Pacific has approximately 6,200 miles of track in seven States and one Canadian province. The Northern Lines operate largely in the area west of St. Paul, Minneapolis, and Duluth, running from these points

[1] The three-judge court decision is reported as *United States* v. *United States*, 296 F. Supp. 853 (D. C. D. C. 1968).

across the Northern Tier of States (Minnesota, North Dakota, Montana, Idaho, and Washington) to Spokane, Tacoma, and Portland. The Northern Pacific's tracks run generally somewhat to the south of the Great Northern's. The Northern Lines jointly own and control the Burlington and the SP&S, while the Great Northern owns and controls the Pacific Coast Railroad Company. The Burlington's 8,648 miles of track extend from Chicago to the Twin Cities and generally southwesterly to Missouri, Kansas, Colorado, and Montana. By its subsidiaries [2] the Burlington reaches the Gulf of Mexico at Houston and Galveston. The SP&S has 599 miles of road in Oregon and Washington, of which 515 are mainline. This mainline provides the most direct route from Spokane to Portland and is of strategic importance to the Northern Lines because Spokane lies on their main transcontinental routes and Portland is an important West Coast terminal for both roads. The Pacific Coast has 32 miles of track, all in King County, Washington; its rolling stock and motive power are leased from the Great Northern.

Rail competition in the areas served by the Northern Lines is principally between three carriers: the Great Northern, the Northern Pacific, and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee). Because the Burlington's routes largely complement those of the Northern Lines, there is no substantial competition between the Burlington and its corporate parents. The Great Northern and the Northern Pacific overshadow the Milwaukee and are each the principal competitor of the other. The Northern Lines carry the lion's share of traffic between the Twin Cities

[2] The Colorado & Southern Railway Company and the Fort Worth & Denver Railway Company are both controlled by the Burlington.

and Duluth and the Pacific Northwest, both roads having good access to the Pacific Northwest through control of certain vital gateways in the area. Although the Milwaukee was designed and constructed to be a competitor of the Northern Lines, it has never accounted for a large percentage of the carriage across the Northern Tier States to the Pacific Northwest; it has never become a rate-making railroad. The explanation for this is that although possessing superior grades and a shorter route west of the Twin Cities, it has never had adequate access to the gateways of the Pacific Northwest, largely because of the Northern Lines' control of the SP&S. As a result, its role has been that of a short-haul carrier feeding much profitable long-haul traffic to the Northern Lines at St. Paul and Minneapolis.

The population of the Northern Tier region traversed by the Northern Lines and the Milwaukee is concentrated largely in its easterly and westerly extremities. The Northern Tier is rich in agricultural and mineral resources, and embraces the country's richest timber reserves. However, the markets for the products of the Northern Tier are limited in number and distant from the region; the major shipments must move east. Thus, transportation capable of carrying its bulk products at a rate low enough to permit participation in those markets is of extreme importance to the region. Rail transportation well serves this need. There has been historically, however, an imbalance between the low-rated agricultural, mineral, and forest produce traffic flowing out of the region, and high-rated manufactured goods flowing into the region. The former is traffic inherently suited to rail transport, but the latter is subject to incursions from other modes of carriage. Although water traffic in the Northern Tier is virtually nonexistent, truck competition has been present for some time and is growing.

Northern Pacific and Great Northern have long sought to merge into a single unified transportation system. In *Pearsall* v. *Great Northern R. Co.,* 161 U. S. 646 (1896), this Court ruled that an attempt to consolidate the operation of the two roads was contrary to a Minnesota statute prohibiting the consolidation of parallel and competing railroads. The next merger attempt was struck down in *Northern Securities Co.* v. *United States,* 193 U. S. 197 (1904), as contrary to the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq.*[3] Then the declining fortunes of rail carriers led Congress to enact the Transportation Act of 1920, 41 Stat. 456, which charged the Interstate Commerce Commission with the affirmative responsibility to formulate plans for simplifying the Nation's rail transport "into a limited number of systems." 41 Stat. 481. This engendered a third effort, under the Commission's auspices, to merge the Northern Lines.[4] However, this effort foundered on the Commission's requirement that the Burlington be excluded from the Northern Lines system, and the Northern Lines were unwilling to consolidate without the Burlington.

I

The Present Merger

In 1955 the Northern Lines began investigating anew the possibility of a merger that would combine five roads—the Burlington, the SP&S, the Pacific Coast, and the Northern Lines—to form a New Company. Extensive negotiations dealing with all phases of the proposed merger were commenced. Five years later, in 1960, an agreement was finally reached. It provided that the Northern Lines, the Burlington, and the Pacific Coast

[3] The vote in this historic case was 5 to 4 with one of the majority, Mr. Justice Brewer, joining on narrower grounds.

[4] See *Great Northern Pacific R. Co. Acquisition,* 162 I. C. C. 37 (1930).

be merged into New Company, which was to acquire the subsidiaries of the merged companies as well as all their leasehold, trackage, and joint-use rights in other carriers and the terminals incident thereto. New Company would lease the SP&S, thereby acquiring that road's subsidiaries and trackage rights.

The merger agreement further provided that Northern Pacific shareholders would receive common stock of New Company on a share-for-share basis. Great Northern stockholders would receive one share of New Company common for each share of Great Northern and, in addition, one-half share of New Company $10 par 5½% preferred for each share of Great Northern held at the date of the merger, this preferred stock to be retired over a 25-year period, beginning at the fifth anniversary of the merger, and to be redeemable at the option of New Company any time after the fifth anniversary of the merger. The Burlington stock held by the Northern Lines, amounting to 97.18% of the total shares outstanding, would be canceled and the remaining shareholders given 3.25 shares of New Company common for each share of Burlington.

Commission Proceedings

First Report.—As a result of these renewed merger negotiations between 1955 and 1960, applications were filed in 1961 under § 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 5, seeking approval of the merger and authorization for the issuance of stock and securities, the assumption of obligations and other authority necessary to effectuate the merger.[5] Extensive public hearings were held in 1961 and 1962 at

[5] Among the allied transactions were the issuance of certain securities and the assumption of obligations and liability in respect of securities under § 20a of the Interstate Commerce Act, and the obtaining of certain extensions and abandonments of railroad lines under §§ 1 (18) to 1 (20), inclusive, of the Act.

which the Department of Justice, the Department of Agriculture, various railway employee groups, nine States or state regulatory agencies, and the Milwaukee and the Chicago & North Western Railway Company (North Western), *inter alia,* actively opposed the merger as proposed. Shippers and related interest groups appeared in support of the proposal. The Hearing Examiner submitted a report in 1964 recommending approval of the merger and the related transactions, subject to certain protective conditions. The Commission heard oral argument and in a report dated March 31, 1966 (First Report), rejected the Examiner's recommendation and disapproved the merger by a vote of 6 to 5.[6]

The applicants petitioned for a reconsideration, asserting that they were willing to accept all protective conditions sought by the Milwaukee and another affected road, the North Western, that they had entered into attrition agreements with the objecting unions for the protection of the employees, and that the merger would yield dollar savings greater than those estimated in the First Report. While this petition was pending before the Commission, the applicants entered into agreements with the North Western and the Milwaukee which provided that the merger applicants would agree to all the conditions sought by those roads; the Milwaukee and the North Western then agreed to support the merger.[7] Thereafter, these roads withdrew their opposition to the merger and urged the Commission to approve it. Approval was advocated or objections withdrawn by a number of parties who had previously either completely opposed the merger or opposed it absent imposition of

[6] 328 I. C. C. 460 (1966). The majority included Commissioners Bush, Tucker, Webb, Tierney, Brown, and Deason. Commissioners Tuggle, Freas, Murphy, Walrath, and Goff dissented.

[7] The Northern Lines also agreed not to oppose the authorization of a proposed Milwaukee-North Western merger.

adequate protective conditions. These included the Department of Agriculture, the Public Utility Commissioner of Oregon, and the States of North Dakota, South Dakota, Iowa, Wisconsin, and Michigan.[8]

Second Report.—On January 4, 1967, the Commission granted the application and reopened the proceedings for reconsideration and further hearings. Although the order by its terms reopened the proceedings on all issues, the hearing was limited to taking evidence on the question of the amount of savings the merger would produce in light of the agreement between the applicants and the Milwaukee and the North Western, and the other changes relevant to savings which had occurred after the close of the first hearing. Oral arguments followed. On November 30, 1967, the Commission handed down a report and order (Second Report) approving the proposed merger by a vote of 8 to 2 as consistent with the public interest and imposing certain conditions to protect other carriers.[9] On April 11, 1968, the Commission denied an application for reconsideration.[10]

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[8] Petitions were also filed by the Northern Pacific Stockholders' Protective Committee seeking further hearings with respect to the justness and reasonableness of the terms of the merger agreement, and the Denver & Rio Grande Railroad seeking an investigation into the agreements entered into by the applicants with the Milwaukee and the North Western. These petitions were denied.

[9] 331 I. C. C. 228 (1967). Commissioners Tuggle, Murphy, Walrath, Bush, Tucker, Deason, Stafford, and Syphers voted to approve the merger, while Commissioners Tierney and Brown dissented. Commissioner Hardin did not participate in the decision.

[10] In this order the Commission modified one of the conditions placed on the merger by the order of November 30, 1967. On June 17, 1968, a further order was issued, ruling that the Milwaukee must be allowed to bring grain traffic through 11 gateways opened to it by conditions contained in the Second Report. Neither the order of April 11 nor that of June 17 was challenged in the District Court. Hence, they are not before us.

District Court Proceedings

The United States, acting through the Department of Justice, filed a complaint on May 9, 1968, in the United States District Court for the District of Columbia challenging the Commission order approving the merger. Other parties intervened, some as plaintiffs [11] and some as defendants.[12] After preliminary proceedings had resulted in a stay of the Commission's order *pendente lite,* the case was submitted on the merits to the three-judge court designated in accordance with 28 U. S. C. §§ 2325 and 2284. The court, in an opinion by Senior Circuit Judge Charles Fahy, unanimously sustained the Commission, holding that in approving the merger and the related transactions the Commission was guided by the applicable legal principles and that its findings were supported by substantial evidence. The court dismissed the complaints, vacated the stay *pendente lite,* and then stayed its order pending appeal to this Court. Upon the filing of appeals with this Court, we ordered a further stay pending final disposition.

II

The Appeals Here

Four appeals were taken from the District Court's judgment; the Department of Justice (No. 28), the Northern Pacific Stockholders' Protective Committee

[11] Attacking the merger were the following: the Northern Pacific Stockholders' Protective Committee; the City of Auburn, Washington; the State of Washington; the Board of Railroad Commissioners of Montana; the Livingston Anti-Merger Committee; and the Public Service Commission of Minnesota.

[12] The intervening defendants included the applicants, the Milwaukee, the Public Utility Commissioner of Oregon, and 230 Pacific Northwest shippers.

(No. 38), the City of Auburn, Washington (No. 43), and the Livingston Anti-Merger Committee (No. 44).

Each of the four appellants attacks the approval of the merger on different grounds. Because these challenges cover every aspect of the merger, and because of the rather complex expositions of fact necessary to the disposition of each objection, these appeals will be dealt with *seriatim*. With the cases in this posture the Court must review the proceedings before the Commission to "determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence." *Penn-Central Merger and N&W Inclusion Cases,* 389 U. S. 486, 499 (1968). It should be emphasized, however, as Mr. Justice Fortas noted, speaking for the Court in a similar context, "[w]ith respect to the merits of the merger . . . our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute." *Id.*, at 498–499.

The governing statute here is § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 905, 49 U. S. C. § 5. The Act provides that the Commission is to approve a proposed merger when it is "consistent with the public interest" and the terms of the proposal are "just and reasonable." In determining whether this standard is met, the Commission is to

> "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 proposed transaction; and (4) the interest of the carrier employees affected." 49 U. S. C. § 5 (2)(c).

In addition to the four factors listed above, the Commission must also consider the anticompetitive effects of any merger or consolidation, because under § 5 (11) of the Interstate Commerce Act any transaction approved by the Commission is relieved of the operation of the antitrust laws. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 83–87 (1944).

In its First Report the Commission found that the merger would result in improved service to shippers in areas served by the Northern Lines because it would enable the roads to make more efficient use of their facilities and would permit the use of the shortest and swiftest internal routes available. In addition, the merger was found to afford estimated savings of approximately $25 million per year by the tenth year after merger. However, the Commission also found that as a consequence of the merger more than 5,200 jobs would be eliminated, this being a significant source of the reduced operating costs. The Commission then analyzed the anticompetitive impact of the proposal and found it would eliminate substantial competition between the Northern Lines in the Northern Tier. The Commission reasoned that even with protective conditions attached to the merger for the benefit of the Milwaukee, it would remain a weak carrier in the Northern Tier when compared with New Company. The Commission, by a vote of 6 to 5, as noted earlier, concluded that the proposed merger plan did not afford benefits of such scope and importance as to outweigh the lessening of rail competition in the Northern Tier; the merger was disapproved.

When the Commission reopened the proceedings in

1967, it considered additional evidence including the changed positions of some of the major objectors, and new evidence on the savings to be realized from the merger; the Second Report was then issued. The Commission found that rather than the $25 million previously estimated, in fact more than $40 million per year in savings would be realized by the tenth year after merger. It also noted that agreements entered into by the applicants and their employees had removed objections of various unions to the merger and that no jobs would be eliminated except in the normal course of attrition. Aside from these changes, and the acceptance by the merger applicants of protective conditions sought by the Milwaukee, the record before the Commission was the same as that on which the First Report was based. The Second Report acknowledged that the First Report had failed to give appropriate weight to one of the aims of the national transportation policy and § 5 of the Interstate Commerce Act, to facilitate rail mergers "consistent with the public interest" in the development of a comprehensive national transport system, and that this had led the Commission to view the merger proposal too stringently. It then went on to re-examine the anticompetitive effects of the merger, weighing them against the savings and benefits to the public, shippers, and the roads, and, accentuating the new and strengthened competitive posture of the Milwaukee, it concluded that the merger proposal should be approved because its benefits outweighed its anticompetitive effects in the Northern Tier region.

That this was not an easy problem for the Commission is attested by the lengthy history of attempts to merge these lines which dates back three-quarters of a century. The efforts to establish a more unified rail transportation system in the Northern Tier represent a 20th

century phase of the development of the American West; it brackets a period of enormous growth and change, and of new developments in transportation and public needs. Against this background it is not surprising that the members of the Commission were divided 6 to 5 against the merger on the First Report in 1966 and 8 to 2 in favor of the merger on the Second Report in 1967 after changes had been made in the plan to meet many of the objections raised. Nor is it remarkable that two great departments of government, each charged with responsibility to protect the public interest, took opposing positions; vigorous advocacy of divergent views on this difficult problem has narrowed and sharpened the issues and aided the Court in their resolution, ensuring that no factor which ought to be considered would elude our attention.

Appellants' Contentions

(a) *No. 28, Department of Justice.*—The United States, through the Antitrust Division of the Justice Department, challenges the Commission's approval of the merger primarily on the ground that the Commission in the Second Report did not properly apply the standard of § 5 (2)(b) of the Interstate Commerce Act in determining that the merger is consistent with the public interest. The Department contends that under the statute when a proposed merger will result in a substantial diminution of competition between two financially healthy, competing roads, its anticompetitive effects should preclude the approval of the merger absent a clear showing that a serious transportation need will be met or important public benefits will be provided beyond the savings and efficiencies that normally flow from a merger. The Department urges that the instant case presents a merger between two financially healthy carriers, each of which is the prime competitor of the

other in the area served. Admittedly the Commission found in its First Report that the merger would result in a "drastic lessening of competition." The Department argues that because no benefits are shown to flow from the merger beyond the economies and efficiencies normally resulting from unified operations, the Commission has not satisfied the statutory standard and that the District Court erred in refusing to enjoin the merger.

The Department maintains that prior to 1920 the antitrust laws and their underlying policies applied with full force to railroads and that the Transportation Act of 1920, which commanded an affirmative development by the Commission of a nationwide plan "for the consolidation of the railway properties of the continental United States into a limited number of systems," 41 Stat. 481, was primarily intended to promote the absorption of financially weak by strong carriers. To the extent that the 1920 Act did not intend to encourage rail mergers producing only the usual or "normal" kinds of merger benefits, the Department contends that the policies of the antitrust laws remain the guiding standard by which these consolidations are to be judged. The Transportation Act of 1940, according to the Department, did not alter this policy, but only eliminated the Commission's duty to formulate a national plan and to confine mergers to the four corners of this plan. The Department suggests that when the Commission is determining whether a merger or consolidation is consistent with the public interest, it must analyze the merger in terms of its anticompetitive impact and, if that impact would be great, then determine whether the merger is required by a serious transportation need or necessary to secure important public benefits. This standard, it urges, is "consistent with both the legislative history of [§ 5] and, more generally, with the goal of substantial

simplification of railroad systems that underlay the Transportation Acts of both 1920 and 1940." [13]

The Department of Justice is correct in stating that one focal point of concern throughout the legislative consideration of the problems of railroads has been the weak carrier and its preservation through combination with the strong. Congress saw that as one—but only one—means to promote its objectives. The 1920 statute as a whole also embodied concern for economy and efficiency in rail operations. See *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, 341 (1924); *Texas & Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266, 277 (1926); *Texas* v. *United States*, 292 U. S. 522, 530 (1934); *United States* v. *Lowden*, 308 U. S. 225, 232 (1939). Thus, a rail merger that furthers the development of a more efficient transportation unit and one that results in the joining of a "sick" with a strong carrier serve equally to promote the long-range objectives of Congress and, upon approval by the Commission, both are immunized from the oper-

[13] We might note that the substance of the Department's position with respect to the Commission's power to approve consolidations was presented to this Court by the Secretary of Agriculture in No. 31, O. T. 1943, *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1944), Brief for Secretary of Agriculture of the United States 38, 40, and to the three-judge court in the Seaboard-Coast Line merger litigation, *Florida East Coast R. Co.* v. *United States*, 259 F. Supp. 993, 1012–1013 (D. C. M. D. Fla. 1966), aff'd *per curiam*, 386 U. S. 544 (1967). In both of these cases, one decided in 1944 and the other in 1966, the Department's position was rejected. In addition, in 1962 a bill was before the Senate that would have imposed a moratorium on the Commission's approval of large railroad mergers that would otherwise violate § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18. The Department actively supported the bill. It was not reported out of committee. See Hearings on S. 3097 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (1962).

ation of the antitrust laws. The policy of the 1920 Act has been consistently interpreted in this way. We find no basis for reading the congressional objective as confining these mergers to combinations by which the strong rescue the halt and the lame.

In *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932), this Court cautioned that

> "[t]he fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. . . . The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case." *Id.,* at 25–26.

Although this decision was prior to the passage of the Transportation Act of 1940, that Act in no way altered the basic policy [14] underlying the 1920 enactment. We recognized in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298, 319 (1954), that Congress adopted the recommendations of the Committee of Six when it passed the 1940 Transportation Act and relieved the Commission of its duty to promulgate a national railroad consolidation plan. That Committee's report recognized economies and efficiencies of operation as well as the elimination of circuitous routing to be benefits that could

[14] The Commission apparently had no difficulty in approving a merger of the Northern Lines under a plan similar to that held violative of the Sherman Act in *Northern Securities Co.* v. *United States,* 193 U. S. 197 (1904). The Commission gave as one of the considerations leading it to approve the proposed merger, "the feasibility of making large operating economies." *Great Northern Pacific R. Co. Acquisition,* 162 I. C. C. 37, 47 (1930).

flow to the public through consolidations.[15] As recently as *County of Marin* v. *United States,* 356 U. S. 412 (1958), this Court observed:

> "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940 . . . was to facilitate merger and consolidation in the national transportation system. In the Transportation Act of 1920 the Congress had directed the Commission itself to take the initiative in developing a plan 'for the consolidation of the railway properties of the continental United States into a limited number of systems,' 41 Stat. 481, but after 20 years of trial the approach appeared inadequate. The Transportation Act of 1940 extended § 5 to motor and water carriers, and relieved the Commission of its responsibility to initiate the unifications. 'Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation* if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness . . . .' (Emphasis added.) *Schwabacher* v. *United States,* 334 U. S. 182, 193 (1948). . . . In short, the result of the 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 na-

[15] Report of Committee appointed September 20, 1938, by the President of the United States, to Submit Recommendations upon the General Transportation Situation, December 23, 1938, in Hearings on H. R. 2531 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., 259–308 (1939).

tional transportation system through substantial corporate simplification." *Id.,* at 416–418. (Emphasis in original.) (Footnotes omitted.)

We turn now to consider the appropriate weight to be accorded by the Commission to antitrust policy in proceedings for approval of a merger. The role of antitrust policy under § 5 was discussed comprehensively and dispositively in *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944), a case dealing with a merger of several large trucking companies. Since this Court has nowhere else dealt so definitively with this issue, the analysis by Mr. Justice Rutledge in the opinion for the Court merits extended quotation:

"The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5 (11), that the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, has its counterpart in motor carrier policy. . . .

"[T]here can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this

policy would be furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws. § 5 (11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against this background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.

"Therefore, the Commission is not bound . . . to accede to the policies of the anti-trust laws . . . .

"Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. . . . Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its 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.

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed

> consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission . . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [Citations omitted.] If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." *Id.*, at 83–88. (Footnotes omitted.)

Accord, *Minneapolis & St. L. R. Co.* v. *United States,* 361 U. S. 173, 186–188 (1959); *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154, 156–157 (1965); see *Florida East Coast R. Co.* v. *United States,* 259 F. Supp. 993 (D. C. M. D. Fla. 1966), aff'd *per curiam,* 386 U. S. 544 (1967).

The Department urges that the Commission failed to give sufficient weight to the diminution of competition between the Northern Lines—in short, that it failed to strike the correct balance between antitrust objectives and the overall transportation needs that concern Congress. This contention tends to isolate individual factors that are to enter into the Commission's decision and view them as the controlling considerations. "Competition is merely one consideration here," *Penn-Central Merger and N&W Inclusion Cases,* 389 U. S. 486, 500 (1968). And, we might add, it is a consideration that is implied and is in addition to the four specifically men-

tioned in § 5 (2)(c) of the statute. In our view the Commission, in both reports, exhibited a concern and sensitivity to the difficult task of accommodating the regulatory policy based on competition with the long-range policy of achieving carrier consolidations. Indeed, this led the Commission to disapprove the merger by a margin of one vote in 1966 after five years of study because of specified infirmities in the plan. The Commission reached a different conclusion by a decisive vote in 1967 on a supplemental record which reflected substantial changes in the merger plan. Our review, like that of the District Court, reveals substantial record evidence to support the Commission's determination that the conditions agreed to by the applicants, the attrition agreements with the employees, the enhanced savings found in the Second Report, and the service improvements to shippers and the public found in both the First and Second Reports outweighed the loss of competition between the Northern Lines. Striking the balance is for the Commission and we cannot say that it did so improperly.

The benefits to the public from this merger are important and deserve elaboration. The Commission found that substantial service benefits would flow from the merger. Shippers will benefit from improved car supply, wider routing, better loading and unloading privileges, and improved tracing and claims service. New Company will be able to use the shortest and most efficient routes while eliminating yard interchange delays, thus providing shippers with faster service. The Commission found that the economies New Company will realize as a result of consolidating yards, repair facilities, and management, eliminating duplicate train services and pooling of cars and trains will result in lower rates to shippers and receivers. In addition, the opening of strategic gateways to the Milwaukee will remove artificial barriers to

the development of new markets, sources of supply, and services.

The Milwaukee objections prior to the First Report were based on the adverse impact of the merger on its competitive position and, in turn, on shippers and the public. Following the First Report the Northern Lines accepted conditions urged by the Milwaukee. Under the new conditions the posture of the Milwaukee, lying largely between the two Northerns and handicapped by limitations at both eastern and western terminals, will be greatly improved. Absent the protective conditions it would continue to be virtually strangled by the unified system; with them the Milwaukee gives prospect of affording substantial competition to the merged lines and will be placed in the position that at its inception it hoped to achieve. Its past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon, or into the southwest terminal of the Northern Lines in California. In a strictly competitive situation it is understandable that neither of the Northern Lines would interchange traffic with the Milwaukee except on its own terms and this destined that the Milwaukee would fail to become a true transcontinental line even though its western terminus lay within a few miles of Portland with the latter's access to the sea.

The Milwaukee north-south traffic on the West Coast was limited to the short run from Seattle to Longview, barely half the distance from the Canadian border to Washington's southern border. Moreover, westbound traffic destined for points on one of the Northern Lines was taken over by one of them at St. Paul or Minneapolis notwithstanding Milwaukee's line from there deep into Washington. In the proceedings prior to 1966 many objecting shippers joined the Milwaukee in pointing out that rates and limitations on Milwaukee's service

precluded full use of the Milwaukee to the disadvantage of both shippers and the carrier.

The conditions imposed by the Commission's Second Report will alter that situation and substantially enlarge the Milwaukee's competitive potential between St. Paul and Minneapolis and the West Coast due to enlargement of its long-haul capability. Shippers will be afforded more flexible service. Another condition attached to the Commission's approval will permit the Milwaukee to run lines from its present western terminus into Portland, giving it a link with the Southern Pacific. All this will enable the Milwaukee to compete with the Northern Lines for east-west traffic and some north-south traffic as well as linkage with Canadian carriers to the north, which was previously the exclusive domain of one or both of the Northerns. Other conditions of lesser consequence will buttress the newly designed competitive posture of the Milwaukee.

The contention that the Commission failed to project an analysis of the relative position of the Milwaukee *vis-à-vis* the merged Northerns discounts the difficulty of precise forecasts and tends to overstate the need for such projections. The Commission can deal only in the probabilities that will arise from the Milwaukee's improved posture as a genuine competitor for traffic over a wide area, something it had never been able to achieve. After the merger it will afford shippers a choice of routes and service negating the idea that all rail competition will disappear in the Pacific Northwest.

(b) *No. 38, The Northern Pacific Stockholders' Protective Committee.*—The Northern Pacific Stockholders' Protective Committee [16] has appealed the District Court's affirmance of the Commission's approval of the pro-

[16] Appellant Committee represents about 3% of Northern Pacific's stockholders, who hold approximately 5% of the outstanding shares of Northern Pacific.

posed merger's stock exchange provisions. To put each of the Committee's contentions in perspective requires that we describe the source of the Committee's concern and how the applicants dealt with it in reaching the present merger terms.

The Committee's continuing opposition to the merger relates to Northern Pacific's land holdings. The Northern Pacific Railway Company holds more than two million acres in fee and has mineral rights in another six million acres. These lands are rich in natural resources, including coal, oil, and timber, and are important sources of income. The negotiations between the parties centered to a large extent on these lands. Northern Pacific's financial adviser had suggested that although Great Northern had a better history of earning power and its stock had generally sold at a level above that of Northern Pacific's, the large land holdings of the Northern Pacific with their vast resources were of sufficient worth to justify a share-for-share exchange ratio between the Great Northern and the Northern Pacific. The Great Northern, however, insisted on a 60-40 stock exchange ratio because of its traditional rail strength. After further negotiations the roads realized that the lands were a stumbling block to the merger and considered several modes of segregating them from Northern Pacific's rail properties. One was to create two classes of New Company stock, one being issued to Northern Pacific shareholders and representing the natural resource properties, and another being issued to both Great Northern and Northern Pacific shareholders and representing Northern Pacific's rail properties. The second solution considered was spinning off the natural resource lands into another corporation and using the proceeds from an issuance of its stock as a Northern Pacific contribution to the merger. Neither of these solutions was acceptable to the negotiators, the former because of the problems inherent in

administering a corporation for two classes of stockholders with divergent interests, and the latter because of potential litigation with bondholders and adverse tax consequences to Northern Pacific. The negotiators concluded that the merger plan must include the land holdings of Northern Pacific.

Thereafter both roads made concessions, the Great Northern abandoning its claim for a permanently larger share for its stockholders and the Northern Pacific abandoning its claim for immediate equality. The result was an exchange ratio giving immediate recognition to Great Northern's greater earning power and historically higher market price while giving Northern Pacific's shareholders equal participation in the earnings of the enterprise on a long-term basis. The terms of the merger, as worked out by the negotiators over a five-year period, were approved by both roads' financial advisors, their boards of directors and their stockholders.[17] Shortly thereafter the Northern Pacific Stockholders' Protective Committee was formed.

When the merger proposal was submitted to the Commission for approval the Stockholders' Committee opposed the exchange ratio, pressing its claim that the natural resource lands were undervalued and that the Commission either should adjust the exchange ratio in accordance with the Committee's estimates of the property's worth or, preferably, should order the lands segregated and placed in a separate corporation, the stock of

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[17] Northern Pacific's shareholders approved the merger terms in 1961 by a vote of 73.81% to 6.64%, the remainder of the stock not being voted. In 1968 the shareholders again approved the merger's terms, as conditioned by the ICC's Second Report, 73.2% voting for and 2.57% voting against, the remainder not voting. Prior to both of these votes the members of the appellant Committee vigorously urged the shareholders to reject the merger as being unfair because of the low value given the natural resource properties.

which would be available to Northern Pacific shareholders. The Hearing Examiner's report reviewed the extensive negotiations between the parties and the modes by which they reached a valuation of the contribution each road's shareholders were making to New Company, concluding that there had been good-faith arm's-length bargaining and that the result of this bargaining fairly reflected each group of stockholders' contribution to New Company. The Examiner found the Committee's contention on value to be unsupported by record evidence and its spinoff proposal to be unfair to Northern Pacific shareholders. He recommended approval of the terms of the exchange.

The Commission's First Report, which disapproved the merger, did not reach the issue of the exchange ratio. When in 1967 the Commission reconsidered its earlier decision, it refused the Committee's request that it reopen the record for the taking of new evidence on the exchange ratio, but did hear oral argument on the matter. The Committee again pressed its contentions. The Commission's Second Report rejected the Committee's arguments upon basically the same grounds given by the Hearing Examiner in his 1964 Report.

The Committee continued its attack on the stock exchange ratio in the District Court and urged that the Commission had abused its discretion in refusing to reopen the record to receive updated evidence on the exchange ratio. The District Court ruled that the Commission's finding that the terms were just and reasonable was supported by substantial evidence. It also held that the evidence the Committee proffered was not of sufficient importance to have affected the ultimate fairness of the Commission's finding. The discretion exercised by the Commission in refusing to reopen the record was, therefore, found free from abuse.

The Committee now contends that the record lacks substantial evidence to support the Commission's determina-

tion that the exchange ratios are just and reasonable; that the Commission failed to consider the whole record before it; that the Commission erred, abused its discretion, or denied appellant due process of law in not permitting the record to be updated respecting the 1967 worth of the contributions being made by each group of shareholders, especially respecting Northern Pacific's natural resource properties; that the record does not contain substantial evidence to support the determination of the Commission that the proposed segregation of the natural resource lands is a proposal lacking merit and is unfair to Northern Pacific shareholders; and that the District Court erred in upholding the Commission's action. Our review leads us to reject these contentions.

Under § 5 (2) of the Interstate Commerce Act, the Commission is to approve only such merger terms as it finds to be just and reasonable. The Commission, as had the negotiators and the Hearing Examiner, fully considered the proposed segregation of the natural resource properties and concluded that it was neither feasible nor fair to Northern Pacific stockholders. That determination is supported by substantial record evidence. In passing we note that although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met. It can hardly be argued that the bargaining parties were not capable of protecting their own interests.

The Commission's unwillingness to reopen the record in 1967 for the taking of new evidence on the exchange ratio was not an abuse of discretion nor did it deny the appellant due process of law. What this Court said in

Interstate Commerce Commission v. *Jersey City,* 322 U. S. 503 (1944), is applicable here:

> "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearing, as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body." *Id.,* at 514–515.

Moreover, as this Court noted in *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1946), "it has been held consistently that rehearings before administrative bodies are addressed to their own discretion. . . . Only a showing of the clearest abuse of discretion could sustain an exception to that rule." *Id.,* at 535.

We find nothing in the Committee's arguments to persuade us that such an abuse occurred when the Commission refused to take further evidence on the question of each group of shareholders' contribution to the merger. *Schwabacher* v. *United States,* 334 U. S. 182 (1948), relied upon by the Committee, is not to the contrary.

That decision requires that the value of a stockholder's contribution to a merger be determined in accord with the "current worth" of his equity. That does not mean there must be a repeated updating of the evidence before the agency; in a complex merger such as this that would lead to interminable delay. A determination that the terms of a merger proposal fairly reflect the current worth of each shareholder's contribution meets the standards of *Schwabacher* if the agency had before it evidence as to the worth of the shareholders' contributions at the time of the submission of the proposal, and there is no showing that subsequent events have materially altered the worth of the various shareholders' contributions to the merger. The evidence the appellant Committee presents to this Court, purporting to show that Northern Pacific's stock is presently worth considerably more, *vis-à-vis* Great Northern's, than was the case at the time of the initial hearings, does show fluctuations in the worth of the two companies' stock. But we cannot say that those fluctuations, in the context of this merger proposal, are sufficient to show that the worth of the various shareholders' contributions to the merger has been materially altered. We agree with the District Court that the Commission's refusal to reopen the record for further evidence was not an abuse of discretion.

(c) *No. 43, City of Auburn.*—The City of Auburn, Washington, opposes the merger for the reasons set out in the brief of the Department of Justice, and, in addition, contends that the Commission failed to adequately assess the impact of the merger upon affected communities and explain why the benefits of the merger convincingly outweigh its adverse effects on these communities. Auburn also objects to the refusal to open the 1967 hearings for further testimony concerning the impact of the merger upon Auburn.

Auburn is a city of 19,000 inhabitants in western Washington, halfway between Seattle and Tacoma,

which serves as the western terminus for the Northern Pacific's transcontinental trains. A substantial part of the city's economy is dependent upon that road's activity there. The record before the Commission indicated that if the merger were approved, the Auburn yard would be closed, and that the town of Everett, on the other side of Seattle, would become the western terminus for all of New Company's transcontinental trains.

Insofar as the city challenges the Commission's action on the same grounds as the Department of Justice, our disposition of the appeal in No. 28 applies here. As for the 1967 hearings, the city failed to object to the scope of the Commission's reopened hearings and made no attempt to present evidence at those hearings. Neither did it challenge the Commission's findings concerning the impact of the merger upon Auburn. Only when it came before the District Court did it raise its contentions. This alone might preclude its attack on the merger. But we need not decide that issue because we find that the Commission did not abuse its discretion in refusing to take evidence in 1967 as to the impact of the merger on Auburn.

In the record upon which the Second Report is based the Commission had evidence of the impact of the yard's closing on the city. Thus, even assuming the closing, the Commission found that the long-run effect of the merger would be to benefit communities in the Northern Tier, such as Auburn, and that the brief and transitory dislocations the merger would occasion were not sufficient to outweigh the merger's benefits. We find this to be a justifiable conclusion supported by substantial evidence on the record. We can hardly imagine any merger of substantial carriers that would not cause some dislocations to some shippers, some communities, and some employees.

The plans for the Auburn yard now seem to be altered; the applicants stated before the District Court and again

before this Court that they now intend to maintain the Auburn yard. As a result, employment in Auburn will be largely unaffected by the merger. Since we conclude that the Commission properly determined that Auburn's hardships and those of communities similarly situated, as posited on the record, did not warrant disapproval of the merger, it is difficult to imagine any basis upon which we might find the Commission to have abused its discretion in not taking further evidence on the merger's impact on Auburn when the principal harm of which the city earlier complained has disappeared.

(d) *No. 44, Livingston Anti-Merger Committee.*—Citizens of Montana, living in and about Livingston, Helena, and Glendive, who appear here as the Livingston Anti-Merger Committee, attack the merger on several grounds. As a prelude to discussing these contentions, the historical facts upon which the Committee's attack is based should be stated.

In 1864 Congress created the Northern Pacific Railroad Company (Railroad) and granted it authority to build a railroad from Lake Superior to Puget Sound. To subsidize this enterprise Congress granted Railroad a right-of-way and alternate sections of land along that right-of-way. According to the terms of Railroad's charter it could not encumber its franchise or right-of-way without congressional approval, and was not authorized to merge with another road, except under limited conditions not relevant here.[15] In 1870 Congress passed a resolution allowing Railroad to issue bonds secured by its property and subject to foreclosure for default. Shortly thereafter a mortgage was pledged, only to be foreclosed in 1875. After the foreclosure proceedings the property was struck off to a committee of bondholders. Later, however, the property was returned to Railroad pursuant to a reorganization plan. Although Congress did not further author-

[18] See Act of July 2, 1864, § 3, 13 Stat. 367.

ize mortgaging of the franchise or right-of-way, Railroad again encumbered its property by pledging several mortgages. In 1896, after these mortgages had been defaulted upon and foreclosure proceedings had been commenced, a negotiated settlement was made which resulted in the property of Railroad being sold to the Northern Pacific Railway Company (Railway), which has operated under Railroad's franchise and upon its right-of-way ever since. Railway presently owns 97% of the stock of Railroad, which is no longer an operating company.

On the basis of these facts Livingston contends that the Interstate Commerce Commission had no authority to approve the proposed merger because Railway does not own the franchise and right-of-way involved in this merger, and Railroad is not a party to the merger. Livingston argues that the 1896 foreclosure was a sham and it actually was a sale of Railroad property to Railway; because Congress never authorized that sale, it is void. In addition, Livingston contends that the mortgages that led to the 1896 foreclosure were not authorized by Congress; therefore, they could not constitute the basis for a valid foreclosure and liquidation. The claimed consequence is that the title to the franchise and right-of-way remains in Railroad. Livingston argues that even if it should be held that Railway does own the franchise and right-of-way, under the 1864 charter of Railroad, to which Railway succeeded, no merger involving these properties can take place without congressional approval, and such approval has not been procured. Finally, Livingston urges that the Commission and the District Court failed to properly deal with these contentions and make specific findings as to the Commission's jurisdiction.

The Commission was presented with these arguments and found them to be without merit. The District Court affirmed the Commission, ruling that it had not erred in refusing to disapprove the merger because of appel-

lant's claims and had not erred in refusing to litigate their merits. We affirm the District Court. Section 5 (2)(a) of the Interstate Commerce Act provides in pertinent part:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> "(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership . . . ." 49 U. S. C. § 5 (2)(a).

The premise of Livingston's position is that under this statute before the Commission can assume jurisdiction over a merger application it must determine that the applicants have proper legal title to the rights and property which they seek to bring into the merger. This is an erroneous assumption. The Commission is not required to deal with the subtleties of "good title" before assuming jurisdiction over a § 5 matter. Cf. *O. C. Wiley & Sons* v. *United States*, 85 F. Supp. 542, 543–545 (D. C. W. D. Va.), aff'd *per curiam*, 338 U. S. 902 (1949); *Walker* v. *United States*, 208 F. Supp. 388, 396 (D. C. W. D. Tex. 1962); *Interstate Investors, Inc.* v. *United States*, 287 F. Supp. 374, 392 n. 32 (D. C. S. D. N. Y. 1968), aff'd *per curiam*, 393 U. S. 479 (1969). And because a Commission order under § 5 (2) "is permissive, not mandatory," *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 26–27 (1932), the approval of a merger proposal does not amount to an adjudication on any such questions. These are matters for the courts, not for an agency that has responsibility in the realm of regulating transportation systems.

In the instant case there were ample grounds for the Commission's assumption of jurisdiction over the appli-

cants. Although the validity of Railway's claim that it is Railroad's successor in interest and has good title to all of Railroad's rights and properties has never been judicially determined, this Court has impliedly recognized it several times. In *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482 (1913), we held that a creditor of Railroad had an assertable claim against the equity of Railroad's shareholders represented by Railway's assets because the foreclosure amounted to little more than a judicially approved reorganization in which the shareholders of the old company became the shareholders of the new. As against a bona fide creditor of Railroad, we found the judicial sale ineffective to bar his rights. However, we also stated that

> "[a]s between the parties and the public generally, the sale was valid. . . . [T]he Northern Pacific Railroad was divested of the legal title [to its properties] . . . ." *Id.,* at 506.

In *United States* v. *Northern Pacific R. Co.,* 311 U. S. 317 (1940), we described some of the history of the appellee company as follows:

> "Pursuant to foreclosure proceedings the Northern Pacific Railway Company acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." *Id.,* at 328.

In addition, Attorney General Harmon in 1897 advised the Secretary of the Interior that Railway had a right, as successor in interest of Railroad, to patents on land grants made to Railroad. 21 Op. Atty. Gen. 486. The Secretary of the Interior thereafter treated Railway as Railroad's legal successor and patented large amounts of land to Railway. When in 1905 the then Secretary of the Interior asked then Attorney General Moody, later an Associate Justice of this Court, about the right of

Railway to Railroad's land grants, Mr. Moody, after investigating the matter, reaffirmed his predecessor's conclusion that Railway was Railroad's legitimate successor in interest. 25 Op. Atty. Gen. 401. In 1954 a committee of Railroad's minority shareholders sued Railway seeking to have the 1896 foreclosure set aside and all titles and franchises declared to be in Railroad and to obtain an accounting from Railway for all properties and profits received from 1896 through 1954. In an exhaustive opinion Judge Edward A. Tamm of the United States District Court for the District of Columbia held the action barred by laches and dismissed the complaint. *Landell* v. *Northern Pacific R. Co.*, 122 F. Supp. 253 (D. C. D. C. 1954), aff'd, 96 U. S. App. D. C. 24, 223 F. 2d 316, cert. denied, 350 U. S. 844 (1955). In this context we think the Commission did not err in assuming jurisdiction over the applicants while refusing to adjudicate the merits of Railway's title. As the District Court stated, "[f]or purposes of merger proceedings it could rely on the existing judicial records . . . supplemented by the opinions of two Attorneys General." [19]

We are then faced with the contention of Livingston that Railway is prohibited from participating in the merger and that the Commission is barred from approving it by the terms of Railroad's charter. That charter does not authorize Railroad to merge with the applicant companies and prohibits the mortgaging of its property in the absence of congressional consent. If Railway is Railroad's successor in interest, Livingston contends, it is bound by the provisions of Railroad's charter, and those provisions would be violated by the proposed merger and issuance of securities incident thereto. Livingston argues that because the Act chartering Railroad is a law as much as it is a grant, see *Oregon & California R. Co.* v. *United States*, 238 U. S. 393, 427 (1915), it is bind-

[19] 296 F. Supp. 853, 877 (D. C. D. C. 1968).

ing upon the Commission and makes the Commission's approval of the merger unlawful. Livingston relies upon *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 160 (1905), as standing for the proposition that statutory restrictions on a predecessor federal railroad company survive a foreclosure sale and apply to a successor private railroad company operating on the original company's rights and franchise.

We do not find the *Mason City* decision to be controlling, despite its somewhat similar legal and factual context. In 1862 Congress chartered the Union Pacific Railroad Company and authorized it to build a transcontinental railroad. In 1865 Railroad, pursuant to congressional authorization, pledged a mortgage secured by its right-of-way and franchise to gain monies necessary for construction. In 1871 Congress granted Railroad authority to issue bonds for the construction of a bridge over the Missouri River, that grant being conditioned upon the bridge's being open for the use of all roads for a reasonable compensation, to be paid to the owner of the bridge. This condition was one generally inserted by Congress in statutes authorizing bridge construction. Sometime after the bridge was built the 1865 mortgage was foreclosed and the Union Pacific Railroad Company, a Utah corporation, purchased the assets of the federal corporation. It thereafter refused to allow any but its own trains to use the bridge, contending that as purchaser under the foreclosure of the 1865 mortgage, it was not bound by the 1871 statute's conditions. This Court rejected that contention and concluded that the conditions applied to the Utah corporation, reasoning that the purpose of Congress in authorizing the construction of the bridge required that the conditions appended to that authorization attach to the bridge and bind its owner.

The instant case is quite different. Here the provisions of the charter of Northern Pacific Railroad Company which are urged to bar this merger were directed only to

the operations of the federal corporation, not to the operation of the railroad. Thus, when the corporation's property was sold to another, the conditions of which Livingston speaks did not follow that property into the hands of the successor corporation. It therefore follows that the statute creating the Northern Pacific Railroad Company did not bar the Interstate Commerce Commission from authorizing a merger involving the Northern Pacific Railway Company, a Wisconsin corporation.[20] We find that the Commission acted within its authority in assuming jurisdiction over the instant merger proposal and that Railway is not barred by the statute from participating in that merger. We have considered Livingston's other contentions and find them to be without merit.

Conclusion

On the entire record we cannot say that the District Court erred in upholding the order set forth in the Second Report or that the Commission has done other than give effect to the Transportation Act of 1920 as amended in 1940, which vested in the Commission the responsibility of balancing the values of competition against the need for consolidation of rail transportation units.

The judgment of the District Court is therefore affirmed and the stay granted by this Court pending the resolution of these appeals is hereby vacated.

[Appendixes A and B follow this page.]

MR. JUSTICE DOUGLAS took no part in the decision of these cases.

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[20] Appellees contend that under §§ 5 (11) and 20a (7) of the Interstate Commerce Act, 49 U. S. C. §§ 5 (11), 20a (7), the approval of a consolidation proposal operates to relieve the applicants from any inhibiting state or federal laws, that the charter of Railroad is such a law, and that approval of the instant merger proposal modifies any conflicting provisions in that charter. Since we do not find Railroad's charter to be binding upon Railway, we need not reach that contention.

364-752 O - 70 (Face p. 530) No. 1

PRINCIPAL TRANSCONTINENTAL LINES PLUS TERRITORIES TO BE MADE AVAILABLE TO MILWAUKEE THROUGH OPENING OF 11 GATEWAYS

SEATTLE 2
TACOMA 1
SPOKANE 3
GREAT FALLS 7
JUDITH GAP 8
FARGO 11
LINTON 10
MISSOULA 4
BUTTE 5
BOZEMAN 6
MILES CITY 9

LIST OF 11 GATEWAYS

1 TACOMA	7 GREAT FALLS
2 SEATTLE	8 JUDITH GAP
3 SPOKANE	9 MILES CITY
4 MISSOULA	10 LINTON
5 BUTTE	11 FARGO
6 BOZEMAN	

COLOR OF AREA INDICATES TERRITORY AVAILABLE THROUGH EACH GATEWAY. SOME AREAS RELATED TO PARTICULAR GATEWAYS OVERLAP, BUT OVERLAPPING IS NOT SHOWN.

LEGEND
- G. N. RY.
- N. P. RY.
- S. P. & S. SYSTEM
- C. B. & Q. RR.
- OTHER RR.
- OTHER LINES
- APPLICANT COMPANIES

0 25 50 75 100
SCALE IN MILES

S.P. to New Orleans via T. & N. O.

364-752 O - 70 (Face p. 530) No. 2

ROSS ET AL., TRUSTEES *v.* BERNHARD ET AL.

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

No. 42. Argued November 10, 1969—Decided February 2, 1970

The right to trial by jury preserved by the Seventh Amendment extends to a stockholder's derivative suit with respect to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury trial.

403 F. 2d 909, reversed.

William E. Haudek argued the cause for petitioners. With him on the briefs were *Richard M. Meyer* and *Stanley M. Grossman.*

Marvin Schwartz argued the cause for respondents. With him on the brief were *Roger L. Waldman, William J. Manning,* and *E. Roger Frisch.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Seventh Amendment to the Constitution provides that in "[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Whether the Amendment guarantees the right to a jury trial in stockholders' derivative actions is the issue now before us.

Petitioners brought this derivative suit in federal court against the directors of their closed-end investment company, the Lehman Corporation, and the corporation's brokers, Lehman Brothers. They contended that Lehman Brothers controlled the corporation through an illegally large representation on the corporation's board of directors, in violation of the Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. § 80a–1 *et seq.*, and used this control to extract excessive brokerage fees from the corporation. The directors of the corporation were accused of converting corporate assets and of "gross abuse

of trust, gross misconduct, willful misfeasance, bad faith, [and] gross negligence." Both the individual defendants and Lehman Brothers were accused of breaches of fiduciary duty. It was alleged that the payments to Lehman Brothers constituted waste and spoliation, and that the contract between the corporation and Lehman Brothers had been violated. Petitioners requested that the defendants "account for and pay to the Corporation for their profits and gains and its losses." Petitioners also demanded a jury trial on the corporation's claims.

On motion to strike petitioners' jury trial demand, the District Court held that a shareholder's right to a jury on his corporation's cause of action was to be judged as if the corporation were itself the plaintiff. Only the shareholder's initial claim to speak for the corporation had to be tried to the judge. 275 F. Supp. 569. Convinced that "there are substantial grounds for difference of opinion as to this question and . . . an immediate appeal would materially advance the ultimate termination of this litigation," the District Court permitted an interlocutory appeal. 28 U. S. C. § 1292 (b). The Court of Appeals reversed, holding that a derivative action was entirely equitable in nature, and no jury was available to try any part of it. 403 F. 2d 909. It specifically disagreed with *DePinto* v. *Provident Security Life Ins. Co.*, 323 F. 2d 826 (C. A. 9th Cir. 1963), cert. denied, 376 U. S. 950 (1964), on which the District Court had relied. Because of this conflict, we granted certiorari. 394 U. S. 917 (1969).

We reverse the holding of the Court of Appeals that in no event does the right to a jury trial preserved by the Seventh Amendment extend to derivative actions brought by the stockholders of a corporation. We hold that the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had

been suing in its own right, would have been entitled to a jury.

The Seventh Amendment preserves to litigants the right to jury trial in suits at common law—

> "not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830).

However difficult it may have been to define with precision the line between actions at law dealing with legal rights and suits in equity dealing with equitable matters, *Whitehead* v. *Shattuck,* 138 U. S. 146, 151 (1891), some proceedings were unmistakably actions at law triable to a jury. The Seventh Amendment, for example, entitled the parties to a jury trial in actions for damages to a person or property, for libel and slander, for recovery of land, and for conversion of personal property.[1] Just as clearly, a corporation, although an artificial being, was commonly entitled to sue and be sued in the usual forms of action, at least in its own State. See *Paul* v. *Virginia,* 8 Wall. 168 (1869). Whether the corporation was viewed as an entity separate from its stockholders or as a device permitting its stockholders to carry on their business and to sue and be sued, a corporation's suit to enforce a legal right was an action

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[1] See, *e. g., Curriden* v. *Middleton,* 232 U. S. 633 (1914); *Whitehead* v. *Shattuck,* 138 U. S. 146 (1891); 5 J. Moore, Federal Practice ¶ 38.11 [5] (2d ed. 1969).

at common law carrying the right to jury trial at the time the Seventh Amendment was adopted.[2]

The common law refused, however, to permit stockholders to call corporate managers to account in actions at law. The possibilities for abuse, thus presented, were not ignored by corporate officers and directors. Early in the 19th century, equity provided relief both in this country and in England. Without detailing these developments,[3] it suffices to say that the remedy in this country, first dealt with by this Court in *Dodge* v. *Woolsey*, 18 How. 331 (1856), provided redress not only against faithless officers and directors but also against third parties who had damaged or threatened the corporate properties and whom the corporation through its managers refused to pursue. The remedy made available in equity was the derivative suit, viewed in this country as a suit to enforce a *corporate* cause of action against officers, directors, and third parties. As elaborated in the cases, one precondition for the suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions.[4] Thus the dual nature of the stockholder's action: first,

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[2] 1 W. Blackstone, Commentaries *475; cf. *Bank of Columbia* v. *Patterson's Adm'r*, 7 Cranch 299 (1813); *Bank of Kentucky* v. *Wister*, 2 Pet. 318 (1829).

[3] Prunty, The Shareholders' Derivative Suit: Notes on Its Derivation, 32 N. Y. U. L. Rev. 980 (1957), treats the development of the equitable remedy.

[4] *Delaware & Hudson Co.* v. *Albany & S. R. Co.*, 213 U. S. 435 (1909); *Doctor* v. *Harrington*, 196 U. S. 579 (1905); *Quincy* v. *Steel*, 120 U. S. 241 (1887); *Hawes* v. *Oakland*, 104 U. S. 450 (1882). Soon after *Hawes* v. *Oakland*, *supra*, the preconditions to a shareholder's suit were promulgated as Equity Rule 94, 104 U. S. IX, which became Equity Rule 27, 226 U. S. 656 (1912), then Fed. Rule Civ. Proc. 23 (b), 308 U. S. 690 (1938), and is now Fed. Rule Civ. Proc. 23.1, 383 U. S. 1050 (1966).

the plaintiff's right to sue on behalf of the corporation and, second, the merits of the corporation's claim itself.[5]

Derivative suits posed no Seventh Amendment problems where the action against the directors and third parties would have been by a bill in equity had the corporation brought the suit. Our concern is with cases based upon a legal claim of the corporation against directors or third parties. Does the trial of such claims at the suit of a stockholder and without a jury violate the Seventh Amendment?

The question arose in this Court in the context of a derivative suit for treble damages under the antitrust laws. *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U. S. 27 (1916). Noting that the bill in equity set up a claim of the corporation alone, Mr. Justice Holmes observed that if the corporation were the plaintiff, "no one can doubt that its only remedy would be at law," and inquired "why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue—how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged"? *Id.,* at 28. His answer was that the bill did not state a good cause of action in equity. Agreeing that there were "cases in which the nature of the right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different state system, has

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[5] See *Koster* v. *Lumbermens Mut. Cas. Co.,* 330 U. S. 518, 522–523 (1947); *Ashwander* v. *TVA,* 297 U. S. 288 (1936). See also 13 W. Fletcher, Cyclopedia of the Law of Private Corporations § 5941.1 (1961 ed.); 2 G. Hornstein, Corporation Law and Practice § 716 (1959); 4 J. Pomeroy, Equity Jurisprudence § 1095, p. 278 (5th ed. 1941). Insofar as the stockholders may have been asserting their own direct interest, they closely resemble other class action plaintiffs who could proceed, before merger, only in equity.

led to the whole matter being disposed of in equity," he concluded that when the penalty of triple damages is sought, the antitrust statute plainly anticipated a jury trial and should not be read as "attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Id.*, at 28–29. Although the decision had obvious Seventh Amendment overtones, its ultimate rationale was grounded in the antitrust laws.[6]

Where penal damages were not involved, however, there was no authoritative parallel to *Fleitmann* in the federal system squarely passing on the applicability of the Seventh Amendment to the trial of a legal claim presented in a pre-merger derivative suit. What can be gleaned from this Court's opinions [7] is not inconsistent

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[6] The dilemma of the stockholder seeking treble damages for the corporation became real and complete in *United Copper Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261 (1917), where the stockholder-plaintiff sought treble damages in an action at law. The Court rejected the claim by reiterating the traditional view that a shareholder was without standing to sue at law on a corporate cause. The treble-damage action was a legal proceeding and only the corporation could bring it. The Court of Appeals for the Second Circuit has held that the federal rules have resolved the dilemma and that derivative actions for treble damages under the antitrust laws are now proper. *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (C. A. 2d Cir. 1953). Cf. *Ramsburg* v. *American Inv. Co. of Ill.*, 231 F. 2d 333 (C. A. 7th Cir. 1956). See generally Comment, Federal Antitrust Law—Stockholders' Remedies For Corporate Injury Resulting From Antitrust Violations: Derivative Antitrust Suit and Fiduciary Duty Action, 59 Mich. L. Rev. 904 (1961).

[7] For example, in *Amalgamated Copper* the Court noted that in *Quincy* v. *Steel*, 120 U. S. 241 (1887), a shareholder's bill in equity that sought to enforce "a purely legal claim of the corporation—damages for breach of contract" was dismissed, "not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors

with the general understanding, reflected by the state court decisions and secondary sources, that equity could properly resolve corporate claims of any kind without a jury when properly pleaded in derivative suits complying with the equity rules.[8]

Such was the prevailing opinion when the Federal Rules of Civil Procedure were adopted in 1938. It continued until 1963 when the Court of Appeals for the Ninth Circuit, relying on the Federal Rules as construed and applied in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469 (1962), required the legal issues in a derivative suit to be tried to a jury.[9] *DePinto* v. *Provident Security Life Ins. Co.,* 323 F. 2d 826. It was this decision that the District Court followed in the case before us and that the Court of Appeals rejected.

Beacon and *Dairy Queen* presaged *DePinto.* Under those cases, where equitable and legal claims are joined

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to enter suit." 244 U. S., at 264–265, n. 2. *Delaware & Hudson Co.* v. *Albany & S. R. Co., supra,* n. 4, involved a derivative suit for money damages due under a lease. The stockholders' right to sue was sustained; no jury trial issue appears to have been raised.

[8] See, *e. g., Goetz* v. *Manufacturers' & Traders' Trust Co.,* 154 Misc. 733, 277 N. Y. S. 802 (Sup. Ct. 1935); *Isaac* v. *Marcus,* 258 N. Y. 257, 179 N. E. 487 (1932); *Morton* v. *Morton Realty Co.,* 41 Idaho 729, 241 P. 1014 (1925); *Neff* v. *Barber,* 165 Wis. 503, 162 N. W. 667 (1917); *Robinson* v. *Smith,* 3 Paige Ch. 222, 231, 233 (N. Y. 1832); 4 W. Cook, Corporations § 734 (8th ed. 1923); S. Thompson & J. Thompson, Law of Corporations § 4661 (Supp. 1931); 6 *id.,* § 4653 (3d ed. 1927).

[9] The possibility that the merged federal practice altered the procedures in derivative suits was early recognized, *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc., supra,* n. 6, but until the action of the District Court below *DePinto* was alone in holding that a right to a jury trial existed in derivative actions. Cf. *Richland* v. *Crandall,* 259 F. Supp. 274 (D. C. S. D. N. Y. 1966). See also *Metcalf* v. *Shamel,* 166 Cal. App. 2d 789, 333 P. 2d 857 (1959); *Steinway* v. *Griffith Consol. Theatres,* 273 P. 2d 872 (Okla. 1954).

in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.[10] See *Simler* v. *Conner,* 372 U. S. 221 (1963). The principle of these cases bears heavily on derivative actions.

We have noted that the derivative suit has dual aspects: first, the stockholder's right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors or third parties on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial. As implied by Mr. Justice Holmes in *Fleitmann,* legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit. The claim pressed by the stockholder against directors or third parties "is not his own but the corporation's." *Koster* v. *Lumbermens Mut. Cas. Co.,* 330 U. S. 518, 522 (1947). The corporation is a necessary party to the action; without it the case cannot proceed. Although named a defendant, it is the real party in interest, the stockholder being at best the nominal plaintiff. The proceeds of the action belong to the corporation and it is bound by the result of the suit.[11]

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[10] As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply. See James, Right to a Jury Trial in Civil Actions, 72 Yale L. J. 655 (1963).

[11] See *Koster* v. *Lumbermens Mut. Cas. Co.,* 330 U. S. 518 (1947); *Meyer* v. *Fleming,* 327 U. S. 161, 167 (1946); *Davenport* v. *Dows,* 18 Wall. 626 (1874).

The heart of the action is the corporate claim. If it presents a legal issue, one entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court. *Beacon* and *Dairy Queen* require no less.

If under older procedures, now discarded, a court of equity could properly try the legal claims of the corporation presented in a derivative suit, it was because irreparable injury was threatened and no remedy at law existed as long as the stockholder was without standing to sue and the corporation itself refused to pursue its own remedies. Indeed, from 1789 until 1938, the judicial code expressly forbade courts of equity from entertaining any suit for which there was an adequate remedy at law.[12] This provision served "to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed." *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94 (1932). If, before 1938, the law had borrowed from equity, as it borrowed other things, the idea that stockholders could litigate for their recalcitrant corporation, the corporate claim, if legal, would undoubtedly have been tried to a jury.

Of course, this did not occur, but the Federal Rules had a similar impact. Actions are no longer brought as actions at law or suits in equity. Under the Rules there is only one action—a "civil action"—in which all claims may be joined and all remedies are available. Purely procedural impediments to the presentation of any issue by any party, based on the difference between law and

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[12] The Judicial Code of 1911, § 267, 36 Stat. 1163, re-enacting the Act of Sept. 24, 1789, § 16, 1 Stat. 82, provided: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

equity, were destroyed. In a civil action presenting a stockholder's derivative claim, the court after passing upon the plaintiff's right to sue on behalf of the corporation is now able to try the corporate claim for damages with the aid of a jury.[13] Separable claims may be tried separately, Fed. Rule Civ. Proc. 42 (b), or legal and equitable issues may be handled in the same trial. *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (C. A. 2d Cir. 1953). The historical rule preventing a court of law from entertaining a shareholder's suit on behalf of the corporation is obsolete; it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors. Under the rules, law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court. The "expansion of adequate legal remedies provided by . . . the Federal Rules necessarily affects the scope of equity." *Beacon Theatres, Inc.* v. *Westover*, 359 U. S., at 509.

Thus, for example, before-merger class actions were largely a device of equity, and there was no right to a jury even on issues that might, under other circumstances, have been tried to a jury. 5 J. Moore, Federal

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[13] It would appear that the same conclusions could have been reached under Equity Rule 23 and the Law and Equity Act of 1915, Act of March 3, 1915, 38 Stat. 956. See *Southern R. Co.* v. *City of Greenwood*, 40 F. 2d 679 (D. C. W. D. S. C. 1928); 2 J. Moore, Federal Practice ¶ 2.05 (2d ed. 1967). Rule 23 provided:

"If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

Practice ¶ 38.38 [2] (2d ed. 1969); 3B *id.*, ¶ 23.02 [1]. Although at least one post-merger court held that the device was not available to try legal issues,[14] it now seems settled in the lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present. *Montgomery Ward & Co.* v. *Langer,* 168 F. 2d 182 (C. A. 8th Cir. 1948); see *Oskoian* v. *Canuel,* 269 F. 2d 311 (C. A. 1st Cir. 1959), aff'g 23 F. R. D. 307; *Syres* v. *Oil Workers Int'l Union, Local 23,* 257 F. 2d 479 (C. A. 5th Cir. 1958), cert. denied, 358 U. S. 929 (1959). 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 571 (Wright ed. 1961).

Derivative suits have been described as one kind of "true" class action. *Id.*, § 562.1. We are inclined to agree with the description, at least to the extent it recognizes that the derivative suit and the class action were both ways of allowing parties to be heard in equity who could not speak at law.[15] 3B J. Moore, Federal Practice

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[14] *Farmers Co-operative Oil Co.* v. *Socony-Vacuum Oil Co.,* 43 F. Supp. 735 (D. C. N. D. Iowa 1942).

[15] Other equitable devices are used under the rules without depriving the parties employing them of the right to a jury trial on legal issues. For example, although the right to intervene may in some cases be limited, *United States for the Use and Benefit of Browne & Bryan Lumber Co.* v. *Massachusetts Bonding & Ins. Co.,* 303 F. 2d 823 (C. A. 2d Cir. 1962); *Dickinson* v. *Burnham,* 197 F. 2d 973 (C. A. 2d Cir.), cert. denied, 344 U. S. 875 (1952), when intervention is permitted generally, the intervenor has a right to a jury trial on any legal issues he presents. See 3B J. Moore, Federal Practice ¶ 24.16 [7] (2d ed. 1969); 5 *id.*, ¶ 38.38 [3]. A similar development seems to be taking place in the lower courts in interpleader actions. Before merger interpleader actions lay only in equity, and there was no right to a jury even on issues that might, under other circumstances, have been tried to a jury. *Liberty Oil Co.* v. *Condon Nat. Bank,* 260 U. S. 235 (1922). This view continued for some time after merger, see *Bynum*

¶¶ 23.02 [1], 23.1.16 [1] (2d ed. 1969). After adoption of the rules there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights. Given the availability in a derivative action of both legal and equitable remedies, we think the Seventh Amendment preserves to the parties in a stockholder's suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its legal claims.

In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence. Under these circumstances it is unnecessary to decide

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v. *Prudential Life Ins. Co.*, 7 F. R. D. 585 (D. C. E. D. S. C. 1947), but numerous courts and commentators have now come to the conclusion that the right to a jury should not turn on how the parties happen to be brought into court. See *Pan American Fire & Cas. Co.* v. *Revere*, 188 F. Supp. 474 (D. C. E. D. La. 1960); *Savannah Bank & Trust Co.* v. *Block*, 175 F. Supp. 798 (D. C. S. D. Ga. 1959); *Westinghouse Elec. Corp.* v. *United Elec. Radio & Mach. Workers of America*, 99 F. Supp. 597 (D. C. W. D. Pa. 1951); *John Hancock Mut. Life Ins. Co.* v. *Yarrow*, 95 F. Supp. 185 (D. C. E. D. Pa. 1951); 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 556 (Wright ed. 1961); 3A J. Moore, Federal Practice ¶ 22.14 [4] (2d ed. 1969). But see *Pennsylvania Fire Ins. Co.* v. *American Airlines, Inc.*, 180 F. Supp. 239 (D. C. E. D. N. Y. 1960); *Liberty Nat. Life Ins. Co.* v. *Brown*, 119 F. Supp. 920 (D. C. M. D. Ala. 1954).

whether the corporation's other claims are also properly triable to a jury. *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469 (1962). The decision of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN join, dissenting.

In holding as it does that the plaintiff in a shareholder's derivative suit is constitutionally entitled to a jury trial, the Court today seems to rely upon some sort of ill-defined combination of the Seventh Amendment and the Federal Rules of Civil Procedure. Somehow the Amendment and the Rules magically interact to do what each separately was expressly intended not to do, namely, to enlarge the right to a jury trial in civil actions brought in the courts of the United States.

The Seventh Amendment, by its terms, does not extend, but merely *preserves* the right to a jury trial "[i]n Suits at common law." All agree that this means the reach of the Amendment is limited to those actions that were tried to the jury in 1791 when the Amendment was adopted.[1] Suits in equity, which were historically tried to the court, were therefore unaffected by it. Similarly, Rule 38 of the Federal Rules has no bearing on the right to a jury trial in suits in equity, for it simply preserves inviolate "[t]he right of trial by jury as declared by the Seventh Amendment." Thus this Rule, like the Amendment itself, neither restricts nor enlarges the right to jury

[1] Where a new cause of action is created by Congress, and nothing is said about how it is to be tried, the jury trial issue is determined by fitting the cause into its nearest historical analogy. *Luria* v. *United States,* 231 U. S. 9; see James, Right to a Jury Trial in Civil Actions, 72 Yale L. J. 655.

trial.[2] Indeed nothing in the Federal Rules can rightly be construed to enlarge the right of jury trial, for in the legislation authorizing the Rules, Congress expressly provided that they "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 48 Stat. 1064. See 28 U. S. C. § 2072. I take this plain, simple, and straightforward language to mean that after the promulgation of the Federal Rules, as before, the constitutional right to a jury trial attaches only to suits at common law. So, apparently, has every federal court that has discussed the issue.[3] Since, as the Court concedes, a shareholder's derivative suit could be brought only in equity, it would seem to me to follow by the most elementary logic that in such suits there is no constitutional right to a trial by jury.[4] Today the Court tosses aside history, logic, and over 100 years of firm precedent to hold that the plaintiff in a shareholder's derivative

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[2] See, *e. g., Ettelson* v. *Metropolitan Life Ins. Co.,* 137 F. 2d 62, 65; 5 J. Moore, Federal Practice ¶ 38.07 [1] and cases cited therein.

[3] The principle that the Rules effected no enlargement or restriction of the right of jury trial has "received complete judicial approbation." 5 J. Moore, Federal Practice ¶ 38.07 [1] and cases cited therein.

[4] Virtually every state and federal court that has faced this issue has similarly reasoned to the same conclusion. See, *e. g., Goetz* v. *Manufacturers' & Traders' Trust Co.,* 154 Misc. 733, 277 N. Y. S. 802 (Sup. Ct.); *Metcalf* v. *Shamel,* 166 Cal. App. 2d 789, 333 P. 2d 857; *Liken* v. *Shaffer,* 64 F. Supp. 432; *Miller* v. *Weiant,* 42 F. Supp. 760. The equitable nature of the derivative suit has been recognized in several decisions of this Court. See, *e. g., Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 547–548. It was also reflected in the adoption of Equity Rule 94 in 1882, and Rule 27 of the Equity Rules of 1912 which established the preconditions to bringing shareholders' derivative suits in the federal courts. These rules are the forerunners of Rule 23 (b) of Fed. Rule Civ. Proc. of 1938, and of Fed. Rule Civ. Proc. 23.1 (1966), which now controls the initiation of such suits. See 3B J. Moore, Federal Practice ¶ 23.1.15 [1].

suit does indeed have a constitutional right to a trial by jury. This holding has a questionable basis in policy [5] and no basis whatever in the Constitution.

The Court begins by assuming the "dual nature" of the shareholder's action. While the plaintiff's right to get into court at all is conceded to be equitable, once he is there the Court says his claim is to be viewed as though it were the claim of the corporation itself. If the corporation would have been entitled to a jury trial on such a claim, then, it is said, so would the shareholder. This conceptualization is without any historical basis. For the fact is that a shareholder's suit was not originally viewed in this country, or in England, as a suit to enforce a *corporate* cause of action. Rather, the shareholder's suit was initially permitted only against the managers of the corporation—not third parties—and it was conceived of as an equitable action to enforce the right of a beneficiary against his trustee.[6] The shareholder was not, therefore, in court to enforce indirectly the corporate right of action, but to enforce directly his own equitable right of action against an unfaithful fiduciary. Later the rights of the shareholder were enlarged to encompass suits against third parties harming the corporation, but "the postulated 'corporate cause of action' has never been thought to describe an actual historical class of suit which

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[5] See, *e. g.*, J. Frank, Courts on Trial 110–111 (1949). Certainly there is no consensus among commentators on the desirability of jury trials in civil actions generally. Particularly where the issues in the case are complex—as they are likely to be in a derivative suit—much can be said for allowing the court discretion to try the case itself. See discussion in 5 J. Moore, Federal Practice ¶ 38.02 [1].

[6] *Robinson* v. *Smith*, 3 Paige Ch. 222 (N. Y.); *Attorney General* v. *Utica Ins. Co.*, 2 Johns. Ch. 371 (N.Y.), discussed in Prunty, The Shareholders' Derivative Suit: Notes on its Derivation, 32 N. Y. U. L. Rev. 980.

was recognized by courts of law." [7] Indeed the commentators, including those cited by the Court as postulating the analytic duality of the shareholder's derivative suit, recognize that historically the suit has in practice always been treated as a single cause tried exclusively in equity. They agree that there is therefore no constitutional right to a jury trial even where there might have been one had the corporation itself brought the suit.[8]

This has been not simply the "general" or "prevailing" view in the federal courts as the Court says, but the unanimous view with the single exception of the Ninth Circuit's 1963 decision in *DePinto* v. *Provident Security Life Ins. Co.*, 323 F. 2d 826, a decision that has since been followed by no court until the present case.

The Court would have us discount all those decisions rendered before 1938, when the Federal Rules of Civil Procedure were adopted, because it says that before the promulgation of the Rules, "[p]urely procedural impediments" somehow blocked the exercise of a constitutional right. In itself this would seem a rather shaky premise upon which to build an argument. But the Court's position is still further weakened by the fact that any "[p]urely procedural impediments" to a jury trial in a derivative suit were eliminated, not in 1938, but at least as early as 1912. For Rule 23 of the Equity Rules of that year provided that if a "matter ordinarily determinable at law" arose in an equity suit it should "be determined in that suit according to the principles applicable, without sending the case or question to the

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[7] Note, The Right to a Jury Trial in a Stockholder's Derivative Action, 74 Yale L. J. 725, 730.

[8] See, *e. g.*, N. Lattin, The Law of Corporations, c. 8, § 3; 2 G. Hornstein, Corporation Law and Practice § 730; 13 W. Fletcher, Cyclopedia of the Law of Private Corporations § 5931 (1961 ed.); 5 J. Moore, Federal Practice ¶ 38.38 [4].

law side of the court." 226 U. S. 654. These applicable principles included the right of jury trial.[9] Consequently, when the Court said in *United Copper Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 264, that "it is clear" that the remedy of a stockholder seeking to enforce the rights of a corporation—whatever their nature—is not in law but in equity, it was not because there were "procedural impediments" to a jury trial on any "legal issues." Rather, it was because the suit itself was conceived of as a wholly equitable cause of action.

This was also true in *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, on which the Court so heavily relies even though it was a pre-Federal-Rules case. In *Fleitmann* the plaintiff sued derivatively to enforce a corporate right of action for treble damages under the antitrust laws. Treble damages were considered punitive, and the statute was read to imply a right in the defendant to a jury trial. In his opinion for the Court, Mr. Justice Holmes recognized the potential for abuse: derivative rather than corporate actions could be brought in order to deprive the defendant of his right to a jury trial. The Court's solution was to dismiss the bill because the antitrust statute "should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Id.*, at 29. I do not see how the Court today can draw sustenance from this decision. Rather, the *Fleitmann* case seems to me to stand for a proposition diametrically opposed to that which the Court seeks to establish, namely, the proposition that because a derivative action is wholly equitable, there is no right to a jury trial. The Court in *Fleitmann* simply held that since there was a statutory right to a jury in all actions for treble damages under the antitrust laws, a derivative

[9] See *Southern R. Co.* v. *City of Greenwood*, 40 F. 2d 679.

suit seeking such damages could not be maintained. Thus the bill had to be dismissed.[10]

These pre-1938 cases, then, firmly establish the unitary, equitable basis of shareholders' derivative suits and in no way support the Court's holding here. But, the Court says, whatever the situation may have been before 1938, the Federal Rules of Civil Procedure of that year, at least as construed in our decisions more than 20 years later in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500, and *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469, in any event require the conclusion reached today. I can find nothing in either of these cases that leads to that conclusion.

In *Beacon Theatres* the plaintiff sought both an injunction preventing the defendant from instituting an antitrust action and a declaratory judgment that certain moving picture distribution contracts did not violate the antitrust laws. The defendant answered and counterclaimed for treble damages under the antitrust laws. He demanded a jury trial on the factual issues relating to his counterclaim. The district court held that even though there were factual issues common to both the complaint and the counterclaim, it would first hear the plaintiff's suit for equitable relief before submitting the counterclaim to a jury. The Court of Appeals affirmed, and this Court reversed, upon the ground that if the equitable claim were tried first, there might be an estoppel which would defeat the defendant's right to a full jury trial on all the factual issues raised in his counterclaim. Similarly in *Dairy Queen* the Court simply held

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[10] Moreover, since the suit was brought *after* the promulgation of Equity Rule 23 it seems evident that here, too, it was not merely "procedural impediments" that prevented the antitrust claim from being tried to a jury, but presumably the fact that no matter arising in a derivative suit—whatever its "inherent nature"—was considered to be one "ordinarily determinable at law."

that a plaintiff could not avoid a jury trial by joining legal and equitable causes of action in one complaint.

It is true that in *Beacon Theatres* it was stated that the 1938 Rules did diminish the scope of federal equity jurisdiction in certain particulars. But the Court's effort to force the facts of this case into the mold of *Beacon Theatres* and *Dairy Queen* simply does not succeed. Those cases involved a combination of historically separable suits, one in law and one in equity. Their facts fit the pattern of cases where, before the Rules, the equity court would have disposed of the equitable claim and would then have either retained jurisdiction over the suit, despite the availability of adequate legal remedies, or enjoined a subsequent legal action between the same parties involving the same controversy.[11]

But the present case is not one involving traditionally equitable claims by one party, and traditionally legal claims by the other. Nor is it a suit in which the plaintiff is asserting a combination of legal and equitable claims. For, as we have seen, a derivative suit has always been conceived of as a single, unitary, equitable cause of action. It is for this reason, and not because of "procedural impediments," that the courts of equity did not transfer derivative suits to the law side. In short, the cause of action is wholly a creature of equity. And whatever else can be said of *Beacon Theatres* and *Dairy Queen*, they did not cast aside altogether the historic division between equity and law.

If history is to be so cavalierly dismissed, the derivative suit can, of course, be artificially broken down into separable elements. But so then can any traditionally equitable cause of action, and the logic of the Court's position would lead to the virtual elimination of all equity jurisdiction. An equitable suit for an injunction, for

[11] See discussion in 74 Yale L. J., at 736–737.

instance, often involves issues of fact which, if damages had been sought, would have been triable to a jury. Does this mean that in a suit asking only for injunctive relief these factual issues *must* be tried to the jury, with the judge left to decide only whether, given the jury's findings, an injunction is the appropriate remedy? Certainly the Federal Rules make it *possible* to try a suit for an injunction in that way, but even more certainly they were not intended to have any such effect. Yet the Court's approach, it seems, would require that if any "legal issue" procedurally *could* be tried to a jury, it constitutionally *must* be tried to a jury.

The fact is, of course, that there are, for the most part, no such things as inherently "legal issues" or inherently "equitable issues." There are only factual issues, and, "like chameleons [they] take their color from surrounding circumstances." [12] Thus the Court's "nature of the issue" approach is hardly meaningful.

As a final ground for its conclusion, the Court points to a supposed analogy to suits involving class actions. It says that before the Federal Rules such suits were considered equitable and not triable to a jury, but that since promulgation of the Rules the federal courts have found that "plaintiffs may obtain a jury trial on any legal issues they present." Of course the plaintiff *may* obtain such a trial even in a derivative suit. Nothing in the Constitution or the Rules precludes the judge from granting a jury trial as a matter of discretion.

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[12] James, *supra*, n. 1, at 692. As Professor Moore has put it, "Whether issues are legal or equitable may, of course, depend upon the manner in which they are presented . . . ." 5 J. Moore, Federal Practice ¶ 38.04 [1], n. 40. And he, along with virtually every other commentator, concludes that if the issues are presented in a shareholder's derivative suit they are equitable and the plaintiff has no constitutional right to have them tried by a jury. 5 J. Moore, Federal Practice ¶ 38.38 [4].

But even if the Court means that some federal courts have ruled that the class action plaintiff in some situations has a constitutional right to a jury trial, the analogy to derivative suits is wholly unpersuasive. For it is clear that the draftsmen of the Federal Rules intended that Rule 23 as it pertained to class actions should be applicable, like other rules governing joinder of claims and parties, "to all actions, whether formerly denominated legal or equitable." [13] This does not mean that a formerly equitable action is triable to a jury simply *because* it is brought on behalf of a class, but only that a historically legal cause of action can be tried to a jury *even if* it is brought as a class action. Since a derivative suit is historically wholly a creation of equity, the class action "analogy" is in truth no analogy at all.

The Court's decision today can perhaps be explained as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions. It certainly cannot be explained in terms of either the Federal Rules or the Constitution.

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[13] Original Committee Note of 1937 to Rule 23. Moreover, as Professor Moore points out, certain class actions could be maintained at law in the federal courts even before the Federal Rules. 5 J. Moore, Federal Practice ¶ 38.38 [2].

Per Curiam

ALABAMA *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 38, Orig. Decided February 2, 1970

State of Alabama's motion for leave to file complaint invoking Court's original jurisdiction fails to state claim warranting exercise of such jurisdiction.

Motion denied.

Albert P. Brewer, Governor of Alabama, *Daniel J. Meador,* and *Maury D. Smith* on the motion.

PER CURIAM.

On January 26, 1970, the plaintiff filed a motion seeking leave to file a complaint invoking the original jurisdiction of this Court naming Robert Finch, as Secretary of the Department of Health, Education, and Welfare, and John N. Mitchell, as Attorney General of the United States, as defendants.

The alleged emergent nature of the claims for relief led the Court to give expedited consideration to the motion and proffered complaint and, having examined the complaint, we conclude it fails to state a claim against either of the defendants warranting the exercise of the original jurisdiction of this Court.

Accordingly, the motion for leave to file the said complaint is denied.

MISSISSIPPI *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 39, Orig. Decided February 2, 1970

State of Mississippi's motion for leave to file complaint invoking Court's original jurisdiction fails to state claim warranting exercise of such jurisdiction.

Motion denied.

John Bell Williams, Governor of Mississippi, *A. F. Summer,* Attorney General, and *William A. Allain,* Assistant Attorney General, on the motion.

PER CURIAM.

On February 2, 1970, the plaintiff filed a motion seeking leave to file a complaint invoking the original jurisdiction of this Court naming Robert Finch, individually and as Secretary of the Department of Health, Education, and Welfare, and John N. Mitchell, individually and as Attorney General of the United States, as defendants.

The alleged emergent nature of the claims for relief led the Court to give expedited consideration to the motion and proffered complaint and, having examined the complaint, we conclude it fails to state a claim against either of the defendants warranting the exercise of the original jurisdiction of this Court.

Accordingly, the motion for leave to file the said complaint is denied.

MR. JUSTICE HARLAN took no part in the consideration or decision of this motion.

JOHNSON ET AL. *v.* WASSERMAN, JUDGE, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 832. Decided February 2, 1970

Appeal dismissed and certiorari denied.

Alvin A. Fein for appellants.

John T. Corrigan and *John L. Dowling* 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.

KIRK *v.* BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA

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

No. 836. Decided February 2, 1970

273 Cal. App. 2d 430, 78 Cal. Rptr. 260, appeal dismissed.

Charles R. B. Kirk, Norman Dorsen, Clark Byse, and *William W. Van Alstyne* for appellant.

Thomas J. Cunningham and *David W. Louisell* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

STEIN *v.* LUKEN ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 854. Decided February 2, 1970

Appeal dismissed.

Yale Stein, appellant, *pro se.*

PER CURIAM.

The appeal is dismissed for failure to docket the case within the time prescribed by Rule 13.

PROVIDENCE & WORCESTER CO. *v.* UNITED STATES ET AL.

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

No. 919. Decided February 2, 1970

300 F. Supp. 185, affirmed.

Harold I. Meyerson for appellant.

Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Springer, Howard E. Shapiro, Robert W. Ginnane, and *Leonard S. Goodman* for appellees the United States et al.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

February 2, 1970 396 U. S.

TV PIX, INC., ET AL. *v.* TAYLOR ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

No. 214. Decided February 2, 1970

304 F. Supp. 459, affirmed.

George M. McMillan for appellants.

Harvey Dickerson, Attorney General of Nevada, for appellees.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Griswold* and *Henry Geller* for the United States, and by *Paul Rodgers* for the National Association of Regulatory Utility Commissioners. *E. Stratford Smith* and *Bruce Lovett* filed a brief for the National Cable Television Association, Inc., as *amicus curiae.*

PER CURIAM.

The motion of the National Association of Regulatory Utility Commissioners for leave to file a brief, as *amicus curiae,* is granted. The motion for leave to file the motion to dismiss or affirm is also granted.

The motion to affirm is granted and the judgment is affirmed.

Reporter's Note

The next page is purposely numbered 801. The numbers between 556 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1968, THROUGH FEBRUARY 13, 1970

Cases Dismissed In Vacation

No. 139. Siu Fung Luk *v.* Rosenberg, District Director of Immigration and Naturalization Service. C. A. 9th Cir. Petition for writ of certiorari dismissed June 25, 1969, pursuant to Rule 60 of the Rules of this Court. *Hiram W. Kwan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Paul C. Summitt* for respondent. Reported below: 409 F. 2d 555.

No. 27. Mann *v.* Vermont Educational Buildings Financing Agency. Appeal from Sup. Ct. Vt. Appeal dismissed July 1, 1969, pursuant to Rule 60 of the Rules of this Court. *Neil J. Cohen* for appellant. *Chester S. Ketcham* for appellee. Reported below: 127 Vt. 262, 247 A. 2d 68. [For earlier order herein, see 394 U. S. 957.]

No. 503, Misc. Carter *v.* United States. C. A. 6th Cir. Petition for writ of certiorari dismissed July 11, 1969, pursuant to Rule 60 of the Rules of this Court.

No. 59, Misc. Malagon-Ramirez *v.* United States. C. A. 9th Cir. Petition for writ of certiorari dismissed July 25, 1969, pursuant to Rule 60 of the Rules of this Court. Reported below: 404 F. 2d 604.

No. 7, Misc. Johnson, aka Watford *v.* Virginia. Sup. Ct. App. Va. Petition for writ of certiorari dismissed August 1, 1969, pursuant to Rule 60 of the Rules of this Court. *J. Hugo Madison* and *Michael Meltsner* for petitioner. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent. Reported below: 208 Va. 481, 158 S. E. 2d 725.

No. 174, Misc. SMITH *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed August 14, 1969, pursuant to Rule 60 of the Rules of this Court. *G. S. Crihfield* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States.

No. 330, Misc. BRUNO *v.* LOUISIANA. Sup. Ct. La. Petition for writ of certiorari dismissed August 18, 1969, pursuant to Rule 60 of the Rules of this Court. *G. Wray Gill, Sr.,* and *George M. Leppert* for petitioner. Reported below: 253 La. 669, 219 So. 2d 490.

No. 287. BILBAO-BASTIDA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Petition for writ of certiorari dismissed September 25, 1969, pursuant to Rule 60 of the Rules of this Court. *David Rein* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 409 F. 2d 820.

OCTOBER 9, 1969

Certiorari Granted and Denied

No. 632. ALEXANDER ET AL. *v.* HOLMES COUNTY BOARD OF EDUCATION ET AL.; and

No. 713. HOLMES COUNTY BOARD OF EDUCATION ET AL. *v.* ALEXANDER ET AL. C. A. 5th Cir. Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* in No. 632 granted. Petition for a writ of certiorari in No. 632 granted, and cross-petition for a writ of certiorari in No. 713 denied. No. 632 set for oral argument on Thursday, October 23.

Case will be heard on the certified unprinted record as well as printed briefs already on file and typewritten copies of any further briefs the parties may desire to

submit. Typewritten brief for the petitioners shall be on file by Friday, October 17, and the typewritten brief, or briefs, for respondents shall be on file by Wednesday, October 22. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker,* and *Melvyn Zarr* for petitioners in No. 632. *A. F. Summer,* Attorney General of Mississippi, and *John C. Satterfield* for Holmes County Board of Education et al., and *Solicitor General Griswold* for the United States, respondents in No. 632. *Messrs. Summer* and *Satterfield* for petitioners Holmes County Board of Education et al. in No. 713. *John W. Douglas, Bethuel M. Webster, Cyrus R. Vance, Asa Sokolow, John Schafer, Louis F. Oberdorfer, John Doar, Richard C. Dinkelspiel, Arthur H. Dean, Lloyd N. Cutler, Bruce Bromley, Berl I. Bernhard, Timothy B. Dyk,* and *Michael R. Klein* for Lawyers' Committee for Civil Rights Under Law as *amicus curiae* in support of the petition in No. 632. Reported below: 417 F. 2d 852.

October 13, 1969

Dismissals Under Rule 60

No. 2. Public Utility District No. 1 of Pend Oreille County *v.* City of Seattle; and

No. 3. City of Seattle *v.* Public Utility District No. 1 of Pend Oreille County. C. A. 9th Cir. Petitions for writs of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *A. L. Newbould* and *Richard S. White* for the City of Seattle in both cases. *Clarence C. Dill, William G. Ennis,* and *Bennett Boskey* for Public Utility District No. 1 of Pend Oreille County in both cases. *Solicitor General Griswold* filed a memorandum for the United States as *amicus curiae,* by invitation of the Court, 390 U. S. 935, in opposition to the petitions. Reported below: 382 F. 2d 666.

No. 870, Misc. BUNTER *v.* UNITED STATES. C. A. D. C. Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

Miscellaneous Orders

No. 573, October Term, 1968. NATIONAL LABOR RELATIONS BOARD *v.* GISSEL PACKING CO., INC., ET AL., 395 U. S. 575. Motions of respondents Gissel Packing Co., Inc., and Heck's Inc. to reassess costs in this case denied. Motion of respondents General Steel Products, Inc., and Crown Flex of North Carolina, Inc., to reassess costs in this case granted and no costs are assessed against those respondents. Gissel Packing Co., Inc., is assessed costs of $2,705.24 and Heck's Inc. is assessed costs of $1,981.06. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Lewis P. Hamlin, Jr.,* for General Steel Products, Inc., et al., *John E. Jenkins, Jr.,* for Gissel Packing Co., Inc., and *Fred F. Holroyd* for Heck's Inc. on the motions. *Solicitor General Griswold* in opposition.

No. 1279, October Term, 1968. UNITED STATES *v.* IDEAL BASIC INDUSTRIES, INC., 395 U. S. 936. Respondent is requested to file a response to petition for rehearing within 30 days. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the entry of this order.

No. ——. LEVY *v.* PARKER, WARDEN, ET AL. Application for bail granted by MR. JUSTICE DOUGLAS pending action by this Court is continued pending disposition of case by the United States District Court for the Middle District of Pennsylvania. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. —. ANDERSON *v.* RAIMONDI. Motion for leave to file a bill of complaint under the original jurisdiction denied.

No. 15. DEBACKER *v.* BRAINARD, SHERIFF. Appeal from Sup. Ct. Neb. [Probable jurisdiction noted, 393 U. S. 1076.] Motion of National Council of Juvenile Court Judges for leave to file a brief as *amicus curiae* granted. *Alfred L. Scanlan* on the motion.

No. 19. FIRST NATIONAL BANK IN PLANT CITY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL.; and

No. 34. CAMP, COMPTROLLER OF THE CURRENCY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL. C. A. 5th Cir. [Certiorari granted, 393 U. S. 1079.] Motion of First National Bank of Gainesville, Georgia, et al. for leave to file a brief as *amici curiae* granted. *James A. Dunlap* on the motion.

No. 25. ZUBER ET AL. *v.* ALLEN ET AL.; and

No. 52. HARDIN, SECRETARY OF AGRICULTURE *v.* ALLEN ET AL. C. A. D. C. Cir. [Certiorari granted, 394 U. S. 958.] Motion of Lorton Blair et al. for leave to file a brief as *amici curiae* granted. Motions of respondents for additional time for oral argument and to postpone oral argument denied. Motion of State of Vermont for leave to participate in oral argument as *amicus curiae* denied, unless respondents cede to it part of their time for argument. MR. JUSTICE STEWART would grant motion of State of Vermont. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Charles Ryan* for respondents on their motions in both cases. *James M. Jeffords,* Attorney General, for the State of Vermont as *amicus curiae* on the motion in both cases. *Lawrence Hollman* and *Carlyle C. Ring, Jr.,* for Zuber et al. in opposition to respondents' motions.

No. 31. BROCKINGTON *v.* RHODES, GOVERNOR OF OHIO, ET AL. Appeal from Sup. Ct. Ohio. [Probable jurisdiction noted, 393 U. S. 1078.] Further consideration of suggestion of mootness by certain appellees postponed to hearing of case.

No. 32. NATIONAL LABOR RELATIONS BOARD *v.* J. H. RUTTER-REX MANUFACTURING CO., INC., ET AL. C. A. 5th Cir. [Certiorari granted, 393 U. S. 1116.] Motion of Amalgamated Clothing Workers of America, AFL–CIO, for leave to participate in oral argument denied. *Jacob Sheinkman, Ralph N. Jackson,* and *James J. Graham* on the motion.

No. 33. SULLIVAN ET AL. *v.* LITTLE HUNTING PARK, INC., ET AL. Sup. Ct. App. Va. [Certiorari granted, 394 U. S. 942.] Motion of Anti-Defamation League of B'nai B'rith et al. for leave to file a brief as *amici curiae* granted. *Arnold Forster* for Anti-Defamation League of B'nai B'rith, *Sol Rabkin* for National Committee Against Discrimination in Housing, Inc., *Melvin L. Wulf* for American Civil Liberties Union, and *Edwin J. Lukas* for American Jewish Committee on the motion.

No. 39. HALL ET UX. *v.* BEALS, CLERK AND RECORDER OF EL PASO COUNTY, ET AL. Appeal from D. C. Colo. [Probable jurisdiction noted, 394 U. S. 1011.] Motion of Bipartisan Committee on Absentee Voting for leave to participate in oral argument as *amicus curiae* denied. *Joseph L. Rauh, Jr.,* and *John Silard* on the motion.

No. 40. CONWAY *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. [Certiorari granted, 393 U. S. 1062.] Motion of petitioner for an injunction and for appointment of new counsel denied. Typewritten brief submitted by petitioner ordered filed.

No. 41. CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL.; and

No. 59. CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA *v.* OKLAHOMA ET AL. [Certiorari granted, 394 U. S. 972.] Motion of Wilkinson, Cragun & Barker for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 20 minutes allotted for that purpose. Twenty additional minutes allotted to counsel for respondents. *Charles A. Hobbs* for Wilkinson, Cragun & Barker on its motion in both cases. *J. D. McLaughlin* for petitioners in No. 41 and *Peyton Ford* for petitioner in No. 59 in opposition. *Solicitor General Griswold* on his motion in both cases.

No. 50. NORTH CAROLINA *v.* ALFORD. Appeal from C. A. 4th Cir. [Probable jurisdiction noted, 394 U. S. 956]; and

No. 268. PARKER *v.* NORTH CAROLINA. Ct. App. N. C. [Certiorari granted, 395 U. S. 974.] Motion of Albert Bobby Childs et al. for leave to file a brief as *amici curiae* granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Charles Stephen Ralston,* and *Anthony G. Amsterdam* on the motion in both cases.

No. 53. BAIRD *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. [Certiorari granted, 394 U. S. 957.] Motion of Peter D. Baird for leave to argue *pro hac vice* granted. *John P. Frank* on the motion.

No. 265. BODDIE ET AL. *v.* CONNECTICUT ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 395 U. S. 974.] Motion of Center on Social Welfare Policy and Law et al. for leave to file a brief as *amici curiae* granted.

No. 81. SIMMONS ET UX. *v.* WEST HAVEN HOUSING AUTHORITY. Appeal from App. Div., Cir. Ct. Conn. [Probable jurisdiction noted, 394 U. S. 957.] Motion of the State of Connecticut for leave to participate in oral argument as *amicus curiae* in support of judgment granted. Motion of National Legal Aid and Defender Assn. for leave to file a brief as *amicus curiae* granted. Motion of Center on Social Welfare Policy and Law et al. for leave to file a brief as *amici curiae* granted. *Robert K. Killian,* Attorney General, and *F. Michael Ahern,* Assistant Attorney General, for the State of Connecticut on its motion.

No. 266. SANKS ET AL. *v.* GEORGIA ET AL. Appeal from Sup. Ct. Ga. [Probable jurisdiction noted, 395 U. S. 974.] Motion of Center on Social Welfare Policy and Law et al. for leave to file a brief as *amici curiae* granted.

No. 85. ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL. C. A. 8th Cir. [Certiorari granted, 395 U. S. 976.] Motion of Sierra Club for leave to file a brief as *amicus curiae* granted. *Matthew P. Mitchell* and *Leland R. Selna, Jr.,* on the motion.

No. 125. MARTIN MARIETTA CORP. *v.* FEDER ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 214. TV PIX, INC., ET AL. *v.* TAYLOR ET AL. Appeal from D. C. Nev. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 270. BRADY *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 395 U. S. 976.] Motion for appointment of counsel granted. It is ordered that *Peter J. Adang, Esquire,* of Albuquerque, New Mexico, be appointed to serve as counsel for petitioner in this case.

No. 189. MINOR *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, 395 U. S. 932.] Motion for appointment of counsel under the Criminal Justice Act granted. It is ordered that *Phylis Skloot Bamberger,* of New York, New York, a member of the Bar of this Court, be appointed to serve as counsel for petitioner in this case.

No. 252, Misc. HILLER *v.* CICCONE, MEDICAL CENTER DIRECTOR; and

No. 317, Misc. FURTAK *v.* MANCUSI, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 220, Misc. NORMAN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to file supplement to petition for certiorari granted.

No. 2, Misc. CHANDLER, U. S. DISTRICT JUDGE *v.* JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES. Motion of *Carl L. Shipley, pro se,* for leave to file a brief as *amicus curiae* granted. Motion of *Solicitor General Griswold, pro se,* for leave to participate in oral argument as *amicus curiae* granted and 30 minutes allotted for that purpose. Thirty additional minutes allotted to counsel for petitioner. Case removed from current argument list and it is ordered that briefs and oral arguments be presented by counsel for the parties. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see 395 U. S. 956.]

No. 201, Misc. GALLEGOS *v.* ARIZONA EX REL. EYMAN, WARDEN. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 149, Misc. IN RE DISBARMENT OF SULLIVAN. It having been reported to the Court that Thomas W. Sullivan, of Montgomery, Alabama, has been disbarred from the practice of the law by the Supreme Court of the State of Alabama; and this Court by order of April 28, 1969 [394 U. S. 995], having suspended the said Thomas W. Sullivan from the practice of the law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, who has filed a return; now, upon consideration of the rule to show cause and the return aforesaid;

It is ordered that the said Thomas W. Sullivan be, and he is hereby, disbarred, and that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. 437, Misc. FARRELL, ADMINISTRATOR, ET AL. *v.* WYATT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Lee S. Kreindler* on the motion. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* in opposition.

Probable Jurisdiction Noted or Postponed

No. 84. UNITED STATES *v.* JORN. Appeal from D. C. Utah. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. *Gerald R. Miller* for appellee.

No. 103. UNITED STATES *v.* ARMOUR & CO. ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. *Solicitor General Griswold, Deputy Assistant Attorney General Hammond,* and *Howard E. Shapiro* for the United States. *Herbert A. Bergson, Howard Adler, Jr., James H. Kelley, Carol Garfiel,* and *Edwin E. McAmis* for appellee General Host Corp.

No. 179. ROGERS, SECRETARY OF STATE *v.* BELLEI. Appeal from D. C. D. C. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Charles Gordon* for appellant. *O. John Rogge* for appellee. Reported below: 296 F. Supp. 1247.

No. 131. DANDRIDGE, CHAIRMAN, MARYLAND BOARD OF PUBLIC WELFARE, ET AL. *v.* WILLIAMS ET AL. Appeal from D. C. Md. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.* *Francis B. Burch,* Attorney General of Maryland, *Robert F. Sweeney,* Deputy Attorney General, and *George W. Liebmann* and *Michael McWilliams,* Assistant Attorneys General, for appellants. Reported below: 297 F. Supp. 450.

No. 185. REETZ, COMMISSIONER OF FISH AND GAME OF ALASKA, ET AL. *v.* BOZANICH ET AL. Appeal from D. C. Alaska. Probable jurisdiction noted and case set for oral argument with No. 301 [probable jurisdiction noted, *infra,* p. 812]. *G. Kent Edwards,* Attorney General of Alaska, and *Robert L. Hartig,* Assistant Attorney General, for appellants. *Seth Warner Morrison III* for appellees. Reported below: 297 F. Supp. 300.

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*[REPORTER'S NOTE: The portion of the orders of October 13, 1969, that provided that No. 131 and No. 540 (*infra,* p. 815) be set down for argument together was rescinded by order of October 20, 1969, *post,* p. 874.]

No. 236. EVANS ET AL. *v.* CORNMAN ET AL. Appeal from D. C. Md. Probable jurisdiction noted. The Solicitor General is invited to file a brief expressing the views of the United States. *Francis B. Burch,* Attorney General of Maryland, *Robert F. Sweeney,* Deputy Attorney General, and *George W. Liebmann,* Assistant Attorney General, for appellants. *Richard Schifter* for appellees. Reported below: 295 F. Supp. 654.

No. 301. PIKE *v.* BRUCE CHURCH, INC. Appeal from D. C. Ariz. Motion of Western Growers Assn. for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted and case set for oral argument with No. 185 [probable jurisdiction noted, *supra,* p. 811]. *George C. Lyon* for Western Growers Assn. on the motion. *Gary K. Nelson,* Attorney General of Arizona, *Thomas A. Miller,* Assistant Attorney General, and *Rex E. Lee* for appellant. *Jacob Abramson* for appellee.

No. 305. UNITED STATES *v.* SISSON. Appeal from D. C. Mass. Further consideration of question of jurisdiction in this case postponed to the hearing of the case on the merits. Case placed on summary calendar and set for oral argument with No. 76 [certiorari granted, *infra,* p. 816]. In addition to questions presented on the merits, counsel requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "arresting a judgment" subdivision of 18 U. S. C. § 3731, but also the questions whether jurisdiction exists under either the "motion in bar" subdivision or the "decision . . . setting aside, or dismissing" subdivision of 18 U. S. C. § 3731. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. *John G. S. Flym* for appellee. Reported below: 297 F. Supp. 902.

No. 43, Misc. VALE *v.* LOUISIANA. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits and review limited to the search and seizure question. Case transferred to appellate docket. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, *Jim Garrison,* and *Louise Korns* for appellee. Reported below: 252 La. 1056, 215 So. 2d 811.

*Certiorari Granted.** (See also No. 264, Misc., *ante,* p. 9.)

No. 153.* MCMANN, WARDEN, ET AL. *v.* ROSS ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen* and *Brenda Soloff,* Assistant Attorneys General, for petitioners. *Thomas D. Barr* for Ross, and *Gretchen White Oberman* for Dash et al., respondents. *Frank S. Hogan, pro se,* and *Michael R. Juviler* for the District Attorney of New York County in support of the petition. Reported below: 408 F. 2d 48 and 658, and 409 F. 2d 1016.

No. 74. TAGGART ET AL. *v.* WEINACKER'S, INC. Sup. Ct. Ala. Certiorari granted. *S. G. Lippman* and *Bernard Dunau* for petitioners. *Edwin J. Curran, Jr.,* for respondent. Reported below: 283 Ala. 171, 214 So. 2d 913.

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*[REPORTER'S NOTE: An order granting certiorari in No. 212, *Trammell* v. *Alabama,* issued on October 13, 1969, was revoked the same day. The reference which previously appeared in No. 153, to the fact that that case was set down for oral argument with No. 212 has accordingly been eliminated.]

No. 88. UNITED STATES *v.* REYNOLDS ET UX. C. A. 6th Cir. Certiorari granted. *Solicitor General Griswold, Acting Assistant Attorney General Taylor, Raymond N. Zagone,* and *Robert S. Lynch* for the United States. *D. Nelson Sutton* for respondents. Reported below: 404 F. 2d 303.

No. 104. UNITED STATES *v.* ESTATE OF DONNELLY ET AL. C. A. 6th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph J. Connolly,* and *Crombie J. D. Garrett* for the United States. *Daniel N. Pevos* for respondents Carlson et al. Reported below: 406 F. 2d 1065.

No. 108. COLONNADE CATERING CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *O. John Rogge* and *Jerome M. Stember* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 410 F. 2d 197.

No. 231. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, AFL–CIO *v.* ARIADNE SHIPPING CO., LTD., ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari granted. *Louis Waldman* and *Seymour M. Waldman* for petitioner. *Thomas H. Anderson* for respondents. Reported below: 215 So. 2d 51.

No. 234. CZOSEK ET AL. *v.* O'MARA ET AL. C. A. 2d Cir. Certiorari granted. *Clarence M. Mulholland* and *Richard R. Lyman* for petitioners. *William B. Mahoney* for O'Mara et al., and *Thomas G. Rickert* for Erie Lackawanna Railroad Co., respondents. Reported below: 407 F. 2d 674.

No. 282. UNITED STATES *v.* DAVIS ET UX. C. A. 6th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Walters, Harris Weinstein,* and *Melva M. Graney* for the United States. *Robert G. McCullough* and *William Waller* for respondents. Reported below: 408 F. 2d 1139.

No. 300. TATE ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari granted. *Omer Luellen* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Robert S. Lynch* for respondent Hickel. Reported below: 407 F. 2d 394.

No. 395. UNITED STATES *v.* SECKINGER, TRADING AS M. O. SECKINGER CO. C. A. 5th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for the United States. *Frank S. Cheatham, Jr.*, for respondent. Reported below: 408 F. 2d 146.

No. 540. ROSADO ET AL. *v.* WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. Application for stay presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. Certiorari and motion to expedite granted.* *Lee A. Albert* and *Robert P. Borsody* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Amy Juviler,* Assistant Attorney General, and *Philip Weinberg* for respondents. Reported below: 414 F. 2d 170.

*[REPORTER'S NOTE: The portion of the orders of October 13, 1969, that provided that No. 131 (*supra,* at 811) and No. 540 be set down for argument together was rescinded by order of October 20, 1969, *post,* p. 874.]

No. 75. In re Stolar. Sup. Ct. Ohio. Certiorari granted and case set for oral argument immediately following No. 53 [*Baird* v. *State Bar of Arizona*, certiorari granted, 394 U. S. 957]. *Leonard B. Boudin* for petitioner. *Paul W. Brown*, Attorney General of Ohio, *Shelby V. Hutchins*, and *William H. Schneider* in opposition.

No. 76. Welsh *v.* United States. C. A. 9th Cir. Certiorari granted and case set for oral argument with No. 305 [probable jurisdiction postponed, *supra*, p. 812]. *J. B. Tietz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg*, and *Sidney M. Glazer* for the United States. Reported below: 404 F. 2d 1078.

No. 51, Misc. Dickey *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *John D. Buchanan, Jr.*, for petitioner. *Earl Faircloth*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent. Reported below: 215 So. 2d 772.

No. 53, Misc. Bachellar et al. *v.* Maryland. Ct. Sp. App. Md. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Fred E. Weisgal* and *Anthony G. Amsterdam* for petitioners. *Francis B. Burch*, Attorney General of Maryland, and *Edward F. Borgerding* and *H. Edgar Lentz*, Assistant Attorneys General, for respondent. Reported below: 3 Md. App. 626, 240 A. 2d 623.

No. 221. HICKEL, SECRETARY OF THE INTERIOR *v.* OIL SHALE CORP. ET AL. C. A. 10th Cir. Certiorari granted. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Peter L. Strauss, Roger P. Marquis,* and *Edmund B. Clark* for petitioner. *Fowler Hamilton, Richard W. Hulbert,* and *Donald L. Morgan* for Oil Shale Corp. et al., *Gail L. Ireland* for Napier et al., and *Fred M. Winner* for Umpleby et al., respondents. Reported below: 406 F. 2d 759.

No. 230. H. K. PORTER CO., INC., DISSTON DIVISION-DANVILLE WORKS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Donald C. Winson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *Bernard Kleiman, Elliot Bredhoff, Michael Gottesman,* and *George H. Cohen* for United Steelworkers of America, AFL–CIO, respondents. Reported below: 134 U. S. App. D. C. 227, 414 F. 2d 1123.

No. 480, Misc. JONES ET AL. *v.* STATE BOARD OF EDUCATION OF TENNESSEE ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted as to petitioner Jones, certiorari denied as to other petitioners, and case transferred to appellate docket. *Reber F. Boult, Jr., Charles Morgan, Jr., Richard Bellman, Melvin L. Wulf,* and *Eleanor H. Norton* for petitioners. *George F. McCanless,* Attorney General of Tennessee, *Thomas E. Fox,* Deputy Attorney General, and *Robert H. Roberts,* Assistant Attorney General, for respondents. Reported below: 407 F. 2d 834.

No. 69, Misc. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 69 Cal. 2d 550, 446 P. 2d 521.

Certiorari Denied. (See also No. 136, *ante,* p. 3; No. 142, *ante,* p. 3; No. 191, *ante,* p. 1; No. 238, *ante,* p. 6; No. 308, *ante,* p. 7; No. 320, *ante,* p. 8; No. 324, *ante,* p. 8; No. 272, Misc., *ante,* p. 10; No. 336, Misc., *ante,* p. 11; and No. 480, Misc., *supra,* p. 817.)

No. 77. HASKIN *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (HASKIN, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied. *Edward Mosk* for petitioner. *Robert F. Nuttman* for respondent.

No. 80. HEYD, SHERIFF *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. *Jim Garrison* and *Louise Korns* for petitioner. *Russell J. Schonekas* for respondents. Reported below: 406 F. 2d 346.

No. 92. AMERICAN EMPIRE INSURANCE CO. OF SOUTH DAKOTA ET AL. *v.* FIDELITY & DEPOSIT CO. OF MARYLAND. C. A. 5th Cir. Certiorari denied. *W. Warren Cole, Jr.,* for petitioners. *Harry T. Gray* and *Francis P. Conroy* for respondent. Reported below: 408 F. 2d 72.

No. 94. PYNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Ronald L. Gainer* for the United States. Reported below: 408 F. 2d 220.

No. 89. NEHRING *v.* EMPRESA LINEAS MARITIMAS ARGENTINAS ET AL. C. A. 5th Cir. Certiorari denied. *W. Jiles Roberts* for petitioner. *Carl O. Bue, Jr.*, for Empresa Lineas Maritimas Argentinas et al., and *Robert Eikel* for Strachan Shipping Co., respondents. Reported below: 401 F. 2d 767.

No. 97. BUSSIE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Charles B. Evins, R. Eugene Pincham, Earl E. Strayhorn,* and *Sam Adam* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 41 Ill. 2d 323, 243 N. E. 2d 196.

No. 98. LONG BEACH BANANA DISTRIBUTORS, INC., ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 9th Cir. Certiorari denied. *Herbert A. Bernhard* for petitioners. *Frederic H. Sturdy* for Southern Pacific Co. et al., and *John J. Balluff* for Atchison, Topeka & Santa Fe Railway Co., respondents. Reported below: 407 F. 2d 1173.

No. 105. NORTHEASTERN CONSOLIDATED CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Paul A. Teschner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Jonathan S. Cohen,* and *Robert I. Waxman* for the United States. Reported below: 406 F. 2d 76.

No. 110. SNYDER ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. *John P. Frank* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *George R. Hyde* for respondent. Reported below: 405 F. 2d 1179.

No. 106. CAMPBELL SOUP CO. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 8, AFL–CIO. C. A. 7th Cir. Certiorari denied. *Theophil C. Kammholz* for petitioner. *Sheldon M. Charone* for respondent. Reported below: 406 F. 2d 1223.

No. 111. LOWE *v.* WELTNER. Ct. App. Ga. Certiorari denied. *Charles E. Muskett* for petitioner. Reported below: 118 Ga. App. 635, 164 S. E. 2d 919.

No. 112. DOTSON *v.* DUTY. C. A. 6th Cir. Certiorari denied. *Jean L. Auxier* for petitioner. Reported below: 406 F. 2d 816.

No. 113. SOUTHWESTERN PORTLAND CEMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *James F. Hulse* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 407 F. 2d 131.

No. 114. STANDARD FRUIT & STEAMSHIP CO. *v.* UNITED FRUIT CO. ET AL. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch, Robert M. Moore,* and *René H. Himel, Jr.,* for petitioner. *Hugh B. Cox, James H. McGlothlin,* and *Michael Boudin* for United Fruit Co., and *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Howard E. Shapiro* for the United States, respondents. Reported below: 410 F. 2d 553.

No. 115. A. R. INDUSTRIES *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO (CERVANTES, REAL PARTY IN INTEREST). Ct. App. Cal., 3d App. Dist. Certiorari denied. *Burton J. Stanley* for petitioner. *John Quincy Brown, Jr.,* for Cervantes. Reported below: 268 Cal. App. 2d 328, 73 Cal. Rptr. 920.

No. 118. WALSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Franklin Smith* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 409 F. 2d 9.

No. 120. FRANKO *v.* MAHONING COUNTY BAR ASSN. Sup. Ct. Ohio. Certiorari denied. *Eugene Gressman* for petitioner. *John H. Ranz* for respondent.

No. 126. WATSCO, INC. *v.* HENRY VALVE CO. C. A. 2d Cir. Certiorari denied. *Samuel J. Stoll* for petitioner. *John D. Dewey* for respondent. Reported below: 404 F. 2d 1104.

No. 130. ASHER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *William C. Erbecker* and *James Manahan* for petitioner. *Theodore L. Sendak,* Attorney General of Indiana, and *William F. Thompson,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 244 N. E. 2d 89.

No. 133. COOPER *v.* LESLIE SALT CO. ET AL. Sup. Ct. Cal. Certiorari denied. *David B. Caldwell* for petitioner. *Bruce M. Casey, Jr.,* for respondents Leslie Salt Co. et al., *Bert W. Levit* for respondents T. Jack Foster et al., and *Frank Piombo* for respondents Estero Municipal Improvement District et al. Reported below: 70 Cal. 2d 627 and 645, 451 P. 2d 406 and 417.

No. 134. IN RE MARVIN. Sup. Ct. N. J. Certiorari denied. *Melvin L. Wulf, Sanford J. Rosen,* and *Robert E. Knowlton* for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, *Marilyn Loftus Schauer,* First Assistant Attorney General, and *Stephen Skillman,* Assistant Attorney General, in opposition. Reported below: 53 N. J. 147, 249 A. 2d 377.

No. 137. DeNarvaez *v.* United States. C. A. 2d Cir. Certiorari denied. *Elmer Fried* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 407 F. 2d 185.

No. 138. Johnson *v.* United States. C. A. 8th Cir. Certiorari denied. *Wallace N. Springer, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 38.

No. 140. Jackman et al. *v.* Bodine et al. Sup. Ct. N. J. Certiorari denied. *Lawrence I. Lerner* for petitioners Scrimmager et al., and *Melvin L. Wulf* for certain other petitioners. *Arthur J. Sills,* Attorney General of New Jersey, and *Stephen G. Weiss,* Assistant Attorney General, for respondent Burkhardt, and *Mr. Sills* and *William Miller* for respondent Apportionment Commission. Reported below: 53 N. J. 585, 252 A. 2d 209. [For earlier order herein, see 395 U. S. 918.]

No. 141. Tagawa *v.* Maui Publishing Co., Ltd. Sup. Ct. Hawaii. Certiorari denied. *Meyer M. Ueoka* for petitioner. Reported below: 50 Haw. 648, 448 P. 2d 337.

No. 145. Tannehill *v.* Roberts et al. Ct. App. La., 4th Cir. Certiorari denied. *Donald V. Organ* for petitioner. *James A. Crooks* for respondent Trinity Universal Insurance Co. Reported below: 216 So. 2d 656.

No. 147. Granderson *v.* Orleans Parish School Board. Sup. Ct. La. Certiorari denied. *Revius O. Ortique, Jr.,* for petitioner.

No. 144. BABB *v.* MARELLI, TRUSTEE. C. A. 7th Cir. Certiorari denied. *David R. Babb*, petitioner, *pro se.*

No. 149. ABRAMSON *v.* EXCHANGE NATIONAL BANK OF CHICAGO ET AL.; and

No. 208. EXCHANGE NATIONAL BANK OF CHICAGO *v.* ABRAMSON ET AL. C. A. 8th Cir. Certiorari denied. *Sidney P. Abramson*, petitioner, *pro se*, in No. 149 and respondent, *pro se*, in No. 208. *Edgar Bernhard* for Exchange National Bank of Chicago, petitioner in No. 208 and respondent in No. 149. Reported below: 408 F. 2d 1099.

No. 150. HARRY F. BERGGREN & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *J. Max Harding* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come*, and *Linda Sher* for respondent. Reported below: 406 F. 2d 239.

No. 154. GAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *William G. Line* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 923.

No. 155. NEIWIRTH *v.* HYDROCARBON CHEMICALS, INC., ET AL.; and

No. 217. STARR ET AL. *v.* HYDROCARBON CHEMICALS, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Max L. Rosenstein* for petitioner in No. 155, and *Edwin Fradkin, pro se*, and for other petitioners in No. 217. *Michael R. Griffinger* for respondent Clemence, Trustee in Bankruptcy, and *Solicitor General Griswold, Philip A. Loomis, Jr., David Ferber*, and *Paul Gonson* for respondent Securities and Exchange Commission, in both cases. Reported below: 411 F. 2d 203.

No. 151. MARTIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh, Carl M. Walsh,* and *Eleanor Waters Walsh* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 408 F. 2d 949.

No. 152. ANGELUS FUNERAL HOME *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Leo Branton, Jr.,* and *William B. Murrish* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Harry Baum,* and *Bennet N. Hollander* for respondent. Reported below: 407 F. 2d 210.

No. 156. TAUFERNER ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Eks Ayn Anderson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Jonathan S. Cohen,* and *Edward Lee Rogers* for the United States. Reported below: 407 F. 2d 243.

No. 159. CROWN MACHINE & TOOL CO. *v.* D & S INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Howard T. Markey* for petitioner. *Carl Hoppe* for respondents. Reported below: 409 F. 2d 1307.

No. 162. RICHARD *v.* TRAVELERS INSURANCE CO. ET AL. Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioner. *J. J. Davidson, Jr.,* for respondents. Reported below: 253 La. 641, 219 So. 2d 175.

No. 163. AGORANOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Eli H. Subin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 409 F. 2d 833.

No. 157. VALLEYDALE PACKERS, INC., OF BRISTOL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *George V. Gardner* and *Asa Ambrister* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. Reported below: 402 F. 2d 768.

No. 165. MOJAVE URANIUM CO. *v.* MESA PETROLEUM CO. Sup. Ct. Utah. Certiorari denied. *Delbert M. Draper, Jr.,* for petitioner. *Clarence C. Neslen* for respondent. Reported below: 22 Utah 2d 239, 451 P. 2d 587.

No. 167. HART ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *George W. Wulff* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 409 F. 2d 221.

No. 168. BELVEAL ET AL. *v.* SOCONY MOBIL OIL CORP. (NOW MOBIL OIL CORP.) ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. *John G. Patterson* for petitioners. *Wm. B. Browder, Jr.,* for Mobil Oil Corp., and *E. B. Mitchell, Jr., Gerald Fitz-Gerald,* and *William L. Kerr* for Athey et al., respondents. Reported below: 430 S. W. 2d 529.

No. 174. SHEINER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert A. Blinder* and *Stephen Hochhauser* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 410 F. 2d 337.

No. 178. K–S–H PLASTICS, INC. *v.* CAROLITE, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Owen J. Ooms* for petitioner. *W. Robert Spensley* for respondents. Reported below: 408 F. 2d 54.

No. 170. PREFERRED INSURANCE CO. *v.* BENTLEY, INSURANCE COMMISSIONER OF GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. *Alfred C. Bennett* and *Irvin Waldman* for petitioner. *Walter G. Cooper* for respondents. Reported below: 225 Ga. 160, 166 S. E. 2d 340.

No. 176. GRIFFITH *v.* BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. *Carl A. Elliott* for petitioner. *M. Roland Nachman, Jr.*, for respondent. Reported below: 283 Ala. 527, 219 So. 2d 357.

No. 184. SULLIVAN *v.* BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. *Fred Blanton, Jr.*, for petitioner. *Reginald T. Hamner* for respondent. Reported below: 283 Ala. 514, 219 So. 2d 346.

No. 186. IOWA PUBLIC SERVICE CO. *v.* IOWA STATE COMMERCE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. *Mark W. Putney* for petitioner. *Leo J. Steffen, Jr.*, for Iowa State Commerce Commission et al., and *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for Aldrich et al., respondents. Reported below: 407 F. 2d 916.

No. 192. MESCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 407 F. 2d 1290.

No. 193. THORNE, RECEIVER *v.* AETNA LIFE INSURANCE CO. C. A. 7th Cir. Certiorari denied. *Roland Obenchain, Jr.*, for petitioner. *Joseph T. Helling* for respondent. Reported below: 407 F. 2d 809.

No. 195. SULLIVAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Thomas J. Carley* and *Gabriel T. Pap* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Meyer Rothwacks,* and *Howard M. Koff* for respondent.

No. 197. O'NEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *T. Malone Sharpe* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 411 F. 2d 131.

No. 203. MOSES ET AL., EXECUTORS *v.* MANUFACTURERS LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. *Philip Wittenberg* for petitioners. *M. M. Weinberg, Jr.,* for respondent. Reported below: 407 F. 2d 1142.

No. 205. TENNESSEE VALLEY SAND & GRAVEL CO. *v.* CRAFTON. C. A. 5th Cir. Certiorari denied. *George B. Matthews* for petitioner. *Truman Hobbs* for respondent. Reported below: 408 F. 2d 1096.

No. 209. MARYLAND CASUALTY CO. *v.* RUSH STREET RUGBY SHOP, LTD., ET AL. C. A. 7th Cir. Certiorari denied. *Norman A. Miller* and *Frederic H. Stafford* for petitioner. *James A. Chatz* for respondents. Reported below: 409 F. 2d 540.

No. 213. FRANCE, TRUSTEE IN BANKRUPTCY *v.* UNION BANK & SAVINGS CO. C. A. 7th Cir. Certiorari denied. *Sol Rothberg* for petitioner. *Paul W. Philips* for respondent. Reported below: 408 F. 2d 209.

No. 216. GEORGE W. CHAPMAN, INC. *v.* SHENK ET AL. C. A. 4th Cir. Certiorari denied. *Harry Marfut* for petitioner. *A. Garland Williams* for respondents.

No. 220. JEFFERSON STANDARD LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Fred W. Peel* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Gilbert E. Andrews,* and *Thomas L. Stapleton* for the United States. *William B. Harman, Jr.,* and *Kenneth L. Kimble* for American Life Convention et al. as *amici curiae* in support of the petition. Reported below: 408 F. 2d 842.

No. 222. BUNCHER, DBA BUNCHER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *John G. Wayman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. *Milton A. Smith* for Chamber of Commerce of the United States as *amicus curiae* in support of the petition. Reported below: 405 F. 2d 787.

No. 223. GOETT, ADMINISTRATRIX *v.* UNION CARBIDE CORP. ET AL. C. A. 4th Cir. Certiorari denied. *Ernest Franklin Pauley* and *Harvey Goldstein* for petitioner.

No. 224. GOTTHELF ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 293. COMMISSIONER OF INTERNAL REVENUE *v.* GOTTHELF. C. A. 2d Cir. Certiorari denied. *Harvey M. Sklaver* for petitioners in No. 224. *Solicitor General Griswold, Assistant Attorney General Walters, C. Guy Tadlock,* and *Bennet N. Hollander* for petitioner in No. 293 and for respondent in No. 224. Reported below: 407 F. 2d 491.

No. 228. TRI-WALL CONTAINERS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Charles B. Spencer* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 187 Ct. Cl. 326, 408 F. 2d 748.

No. 229. DOBBINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. H. Gearinger* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 408 F. 2d 973.

No. 232. Ross *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. Reported below: 103 Ill. App. 2d 430, 243 N. E. 2d 697.

No. 233. SIMON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* and *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 409 F. 2d 474.

No. 237. COLLINS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *John Caughlan* for petitioner. *James E. Kennedy* for respondent.

No. 243. TEXAS OIL & GAS CORP. ET AL. *v.* PHILLIPS PETROLEUM CO. C. A. 10th Cir. Certiorari denied. *Geo. L. Verity* for petitioners. *Edward J. Fauss* for respondent. Reported below: 406 F. 2d 1303.

No. 246. PATTERSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Palmer K. Ward* for petitioner. *Theodore L. Sendak,* Attorney General of Indiana, and *William F. Thompson,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 244 N. E. 2d 221.

No. 251. MAGNETIC HEATING CORP. ET AL. *v.* FOSTER. C. A. 2d Cir. Certiorari denied. *Charles H. Walker* and *William K. Kerr* for petitioners. *Alexander Kahan* for respondent. Reported below: 410 F. 2d 12.

No. 247. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Daniel P. Reardon, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 410 F. 2d 1290.

No. 252. DEJORIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Leonard Fleet* and *Julius L. Goldstein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Gilbert E. Andrews* for the United States. Reported below: 409 F. 2d 2.

No. 253. PHILLIPS ET UX. *v.* LATHAM. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. *Fred S. Abney* for petitioners. Reported below: 433 S. W. 2d 775.

No. 254. ACUFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Howard G. Swafford* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 410 F. 2d 463.

No. 255. WAX *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 409 F. 2d 498.

No. 257. GENERAL METAL PRODUCTS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Carroll C. Gilpin* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 410 F. 2d 473.

No. 262. WILSON *v.* CITY OF PORT LAVACA, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. *Willett Wilson* for petitioner. Reported below: 409 F. 2d 1362.

No. 256. McCluskey *v.* Norfolk & Western Railway Co. C. A. 6th Cir. Certiorari denied. *Rankin M. Gibson* for petitioner. *John M. Curphey* for respondent. Reported below: 408 F. 2d 1025.

No. 258. Knauff, Executrix, et al. *v.* Utah Construction & Mining Co. et al. C. A. 10th Cir. Certiorari denied. *Edward T. Lazear* for petitioners. *Francis R. Kirkham, John B. Bates,* and *James F. Kirkham* for Utah Construction & Mining Co. et al., and *Gerald R. Miller* for Cranmer, respondents. Reported below: 408 F. 2d 958.

No. 259. Saab Aktiebolag, formerly Svenska Aeroplan Aktiebolaget (Saab) *v.* Mergenthaler Linotype Co. C. A. 2d Cir. Certiorari denied. *Ira Milton Jones* and *Howard W. Churchill* for petitioner. *Luther E. Morrison* for respondent. Reported below: 410 F. 2d 979.

No. 263. Crumley *v.* Alabama. Ct. App. Ala. Certiorari denied. *Fred Blanton, Jr.,* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *Robert P. Bradley* and *Walter S. Turner,* Assistant Attorneys General, for respondent. Reported below: 44 Ala. App. 692, 220 So. 2d 862.

No. 274. Ketron *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. *Preston H. Taylor* for petitioner.

No. 277. Knaack et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *R. Eugene Pincham, Earl J. Strayhorn,* and *Charles B. Evins* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 409 F. 2d 418.

No. 264. MILLER ET UX. *v.* CAMP, COMPTROLLER OF THE CURRENCY. C. A. 3d Cir. Certiorari denied. *Mitchell A. Kramer* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 407 F. 2d 223.

No. 272. BARASH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Louis Bender* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 412 F. 2d 26.

No. 273. CARRIL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 419 F. 2d 548.

No. 276. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *George G. Gallantz* and *Marvin Dicker* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 411 F. 2d 356.

No. 278. RIDGEWOOD MANAGEMENT CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *John H. Benckenstein* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 410 F. 2d 738.

No. 286. CANOVA *v.* TRAVELERS INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Sam J. D'Amico* for petitioner. Reported below: 406 F. 2d 410.

No. 280. CITY OF DETROIT ET AL. *v.* AMBASSADOR STEEL CO. ET AL. Ct. App. Mich. Certiorari denied. *Julius C. Pliskow* for petitioners City of Detroit et al. *Carroll D. Little* for respondents Ambassador Steel Co. et al., *Stanley M. Weingarden* for respondents Advance Steel Co. et al., *Erwin B. Ellmann* for respondent American Steel Corp., *Steven I. Victor* for respondent Contractors Steel Co., and *Seymour J. Frank* for respondent Kasle Steel Corp. Reported below: 14 Mich. App. 657, 165 N. W. 2d 875.

No. 281. TYNE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Thomas J. Carley* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Meyer Rothwacks* for respondent. Reported below: 409 F. 2d 485.

No. 283. JOHN KLANN MOVING & TRUCKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Bernard S. Goldfarb* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Nancy M. Sherman* for respondent. Reported below: 411 F. 2d 261.

No. 289. MARGOLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John P. Diuguid* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 407 F. 2d 727.

No. 294. SOUTHEASTERN CANTEEN CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *John J. Kendrick* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Jonathan S. Cohen,* and *Michael B. Arkin* for respondent. Reported below: 410 F. 2d 615.

No. 295. WHEELER-VAN LABEL CO., SUBSIDIARY OF STECHER-TRAUNG-SCHMIDT CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Richard L. Epstein* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 408 F. 2d 613.

No. 297. PURER & CO. ET AL. *v.* AKTIEBOLAGET ADDO ET AL. C. A. 9th Cir. Certiorari denied. *Joseph W. Fairfield* for petitioners. *Harold A. Black* for respondents. Reported below: 410 F. 2d 871.

No. 298. ROSENTHAL ET AL. *v.* ASH, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 7th Cir. Certiorari denied. *Albert E. Jenner, Jr., Gilbert H. Hennessey, Jr.,* and *John J. Crown* for petitioners. *Malcolm M. Gaynor* for Ash et al., and *Edwin A. Rothschild* and *Ralph R. Mickelson* for Holleb, respondents. Reported below: 410 F. 2d 1182.

No. 299. REGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John T. Casey* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Grant W. Wiprud* for the United States. Reported below: 410 F. 2d 744.

No. 302. MAYNARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 409 F. 2d 505.

No. 303. TURNER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *Raymond L. Brown* for petitioner. Reported below: 220 So. 2d 295.

No. 309. BREEN *v.* OTIS ELEVATOR CO. ET AL. Sup. Ct. La. Certiorari denied. *Steven R. Plotkin* for petitioner. *Charles K. Reasonover* for respondents. Reported below: 253 La. 874, 220 So. 2d 458.

No. 311. WASHINGTON TERMINAL CO. *v.* TAYLOR. C. A. D. C. Cir. Certiorari denied. *Stephen A. Trimble* for petitioner. *James R. Scullen* for respondent. Reported below: 113 U. S. App. D. C. 110, 409 F. 2d 145.

No. 312. MEYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Alan H. Levine* and *Thomas H. Baer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 693.

No. 313. KALISH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Jonathan S. Cohen,* and *Stuart A. Smith* for the United States. Reported below: 411 F. 2d 606.

No. 315. HAYES *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *David P. Schippers* and *Samuel J. Betar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States et al. Reported below: 408 F. 2d 932.

No. 317. B. F. DIAMOND CONSTRUCTION CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Daniel R. Coffman, Jr.,* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 410 F. 2d 462.

No. 314. BARNES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *George D. Crowley* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Walters* for respondent. Reported below: 408 F. 2d 65.

No. 319. CROUGHAN *v.* MURPHY, POLICE COMMISSIONER OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Denis M. Hurley* and *John F. Haggerty* for petitioner. *J. Lee Rankin, Stanley Buchsbaum,* and *Edmund B. Hennefeld* for respondent.

No. 322. MONTECATINI EDISON S. P. A. *v.* E. I. DU PONT DE NEMOURS & Co. C. A. 3d Cir. Certiorari denied. *Edward S. Irons* and *Mary Helen Sears* for petitioner. *James M. Tunnell, Jr.,* for respondent. Reported below: 410 F. 2d 187.

No. 323. MCCARTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John C. Moran* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 409 F. 2d 793.

No. 325. FRANCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard Kanner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 413 F. 2d 282.

No. 328. STUYVESANT INSURANCE CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Dean E. Richards* and *James Manahan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 410 F. 2d 524.

No. 327. SHER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Mario Matthew Cuomo* for petitioner. *William Cahn* for respondent. Reported below: 24 N. Y. 2d 454, 248 N. E. 2d 887.

No. 332. BERNE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. *Thomas W. Finucan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for respondent. Reported below: 412 F. 2d 1055.

No. 333. PANACCIONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Daniel E. Isles* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 412 F. 2d 407.

No. 334. BOENKER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Harvey H. Starkoff* for petitioner. *John T. Corrigan* and *Harvey R. Monck* for respondent.

No. 336. MCKEE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 183 Neb. 754, 164 N. W. 2d 434.

No. 339. SHOEMAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 413 F. 2d 274.

No. 344. KANDALL *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* and *Rufus W. Peckham, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 186 Ct. Cl. 900.

No. 341. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* BUTTREY, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari denied. *Alan W. Boyd* and *Thomas M. Scanlon* for petitioner. *Hugh A. Thornburg* for respondent. Reported below: 410 F. 2d 135.

No. 342. EXCHANGE NATIONAL BANK OF ATCHISON *v.* HIBERNIA NATIONAL BANK OF NEW ORLEANS. C. A. 5th Cir. Certiorari denied. *H. Hepburn Many, John M. Phillips,* and *O. John Rogge* for petitioner. Reported below: 407 F. 2d 840.

No. 345. AMALGAMATED TRANSIT UNION, LOCAL DIVISION 1338, ET AL. *v.* DALLAS PUBLIC TRANSIT BOARD ET AL. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. *Earle W. Putnam* and *L. N. D. Wells, Jr.,* for petitioners. *N. Alex Bickley* and *Ted P. MacMaster* for respondents Dallas Public Transit Board et al. Reported below: 430 S. W. 2d 107.

No. 346. HICKMAN GARMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Marvin Posner* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Eugene B. Granof* for respondent. Reported below: 408 F. 2d 379.

No. 353. R. G. BARRY CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Glenn L. Greene, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 359. HOLOCHUCK *v.* UNITED AIRCRAFT CORP. C. A. 2d Cir. Certiorari denied. *Lee S. Kreindler* for petitioner. *Daniel Huttenbrauck* for respondent.

No. 348. WASHINGTON *v.* GOLDEN STATE MUTUAL LIFE INSURANCE CO. Sup. Ct. Tex. Certiorari denied. *Robert W. Hainsworth* for petitioner. *Finis E. Cowan* and *Joe R. Greenhill, Jr.*, for respondent.

No. 351. DURHAM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *B. Clarence Mayfield* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 413 F. 2d 1003.

No. 350. SMITH ET UX. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Sup. Ct. Pa. Certiorari denied. *J. Willison Smith, Jr.*, and *Bayard M. Graf* for petitioners. *Anthony L. Marino* for Pennsylvania Public Utility Commission, and *Charles E. Thomas, Vincent P. McDevitt, Eugene J. Bradley,* and *Edwin W. Scott* for Philadelphia Electric Co., respondents. Reported below: 434 Pa. 41, 252 A. 2d 589.

No. 354. LACY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Gerald K. Fugit* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 410 F. 2d 103.

No. 356. KIRK ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Joe Hobson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States.

No. 361. PROCTOR *v.* PROCTOR. Super. Ct. Pa. Certiorari denied. *E. Eugene Mason* for petitioner. Reported below: 213 Pa. Super. 171, 245 A. 2d 684.

No. 364. CAMPBELL *v.* GOOCH ET AL. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 365. BRANN & STUART CO. *v.* CONSOLIDATED SUN RAY, INC. Sup. Ct. Pa. Certiorari denied. *Fred M. Vinson, Jr.,* for petitioner. *Morris Wolf* for respondent. Reported below: 433 Pa. 574, 253 A. 2d 105.

No. 366. SPAHR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Bruce I. Hochman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 409 F. 2d 1303.

No. 370. FARRELL ET AL., ADMINISTRATORS *v.* PIEDMONT AVIATION, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Lee S. Kreindler* for petitioners. *Douglas B. Bowring* for respondent Rapidair, Inc., and *John M. Aherne* and *John J. Martin* for respondent Lanseair, Inc. Reported below: 411 F. 2d 812.

No. 371. JOHN S. BARNES CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Theophil C. Kammholz* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 372. NEW YORK STATE LIQUOR AUTHORITY *v.* FINN'S LIQUOR SHOP, INC. Ct. App. N. Y. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for petitioner. *Samuel B. Waterman* for respondent. Reported below: 24 N. Y. 2d 647, 249 N. E. 2d 440.

No. 367. EDMOR PROPERTIES, INC. *v.* METROPOLITAN DADE COUNTY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Alfred M. Carvajal* for petitioner.

No. 377. NOGA, SPECIAL ADMINISTRATOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James C. Hagedorn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for the United States. Reported below: 411 F. 2d 943.

No. 380. SANFORD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Gabriel T. Pap* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Elmer J. Kelsey* for respondent. Reported below: 412 F. 2d 201.

No. 385. ORDER OF RAILWAY CONDUCTORS & BRAKEMEN ET AL. *v.* CLINCHFIELD RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Herbert S. Thatcher* for petitioners. *Dennis G. Lyons* for respondent. Reported below: 407 F. 2d 985.

No. 405. LODWICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Walter A. Raymond* and *Kenneth C. West* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 410 F. 2d 1202.

No. 479. SIMASKO *v.* TOWNSHIP OF HARRISON, MACOMB COUNTY. Ct. App. Mich. Certiorari denied. *Ray H. Boman* for petitioner. *John B. Bruff* for respondent. Reported below: 15 Mich. App. 534, 166 N. W. 2d 635.

No. 491. MORGAN *v.* UNITED STATES FIDELITY & GUARANTY Co. Sup. Ct. Miss. Certiorari denied. *Charles Clark* for petitioner. *Joseph A. Covington, Junior O'Mara,* and *Phineas Stevens* for respondent. Reported below: 222 So. 2d 820.

No. 47. TOBACCO INSTITUTE, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 48. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 49. AMERICAN BROADCASTING COMPANIES, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 51. NATIONAL BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. *Paul A. Porter, Abe Krash, Daniel A. Rezneck,* and *Jerome I. Chapman* for petitioners Tobacco Institute, Inc., et al., *Eugene R. Anderson* and *Janet C. Brown* for petitioner American Tobacco Co., *James N. Ravlin* for petitioner Brown & Williamson Tobacco Corp., *Donald J. Cohn* for petitioner Liggett & Myers Inc., *Carleton A. Harkrader* for petitioner P. Lorillard Co., *Porter R. Chandler* for petitioner R. J. Reynolds Tobacco Co., and *Alfred S. Forsyth* for petitioner United States Tobacco Co., in No. 47; *Howard C. Westwood, Herbert Dym,* and *Douglas A. Anello* for petitioners in No. 48; *James A. McKenna, Jr.,* and *Vernon L. Wilkinson* for petitioner in No. 49; and *Lawrence J. McKay, Raymond L. Falls, Jr., Corydon B. Dunham, Jr.,* and *Howard Monderer* for petitioner in No. 51. *Solicitor General Griswold, Assistant Attorney General McLaren, Henry Geller, John H. Conlin,* and *Lenore G. Ehrig* for the United States et al., respondents in all four cases. Reported below: 132 U. S. App. D. C. 14, 405 F. 2d 1082. [For earlier order herein, see 395 U. S. 973.]

No. 416. RIFFE *v.* WILSHIRE OIL CO. OF TEXAS. C. A. 10th Cir. Certiorari denied. *Gerald G. Stamper* for petitioner. *Richard H. Shaw* for respondent. Reported below: 406 F. 2d 1061.

No. 107. HAYMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Walters, Crombie J. D. Garrett,* and *Benjamin M. Parker* for respondent.

No. 219. TIJERINA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Morton Stavis, Arthur Kinoy, William M. Kunstler, Dennis J. Roberts,* and *William L. Higgs* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 407 F. 2d 349.

No. 122. FREEMAN ET AL. *v.* GOULD SPECIAL SCHOOL DISTRICT OF LINCOLN COUNTY, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Burl C. Rotenberry, George Howard, Jr.,* and *Philip J. Hirschkop* for petitioners. *Robert V. Light* and *Herschel H. Friday* for respondents. Reported below: 405 F. 2d 1153.

No. 211. BROADWAY ENTERPRISE, INC. *v.* LIQUOR CONTROL COMMISSION OF OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William J. Abraham* for petitioner. *Paul W. Brown,* Attorney General of Ohio, *James E. Rattan,* Assistant Attorney General, and *Shelby V. Hutchins* for respondent.

No. 56. EDMUNDSON ET AL. *v.* TENNESSEE EX REL. BATTLE. Sup. Ct. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Armistead F. Clay* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

No. 169. NOWELL *v.* NOWELL. Sup. Ct. Conn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Frederick Bernays Wiener* for petitioner. *Edgar W. Bassick III* for respondent. Reported below: 157 Conn. 470, 254 A. 2d 889.

No. 177. ROSENBERG ET AL. *v.* MINICHIELLO, EXECUTRIX, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James M. Marsh* for petitioners. *Irving I. Waxman* for respondent Stevens. Reported below: 410 F. 2d 106.

No. 181. SHIFFLETT ET AL. *v.* MINOR ET AL. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard D. Payne* for petitioners. Reported below: 252 Md. 158, 249 A. 2d 159.

No. 194. VETERANS OF THE ABRAHAM LINCOLN BRIGADE ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leonard B. Boudin, Victor Rabinowitz,* and *David Rein* for petitioners. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson* for respondents. Reported below: 133 U. S. App. D. C. 222, 409 F. 2d 1139.

No. 198. HIRSCHKOP *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Arthur Kinoy, Melvin L. Wulf,* and *Morton Stavis* for petitioner. Reported below: 209 Va. 678, 166 S. E. 2d 322.

No. 227. CITY OF AUDUBON PARK, KENTUCKY, ET AL. *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Henry J. Burt, Jr.,* for petitioners. *Wilson W. Wyatt* and *Stuart E. Lampe* for respondents. Reported below: 407 F. 2d 1306.

No. 244. HUNT *v.* ARIZONA. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Beauford James George, Jr.,* and *Clark Shanahan* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 408 F. 2d 1086.

No. 260. GULF OIL CORP. ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leo T. Kissam* for Gulf Oil Corp., *A. Donald MacKinnon* for Humble Oil & Refining Co., *John E. F. Wood* for Mobil Oil Corp., and *Harold F. McGuire* for Sinclair Refining Co., petitioners. *Solicitor General Griswold* and *Acting Assistant Attorney General Hammond* for respondent United States. Reported below: See 296 F. Supp. 538.

No. 335. ESCHMANN *v.* MOYER ET AL. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Floyd J. Reed* for petitioner. Reported below: 253 La. 818, 220 So. 2d 86.

No. 291. UNITED MINE WORKERS OF AMERICA *v.* RIVERSIDE COAL CO., INC. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward L. Carey, Harrison Combs, Willard P. Owens,* and *E. H. Rayson* for petitioner. Reported below: 410 F. 2d 267.

No. 296. KADLEC ET AL. *v.* ILLINOIS BELL TELEPHONE CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harry R. Booth* for petitioners. *James R. Bryant, Jr.,* for respondent. Reported below: 407 F. 2d 624.

No. 373. SCHWARTZMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abraham Glasser* and *Stanley J. Reiben* for petitioner. *William Cahn* for respondent. Reported below: 24 N. Y. 2d 241, 247 N. E. 2d 642.

No. 437. ATKINS *v.* GREENVILLE SHIPBUILDING CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Fountain D. Dawson* and *Samuel C. Gainsburgh* for petitioner. *J. Robertshaw* for respondent. Reported below: 411 F. 2d 279.

No. 91. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* CAPPETTA. C. A. 5th Cir. Motions of respondent for leave to proceed *in forma pauperis* and for leave to file a *pro se* brief in opposition to petition for writ of certiorari granted. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for petitioner. *Robert G. Petree* for respondent. Reported below: 406 F. 2d 1238.

No. 61. HENDERSON, WARDEN *v.* PRYOR. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Edward P. A. Smith* for petitioner. Reported below: 403 F. 2d 46. [For earlier order herein, see 394 U. S. 969.]

No. 248. HEROLD, STATE HOSPITAL DIRECTOR *v.* SCHUSTER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Maria L. Marcus,* Assistant Attorney General, and *Arlene R. Silverman,* Deputy Assistant Attorney General, for petitioner. *George J. Alexander* and *Melvin L. Wulf* for respondent. Reported below: 410 F. 2d 1071.

No. 326. MYERS, CORRECTIONAL SUPERINTENDENT *v.* GOCKLEY. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Angelo J. Baro* for petitioner. Reported below: 411 F. 2d 216.

No. 109. DORSEY *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *J. Minos Simon* for petitioner.

No. 207. MEEK *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Mark Wilmer* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 9 Ariz. App. 149, 450 P. 2d 115.

No. 99. LEVIN ET AL. *v.* GREAT WESTERN SUGAR CO. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Ralph Wienshienk, Irving Sonnenschein,* and *Bernard Rothman* for petitioners Levin et al. *Simon H. Rifkind, William L. Dill, Jr.,* and *Donald B. Kipp* for respondents. Reported below: 406 F. 2d 1112.

No. 116. LIFSCHUTZ *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO. Sup. Ct. Cal. Motions of California State Psychological Assn., American Psychiatric Assn., and National Association for Mental Health for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Kurt W. Melchior* for petitioner. *Warren E. Magee* on the motion for American Psychiatric Assn. *William C. Schaab* for National Association for Mental Health as *amicus curiae* in support of the petition.

No. 202. BATTAGLIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Maurice J. Walsh* and *Carl M. Walsh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 279.

No. 304. DUFFY, ANCILLARY ADMINISTRATRIX *v.* WHARTON, ADMINISTRATOR. Ct. App. Md. Motion to dispense with printing petition granted. Certiorari denied.

No. 180. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman,* and *Isaac N. Groner* for petitioner. *Francis M. Shea, Richard T. Conway,* and *James A. Wilcox* for respondents. Reported below: —— U. S. App. D. C. ——, 420 F. 2d 75.

No. 119. LARIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Louis M. Tarasi, Jr.,* for petitioner. *J. Quint Salmon* for respondent.

No. 218. VERNELL *v.* FLORIDA EX REL. GERSTEIN, STATE ATTORNEY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 212 So. 2d 11.

No. 368. WARD *v.* PENNSYLVANIA NEW YORK CENTRAL TRANSPORTATION CO. ET AL. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 316. POWELL *v.* NATIONAL SAVINGS & TRUST CO. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 36, Misc. CLINE *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied. *Harvey Dickerson,* Attorney General of Nevada, for respondents.

No. 363. INGOGLIA *v.* SPITZER. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Roy E. Monaco* for petitioner. *Edward Margolin* and *Donald J. Payton* for respondent.

No. 26, Misc. BROOKS *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondent.

No. 41, Misc. SOOLOOK *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. *Joseph H. Shortell* for petitioner. *G. Kent Edwards,* Attorney General of Alaska, and *Robert L. Hartig,* Assistant Attorney General, for respondent. Reported below: 447 P. 2d 55.

No. 42, Misc. CORNELIUS *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied. *Robert E. Henke* for petitioner. *Robert W. Warren,* Attorney General of Wisconsin, and *William A. Platz, Sverre O. Tinglum,* and *William F. Eich,* Assistant Attorneys General, for respondent.

No. 46, Misc. SCHEIMER *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Howard J. Schwab,* Deputy Attorney General, for respondent.

No. 55, Misc. RUSSELL ET AL. *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Douglas M. Head,* Attorney General of Minnesota, *George M. Scott,* and *Henry W. McCarr, Jr.,* for respondent. Reported below: 282 Minn. 223, 164 N. W. 2d 65.

No. 40, Misc. VITALE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Irl B. Baris* for petitioner. *John C. Danforth,* Attorney General of Missouri, and *Gene E. Voigts,* Assistant Attorney General, for respondent.

No. 54, Misc. CRISPIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 56, Misc. FLYNN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 404 F. 2d 935.

No. 57, Misc. LUCAS *v.* DUGGAN, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, ET AL. Sup. Ct. Pa. Certiorari denied. *James P. McKenna, Jr.,* for petitioner. *Robert W. Duggan, pro se,* and for other respondents. Reported below: 432 Pa. 357, 248 A. 2d 37.

No. 58, Misc. WALKER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *James T. McNally,* Deputy Attorney General, for respondent.

No. 61, Misc. GUNNING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jeffrey T. Miller,* Deputy Attorney General, for respondent.

No. 68, Misc. GATES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent.

No. 62, Misc. DALTON, AKA AULTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondent.

No. 65, Misc. SMITH ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioners. *William J. Scott,* Attorney General of Illinois, and *James R. Thompson, Joel M. Flaum,* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 41 Ill. 2d 158, 242 N. E. 2d 198.

No. 67, Misc. HINTZ *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. *Lee Johnson,* Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent.

No. 75, Misc. IN RE FLETCHER. Ct. App. Md. Certiorari denied. *Norman Dorsen* for petitioner. *Francis B. Burch,* Attorney General, and *Edward F. Borgerding* and *John J. Garrity,* Assistant Attorneys General, for the State of Maryland. Reported below: 251 Md. 520, 248 A. 2d 364.

No. 83, Misc. HAYWOOD *v.* UNITED STATES; and

No. 139, Misc. JESSUP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioner in No. 83, Misc. *Robert Kasanof* for petitioner in No. 139, Misc. *Solicitor General Griswold* for the United States in No. 83, Misc. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States in No. 139, Misc. Reported below: 409 F. 2d 888.

No. 70, Misc. YOUNG *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Jack J. Taffer* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *James M. Adams,* Assistant Attorney General, for respondent. Reported below: 217 So. 2d 567.

No. 90, Misc. CONLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Leonard H. Dickstein* for the United States. Reported below: 407 F. 2d 45.

No. 91, Misc. TWIST *v.* REDEKER ET AL. C. A. 8th Cir. Certiorari denied. *Harold Norris* for petitioner. *Richard C. Turner,* Attorney General of Iowa, and *Elizabeth A. Nolan,* Assistant Attorney General, for respondents. Reported below: 406 F. 2d 878.

No. 93, Misc. HEIRENS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *William J. Scott,* Attorney General of Illinois, and *James R. Thompson, Joel M. Flaum, James B. Zagel,* and *Morton E. Friedman,* Assistant Attorneys General, for respondent. Reported below: 405 F. 2d 449.

No. 94, Misc. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Harold Buchman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 405 F. 2d 395.

No. 95, Misc. CAFFEY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *John C. Danforth,* Attorney General of Missouri, and *Gene E. Voigts,* First Assistant Attorney General, for respondent. Reported below: 438 S. W. 2d 167.

No. 96, Misc. IN RE JOHNSON ET AL. Sup. Ct. Wash. Certiorari denied. *Fred C. Dorsey* for petitioners. *Joseph D. Mladinov* for the State of Washington.

No. 97, Misc. EDWARDS *v.* BREWER, WARDEN. Sup. Ct. Iowa. Certiorari denied.

No. 98, Misc. CARROLL *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 402 F. 2d 61.

No. 100, Misc. RODRIQUEZ *v.* COKE ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edward W. Bergtholdt,* Deputy Attorney General, for respondents.

No. 101, Misc. DE ROSA *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General, for respondent. Reported below: 406 F. 2d 807.

No. 102, Misc. BOYD *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for respondent.

No. 106, Misc. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 107, Misc. YOUGH *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Richard Newman* for petitioner.

No. 111, Misc. DOSSKEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *S. Clark Moore,* Deputy Attorney General, for respondent.

No. 114, Misc. AUSTIN *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent.

No. 130, Misc. MEAD *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 445 P. 2d 229.

No. 131, Misc. BARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert L. Segar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein* for the United States. Reported below: 408 F. 2d 347.

No. 153, Misc. PURSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 154, Misc. LANDMAN *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied.

No. 158, Misc. JONES *v.* BROWN, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS. C. A. 4th Cir. Certiorari denied.

No. 161, Misc. GLENN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 155, Misc. DAVIS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *Jack Greenberg, Michael Meltsner, Melvyn Zarr,* and *Anthony G. Amsterdam* for petitioner. Reported below: 411 F. 2d 750.

No. 163, Misc. STEWART *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 164, Misc. MOORE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 450 P. 2d 918.

No. 165, Misc. BELK *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 166, Misc. ROWLES *v.* MYERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 407 F. 2d 1332.

No. 167, Misc. JENKINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam* for petitioner. Reported below: 41 Ill. 2d 334, 243 N. E. 2d 216.

No. 169, Misc. DAVIS *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 408 F. 2d 779.

No. 170, Misc. LUTCHIN *v.* COUNTY COURT OF OUTAGAMIE COUNTY ET AL. Sup. Ct. Wis. Certiorari denied. *Robert E. Henke* for petitioner. Reported below: 42 Wis. 2d 78, 165 N. W. 2d 593.

No. 171, Misc. BAGBY *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 173, Misc. GERARDI *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 491.

No. 172, Misc. GERARDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 492.

No. 175, Misc. COX *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 176, Misc. PATTERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 180, Misc. ROBERTS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 181, Misc. DEANGELIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 404 F. 2d 46.

No. 182, Misc. JONES *v.* HAREWOOD, JUDGE. C. A. 7th Cir. Certiorari denied.

No. 184, Misc. RISENHOOVER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 70 Cal. 2d 39, 447 P. 2d 925.

No. 185, Misc. HUFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 409 F. 2d 1225.

No. 186, Misc. JONES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 188, Misc. SMITH *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 409 F. 2d 564.

No. 189, Misc. WOLFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 409 F. 2d 413.

No. 190, Misc. CHAVEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harry D. Steward* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 407 F. 2d 535.

No. 191, Misc. FELLABAUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Ronald L. Gainer* for the United States. Reported below: 408 F. 2d 220.

No. 192, Misc. EWING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 404 F. 2d 625.

No. 193, Misc. BINDULSKI *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Conrad J. Marshall* for petitioner.

No. 194, Misc. GREEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 195, Misc. BLACKWELL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 199, Misc. GRANT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 268 Cal. App. 2d 470, 74 Cal. Rptr. 111.

No. 196, Misc. PERKINS *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 198, Misc. MONTGOMERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 403 F. 2d 605.

No. 204, Misc. KLINGLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 409 F. 2d 299.

No. 205, Misc. PIACENTILE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 410 F. 2d 337.

No. 206, Misc. ATKINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *John D. Buchanan, Jr.,* for petitioner. Reported below: 218 So. 2d 748.

No. 208, Misc. ROGERS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 211, Misc. FORELLA *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 405 F. 2d 680.

No. 213, Misc. SAIA *v.* UNITED STATES;

No. 214, Misc. SARNO *v.* UNITED STATES; and

No. 285, Misc. FREIJE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States in all three cases. Reported below: 408 F. 2d 100.

No. 202, Misc. FIELDS *v.* MANCUSI, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 216, Misc. WATSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 218, Misc. CUNNINGHAM *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 397 F. 2d 724.

No. 221, Misc. LUSE *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied. Reported below: 85 Nev. 83, 450 P. 2d 356.

No. 222, Misc. FELICIANO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent. Reported below: 31 App. Div. 2d 720, 296 N. Y. S. 2d 278.

No. 223, Misc. HEILMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 406 F. 2d 1011.

No. 224, Misc. ERHART *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 729.

No. 225, Misc. BANKS *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 227, Misc. FIORAVANTI *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. Reported below: 404 F. 2d 675.

No. 228, Misc. SMITH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 233, Misc. ZAPPIA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Leonard M. Bell,* Assistant Attorney General, for respondent. Reported below: 8 Ariz. App. 549, 448 P. 2d 119.

No. 234, Misc. WELLS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 236, Misc. BRYANT *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 238, Misc. NEEDEL *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. *Reuben Goodman* for petitioner. *Robert H. Quinn,* Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, *Lawrence P. Cohen,* Deputy Assistant Attorney General, *James B. Krasnoo,* Special Assistant Attorney General, and *Matthew J. Ryan, Jr.,* for respondent. Reported below: 412 F. 2d 761.

No. 241, Misc. LUNA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 243, Misc. RODES *v.* MUNICIPAL AUTHORITY OF THE BOROUGH OF MILFORD. C. A. 3d Cir. Certiorari denied. *Leo M. McCormack* for respondent. Reported below: 409 F. 2d 16.

No. 245, Misc. COSTELLO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 248, Misc. WASHINGTON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *John C. Emery, Jr.,* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 249, Misc. FOSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Grauman Marks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 407 F. 2d 1335.

No. 250, Misc. BOOKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 408 F. 2d 955.

No. 253, Misc. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 1165.

No. 255, Misc. DREELAN *v.* CHIEF DISBURSING OFFICER, FEDERAL RESERVE BANK, BOSTON, MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 256, Misc. CLARKE *v.* REDEKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 406 F. 2d 883.

No. 270, Misc. BURKE *v.* LANGLOIS, WARDEN. C. A. 1st Cir. Certiorari denied. *Herbert F. De Simone,* Attorney General of Rhode Island, *Donald P. Ryan,* Assistant Attorney General, and *Luc R. La Brosse,* Special Assistant Attorney General, for respondent.

No. 271, Misc. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 409 F. 2d 1352.

No. 273, Misc. JACKSON *v.* WARDEN, ILLINOIS PENITENTIARY. C. A. 7th Cir. Certiorari denied.

No. 275, Misc. BLOOMBAUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 277, Misc. LIEBENDORFER *v.* GAYLE. Ct. App. La., 3d Cir. Certiorari denied. *Thomas C. Hall* for respondent. Reported below: 217 So. 2d 37.

No. 279, Misc. TEPLITSKY *v.* BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 282, Misc. NIETO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 287, Misc. ODEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 410 F. 2d 103.

No. 289, Misc. BISHOP *v.* HUFF, SHERIFF. Sup. Ct. Ga. Certiorari denied. *Thomas S. Lawson, Jr.,* for respondent. Reported below: 225 Ga. 156, 166 S. E. 2d 578.

No. 292, Misc. DAVIS *v.* BROWN, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS. C. A. 4th Cir. Certiorari denied.

No. 295, Misc. BASS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill, Sr.,* and *George M. Leppert* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 409 F. 2d 179.

No. 296, Misc. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 830.

No. 301, Misc. MARQUEZ *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 303, Misc. JONES *v.* PRATT & WHITNEY, INC., ET AL. C. A. 1st Cir. Certiorari denied.

No. 304, Misc. CUTY *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 308, Misc. SHIPP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 409 F. 2d 33.

No. 311, Misc. LOMBARDI *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 313, Misc. CHO PO SUN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 409 F. 2d 489.

No. 315, Misc. TINKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 135 U. S. App. D. C. 125, 417 F. 2d 542.

No. 318, Misc. RUFFIN *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 321, Misc. ROSSILLI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *William Cahn* and *Jules E. Orenstein* for respondent. Reported below: 30 App. Div. 2d 815, 293 N. Y. S. 2d 702.

No. 322, Misc. BOWLES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 29 App. Div. 2d 996, 289 N. Y. S. 2d 526.

No. 334, Misc. RICHARDSON *v.* BROWN, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS. C. A. 4th Cir. Certiorari denied.

No. 350, Misc. RYDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Seymour Horwitz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 409 F. 2d 1349.

No. 370, Misc. CZAP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Orrin G. Hatch* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 410 F. 2d 453.

No. 377, Misc. GREGORY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 133 U. S. App. D. C. 317, 410 F. 2d 1016.

No. 398, Misc. CARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 631.

No. 424, Misc. CAVERLY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Richard S. Campagna* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 1313.

No. 427, Misc. BULLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert G. Doumar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 408 F. 2d 974.

No. 483, Misc. LEWIS *v.* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO. C. A. 3d Cir. Certiorari denied. *Mitchell A. Kramer* and *David C. Harrison* for petitioner. *Henry Kaiser* and *Ronald Rosenberg* for respondent. Reported below: 407 F. 2d 1185.

No. 4, Misc. DAUGHERTY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Walter R. Jones,* Deputy Attorney General, for respondent.

No. 74, Misc. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Robert C. Flowers* and *Ronald Luna,* Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 435 S. W. 2d 520.

No. 507, Misc. HUGHES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert S. Rifkind* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 461.

No. 207, Misc. CHANEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein* for the United States. Reported below: 406 F. 2d 809.

No. 374, Misc. CURRY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Lawrence Herman* for petitioner.

No. 104, Misc. CONKLIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted, judgment of the United States Court of Appeals vacated, and case remanded to that court for a ruling on the merits. *Earl Faircloth,* Attorney General of Florida, and *James McGuirk,* Assistant Attorney General, for respondent.

No. 434, Misc. DOMINGUEZ *v.* UNITED STATES; and

No. 436, Misc. CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States in both cases. Reported below: 407 F. 2d 349.

No. 44, Misc. MAYES ET AL. *v.* MCKEITHEN ET AL. Sup. Ct. La. Motion of Louisiana Trial Lawyers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. *J. Minos Simon* for petitioners. Reported below: 252 La. 965, 215 So. 2d 130.

No. 230, Misc. NEWMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *William J. Garber* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 133 U. S. App. D. C. 271, 410 F. 2d 259.

No. 247, Misc. HAMILTON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Anthony G. Amsterdam, Michael Meltsner, Peter Hall,* and *Orzell Billingsley, Jr.,* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 283 Ala. 540, 219 So. 2d 369.

No. 314, Misc. MIRANDA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *John P. Frank* and *John J. Flynn* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 104 Ariz. 174, 450 P. 2d 364.

No. 316, Misc. CARUSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 406 F. 2d 558.

Rehearing Denied

No. —, October Term, 1968. IN RE SKOLNICK, 395 U. S. 942;

No. —, October Term, 1968. IN RE ALBRIGHT, 395 U. S. 942;

No. 200, October Term, 1968. FRANK *v.* UNITED STATES, 395 U. S. 147;

No. 216, October Term, 1968. MARTONE *v.* MORGAN ET AL., 393 U. S. 12;

No. 548, October Term, 1968. JENKINS *v.* McKEITHEN, GOVERNOR OF LOUISIANA, ET AL., 395 U. S. 411;

No. 573, October Term, 1968. NATIONAL LABOR RELATIONS BOARD *v.* GISSEL PACKING CO., INC., ET AL., 395 U. S. 575;

No. 670, October Term, 1968. BANKS *v.* CALIFORNIA, 395 U. S. 708;

No. 770, October Term, 1968. CHIMEL *v.* CALIFORNIA, 395 U. S. 752;

No. 995, October Term, 1968. HOWARD *v.* UNITED STATES, 395 U. S. 958;

No. 1089, October Term, 1968. LEVINSON ET AL. *v.* UNITED STATES, 395 U. S. 958;

No. 1162, October Term, 1968. DANICA ENTERPRISES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE, 395 U. S. 933;

No. 1163, October Term, 1968. SMITH *v.* UNITED STATES, 395 U. S. 977;

No. 1244, October Term, 1968. RADIO CORPORATION OF AMERICA *v.* SCM CORP., 395 U. S. 943;

No. 1253, October Term, 1968. WILSON *v.* UNITED STATES, 395 U. S. 923; and

No. 1266, October Term, 1968. DLUTZ *v.* FEDERAL TRADE COMMISSION, 395 U. S. 936. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions.

No. 1278, October Term, 1968. ARMSTRONG *v.* UNITED STATES, 395 U. S. 934;

No. 1351, October Term, 1968. STONEHILL ET AL. *v.* UNITED STATES, 395 U. S. 960;

No. 1355, October Term, 1968. BLUMCRAFT OF PITTSBURGH *v.* CITIZENS & SOUTHERN NATIONAL BANK OF SOUTH CAROLINA ET AL., 395 U. S. 961;

No. 1373, October Term, 1968. WECHSLER *v.* UNITED STATES, 395 U. S. 978;

No. 1381, October Term, 1968. TOONI ET AL. *v.* ZUCKERT, SECRETARY OF THE AIR FORCE, 395 U. S. 980;

No. 224, Misc., October Term, 1968. STURM *v.* CALIFORNIA ADULT AUTHORITY ET AL., 395 U. S. 947;

No. 550, Misc., October Term, 1968. JAMISON *v.* UNITED STATES, 395 U. S. 986;

No. 984, Misc., October Term, 1968. ANDERSON *v.* SOUTH CAROLINA, 394 U. S. 574;

No. 1097, Misc., October Term, 1968. HARRIS *v.* ILLINOIS, 395 U. S. 985;

No. 1172, Misc., October Term, 1968. RUPPERT *v.* LAVALLEE, WARDEN, 395 U. S. 937;

No. 1282, Misc., October Term, 1968. CAVANAUGH *v.* CALIFORNIA, 395 U. S. 981;

No. 1424, Misc., October Term, 1968. BARBEE *v.* TEXAS, 395 U. S. 924;

No. 1554, Misc., October Term, 1968. THERIAULT *v.* UNITED STATES, 395 U. S. 965;

No. 1587, Misc., October Term, 1968. PETERSON ET AL. *v.* UNITED STATES, 395 U. S. 938;

No. 1642, Misc., October Term, 1968. HOUSE *v.* UNITED STATES ET AL., 395 U. S. 829; and

No. 1726, Misc., October Term, 1968. WILLIAMS *v.* UNITED STATES, 395 U. S. 915. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions.

No. 1765, Misc., October Term, 1968. DeLevay *v.* Reynolds, Acting Commissioner of Patents, 395 U. S. 926;

No. 1787, Misc., October Term, 1968. Charland *v.* Norge Division, Borg-Warner Corp., et al., 395 U. S. 927;

No. 1794, Misc., October Term, 1968. Lee *v.* Alabama, 395 U. S. 927;

No. 1827, Misc., October Term, 1968. Brown et al. *v.* Bethania Hospital et al., 395 U. S. 939;

No. 1841, Misc., October Term, 1968. Buchanon *v.* Michigan, 395 U. S. 928;

No. 1868, Misc., October Term, 1968. Neal et al. *v.* Saga Shipping Co., S. A., et al., 395 U. S. 986;

No. 1880, Misc., October Term, 1968. Simmons *v.* United States, 395 U. S. 982;

No. 1900, Misc., October Term, 1968. Rispo *v.* Pennsylvania, 395 U. S. 983;

No. 1922, Misc., October Term, 1968. Chase *v.* Pennsylvania, 395 U. S. 968;

No. 1937, Misc., October Term, 1968. Kamsler *v.* Pate, Warden, et al., 395 U. S. 969; and

No. 1956, Misc., October Term, 1968. Furtak *v.* New York, 395 U. S. 969. Petitions for rehearing denied. The Chief Justice took no part in the consideration or decision of these petitions.

No. 624, October Term, 1968. Perkins *v.* Standard Oil Co. of California, 395 U. S. 642. Petition for rehearing denied. The Chief Justice and Mr. Justice Harlan took no part in the consideration or decision of this petition.

No. 1276, October Term, 1968. Roberts *v.* McDonald et al., 395 U. S. 963. Petition for rehearing denied. The Chief Justice and Mr. Justice Brennan took no part in the consideration or decision of this petition.

No. 1029, October Term, 1968. DeLury et al. *v.* City of New York, 394 U. S. 455; and

No. 1610, Misc., October Term, 1968. Delgado *v.* United States, 394 U. S. 966. Motions for leave to file petitions for rehearing denied. The Chief Justice took no part in the consideration or decision of these motions.

No. 887, Misc., October Term, 1968. Robinson *v.* United States, 393 U. S. 1057 and 1124. Motion for leave to file second petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this motion.

No. 979, Misc., October Term, 1968. Sellers *v.* Laird, Secretary of Defense, et al., 395 U. S. 950. Petition for rehearing and other relief denied. The Chief Justice took no part in the consideration or decision of this petition.

No. 1574, Misc., October Term, 1968. Lupino *v.* Young, Warden, 394 U. S. 969. Motion of Minnesota Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this motion and petition. *Lynn S. Castner* and *John S. Connolly* on the motion in support of the petition for rehearing.

October 20, 1969

Miscellaneous Orders

No. 353, October Term, 1968. Ratcliff *v.* Bruce et al., 393 U. S. 848, 956. Motion to reinstate petition for writ of certiorari denied. The Chief Justice took no part in the consideration or decision of this motion.

No. —. HORELICK ET AL. *v.* NEW YORK. C. A. 2d Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Eleanor Jackson Piel* for applicants.

No. —. NOLAN *v.* UNITED STATES. D. C. Kan. Application for reduction in bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Solicitor General Griswold* in opposition.

No. 33, Orig. ARKANSAS *v.* TENNESSEE. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs, to the Report of Special Master may be filed by the parties on or before December 4, 1969. Reply briefs, if any, to such exceptions may be filed on or before January 3, 1970. [For earlier orders herein, see, *e. g.*, 390 U. S. 985.]

No. 13. MAXWELL *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. Motion of petitioner to enlarge scope of review denied. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Michael Meltsner, Elizabeth Dubois, George Howard, Jr.,* and *Anthony G. Amsterdam* on the motion. [For earlier orders herein, see, *e. g.*, 395 U. S. 918.]

No. 66. GOLDSTEIN, AKA PIETRARU, ET AL. *v.* COX ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 394 U. S. 996.] Motion of Wolf Popper Ross Wolf & Jones for leave to file reply brief as *amicus curiae* granted. *Martin Popper* on the motion. *Louis J. Lefkowitz,* Attorney General of New York, and *Daniel M. Cohen,* Assistant Attorney General, in opposition.

No. 356, Misc. IN RE KAMSLER. Motion for leave to file petition for writ of mandamus denied.

No. 131. DANDRIDGE, CHAIRMAN, MARYLAND BOARD OF PUBLIC WELFARE, ET AL. *v.* WILLIAMS ET AL. Appeal from D. C. Md. [Probable jurisdiction noted, *ante,* p. 811]; and

No. 540. ROSADO ET AL. *v.* WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 815.] Orders setting these cases to be argued together are hereby rescinded.

No. 135. WALZ *v.* TAX COMMISSION OF THE CITY OF NEW YORK. Appeal from Ct. App. N. Y. [Probable jurisdiction noted, 395 U. S. 957.] Motion of Madalyn Murray O'Hair et al. for leave to file a brief as *amici curiae* granted. *Lola Boswell* on the motion.

No. 92, Misc. DAVIDSON *v.* CALIFORNIA ADULT AUTHORITY ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Frederick R. Millar, Jr.,* Deputy Attorney General, in opposition.

Certiorari Granted. (See also No. 267, Misc., *ante,* p. 12.)

No. 402. UNITED STATES *v.* KEY, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett* for the United States. *Sigmund J. Beck* for respondent. Reported below: 407 F. 2d 635.

No. 413. GREENBELT COOPERATIVE PUBLISHING ASSN., INC., ET AL. *v.* BRESLER. Ct. App. Md. Certiorari granted. *Roger A. Clark* for petitioners. *Abraham Chasanow* for respondent. Reported below: 253 Md. 324, 252 A. 2d 755.

No. 412. WOODWARD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari granted. *Martin M. Cooney* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 410 F. 2d 313.

No. 441. TOUSSIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Murray I. Gurfein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 1156.

Certiorari Denied

No. 212. TRAMMELL *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *William B. McCollough, Jr.,* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 44 Ala. App. 681, 220 So. 2d 258.

No. 307. GERBER *v.* FIRST NATIONAL BANK OF NEVADA, ADMINISTRATOR; and

No. 431. EL RANCO, INC., ET AL. *v.* FIRST NATIONAL BANK OF NEVADA, ADMINISTRATOR. C. A. 9th Cir. Certiorari denied. *Frank Rothman* for petitioner in No. 307, and *Samuel S. Lionel* and *Burton Marks* for petitioners in No. 431. *Morton R. Galane* for respondent in both cases. Reported below: 406 F. 2d 1205.

No. 375. WARE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Wayne G. Popham* for petitioner. Reported below: 284 Minn. 525, 169 N. W. 2d 16.

No. 391. FITZGERALD ET AL. *v.* FREEMAN ET AL. C. A. 7th Cir. Certiorari denied. *John O'C. Fitzgerald, pro se,* and for other petitioner. Reported below: 409 F. 2d 427.

No. 338. SAPPINGTON ET AL., CO-EXECUTRICES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Edward L. Blanton, Jr.*, for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Benjamin M. Parker,* and *John S. Stephan* for the United States. Reported below: 408 F. 2d 817.

No. 392. TANT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Cullen M. Ward* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 412 F. 2d 840.

No. 396. MEISINGER ET UX. *v.* SCULLY ET UX. C. A. 10th Cir. Certiorari denied. *Ralph J. Luttrell* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *A. Donald Mileur* for the United States in opposition. Reported below: 409 F. 2d 1061.

No. 398. COMPONENTS, INC. *v.* WESTERN ELECTRIC CO., INC. C. A. 3d Cir. Certiorari denied. *Gene W. Stockman* and *Frank A. Steinhilper* for petitioner. *Donald B. Kipp* and *James C. Pitney* for respondent. Reported below: 409 F. 2d 1377.

No. 410. CASS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Raymond Kyle Hayes* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 411 F. 2d 792.

No. 381. SPENCER *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 798.

No. 427. DEFIANCE INDUSTRIES, INC., ET AL. *v.* TANZER ET AL. C. A. 3d Cir. Certiorari denied. *H. Albert Young* and *Murray I. Gurfein* for petitioners. *Irving Morris, Joseph A. Rosenthal, Benedict Wolf, Paul L. Ross,* and *Howard L. Jacobs* for respondents. Reported below: 412 F. 2d 221.

No. 433. SEYMOUR-HEATH *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Louis R. Baker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *S. Billingsley Hill* for the United States, and *Thomas S. Tobin* for American Pumice Co. et al., respondents.

No. 78. YAM SANG KWAI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Wasserman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Charles Gordon* for respondent. Reported below: 133 U. S. App. D. C. 369, 411 F. 2d 683.

No. 275. LOOS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Nathan T. Notkin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *George W. Masterton, Jr.,* for respondent. Reported below: 407 F. 2d 651.

No. 424. FMC CORP. *v.* PAPER CONVERTING MACHINE CO., INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles F. Meroni* for petitioner. *Jerome F. Fallon* for respondent. Reported below: 409 F. 2d 344.

No. 349. SILVERIO *v.* MUNICIPAL COURT OF THE CITY OF BOSTON ET AL. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David Berman* and *John F. Zamparelli* for petitioner. *Robert H. Quinn,* Attorney General of Massachusetts, and *John Wall* and *Edward W. Hanley III,* Assistant Attorneys General, for respondent Municipal Court of the City of Boston. Reported below: 355 Mass. 623, 247 N. E. 2d 379.

No. 393. CLEVELAND BOARD OF EDUCATION *v.* MASHETER, DIRECTOR OF HIGHWAYS. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Donald J. Guittar* for petitioner. *Paul W. Brown,* Attorney General of Ohio, and *I. Charles Rhoads,* Assistant Attorney General, for respondent. Reported below: 17 Ohio St. 2d 27, 244 N. E. 2d 745.

No. 200. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. *v.* NATIONAL MEDIATION BOARD ET AL.; and

No. 206. BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* NATIONAL MEDIATION BOARD ET AL. C. A. D. C. Cir. 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 these petitions. *Francis M. Shea, Richard T. Conway, William H. Dempsey, Jr., David W. Miller,* and *James A. Wilcox* for petitioners in No. 200, and *Harold A. Ross* for petitioner in No. 206. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Walter H. Fleischer* for respondent National Mediation Board, and *Joseph L. Rauh, Jr., John Silard, Daniel H. Pollitt, Elliott C. Lichtman,* and *Isaac N. Groner* for respondent Brotherhood of Locomotive Firemen & Enginemen, in both cases. Reported below: 133 U. S. App. D. C. 326, 410 F. 2d 1025.

No. 240. COVELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Edward Bennett Williams* and *Robert L. Weinberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 410 F. 2d 536.

No. 654. HUNTER *v.* OHIO EX REL. MILLER ET AL. Sup. Ct. Ohio. Motion of petitioner for leave to intervene granted. Certiorari denied. *Sheldon I. Cohen* and *Eugene Gressman* for petitioner. *Henry A. Berliner, Jr.,* for respondent Miller.

No. 117, Misc. PORTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 120, Misc. WOLCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 407 F. 2d 1149.

No. 178, Misc. TAITE *v.* BUSBEE ET AL. Sup. Ct. Fla. Certiorari denied.

No. 209, Misc. ALAMO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William E. Hellerstein* for petitioner.

No. 215, Misc. NICHOLSON ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 183 Neb. 834, 164 N. W. 2d 652.

No. 246, Misc. AUSTIN *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 300, Misc. GABLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 302, Misc. KEYS *v.* DUNBAR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 405 F. 2d 955.

No. 331, Misc. MORENO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 339, Misc. FINK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 340, Misc. COOK *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 346, Misc. WILLIAMS *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 348, Misc. PISANI *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 355, Misc. CASTRUITA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 360, Misc. GERARDI *v.* SIPOS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 361, Misc. STEIGLER *v.* SUPERIOR COURT OF DELAWARE, COUNTY OF NEW CASTLE, ET AL. Sup. Ct. Del. Certiorari denied. *William E. Taylor, Jr.,* and *Alfred J. Lindh* for petitioner. Reported below: —— Del. ——, 252 A. 2d 300.

No. 366, Misc. TEASLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 408 F. 2d 1012.

No. 378, Misc. PAGAN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 379, Misc. CLARK *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 381, Misc. PEPITONE *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 387, Misc. CONTI *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 388, Misc. DANIEL *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 244, Misc. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 407 F. 2d 140.

No. 338, Misc. GAMBALE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Robert H. Quinn,* Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, and *Lawrence P. Cohen,* Deputy Assistant Attorney General, for respondent. Reported below: 355 Mass. 395, 245 N. E. 2d 246.

Rehearing Denied

No. 574, October Term, 1968. UNITED STATES *v.* ESTATE OF GRACE ET AL., 395 U. S. 316. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

October 27, 1969

Miscellaneous Orders

No. —. Providence & Worcester Railroad Co., now Providence & Worcester Co. *v.* United States et al. D. C. S. D. N. Y. Motion of Providence & Worcester Railroad Co., now known as Providence & Worcester Co., for an extension of time to docket its appeal from the judgment of the United States District Court for the Southern District of New York entered on the 28th day of April 1969 granted, and the time for docketing said appeal extended to the date when appeals from the decree by said court dated September 11, 1969, are required to be docketed or, if no appeal is noted, until December 15, 1969. *Harold I. Meyerson* on the motion. Reported below: 300 F. Supp. 185.

No. —. Moskowitz *v.* Power et al. Ct. App. N. Y. Application for temporary restraining order presented to Mr. Justice Harlan, and by him referred to the Court, denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel Hirshowitz,* First Assistant Attorney General, and *Philip Kahaner* and *Robert S. Hammer,* Assistant Attorneys General, for respondents Power et al., and *Joseph Slavin* and *Eugene Victor* for respondent Lerner, in opposition.

No. —. Grove Press, Inc. *v.* Brockett et al. D. C. E. D. Wash. Application for temporary stay presented to Mr. Justice Douglas, and by him referred to the Court, denied. *Stanley Fleishman* and *Edward de Grazia* for applicant.

No. 71. Gutknecht *v.* United States. C. A. 8th Cir. [Certiorari granted, 394 U. S. 997.] Motion of Michael E. Tigar for leave to argue *pro hac vice* granted. *Melvin L. Wulf* on the motion.

No. ——. LICATA *v.* UNITED STATES. C. A. 9th Cir. Petition presented to MR. JUSTICE DOUGLAS for rehearing from his denial of bail, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Russell E. Parsons* and *John J. Hooker, Sr.,* for petitioner.

No. ——. HUNT *v.* EYMAN, WARDEN, ET AL. Petition presented to MR. JUSTICE DOUGLAS for rehearing from his denial of petition for writ of habeas corpus, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 632. ALEXANDER ET AL. *v.* HOLMES COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. [Certiorari granted, *ante,* p. 802.] Motions of National Education Assn. and Tennessee Federation for Constitutional Government for leave to file briefs as *amici curiae* granted. *Richard B. Sobol* and *David Rubin* on the motion for National Education Assn.

No. 674. HENRY I. SIEGEL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Osmond K. Fraenkel* for applicant.

No. 727. VALE *v.* LOUISIANA. Appeal from Sup. Ct. La. [Probable jurisdiction postponed, *ante,* p. 813.] Motion of appellant for appointment of counsel granted. It is ordered that *Eberhard P. Deutsch, Esquire,* of New Orleans, Louisiana, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for appellant in this case.

No. 147, Misc. SLAUGHTER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Petition presented to MR. JUSTICE DOUGLAS for rehearing from his denial of an injunction, and by him referred to the Court, denied.

No. 608, Misc. BAKER *v.* BETO, CORRECTIONS DIRECTOR, 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.

*Probable Jurisdiction Noted or Postponed**

No. 369. AMERICAN FARM LINES *v.* BLACK BALL FREIGHT SERVICE ET AL.; and

No. 382. INTERSTATE COMMERCE COMMISSION *v.* BLACK BALL FREIGHT SERVICE ET AL. Appeals from D. C. W. D. Wash. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. *Joseph A. Califano, Jr., John D. Hawke, Jr.,* and *William L. Peterson, Jr.,* for appellant in No. 369, and *Robert W. Ginnane* and *Arthur J. Cerra* for appellant in No. 382. *Peter T. Beardsley* and *Nelson J. Cooney* for Black Ball Freight Service et al., *William H. Dempsey, Jr.,* for Consolidated Freightways Corp. of Delaware et al., *James W. Wrape* and *Robert E. Joyner* for United Transports, Inc., and *Ed White* and *James E. Nelson* for Atchison, Topeka & Sante Fe Railway Co., appellees in both cases. *Solicitor General Griswold* filed a memorandum for the United States in both cases. Reported below: 298 F. Supp. 1006.

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*[REPORTER'S NOTE: An order postponing further consideration of question of jurisdiction to hearing of case on merits in No. 330, *United States* v. *Eisdorfer,* issued on October 27, 1969, was revoked the same day.]

No. 399. ROWAN, DBA AMERICAN BOOK SERVICE, ET AL. *v.* UNITED STATES POST OFFICE DEPARTMENT ET AL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted. *Joseph Taback* for appellants. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for appellees. Reported below: 300 F. Supp. 1036.

No. 85, Misc. IN RE WINSHIP. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Motion for leave to proceed *in forma pauperis* granted and case transferred to appellate docket. *William E. Hellerstein* for appellant. *J. Lee Rankin* and *Stanley Buchsbaum* in opposition.

Certiorari Granted. (See also No. 419, *ante,* p. 13.)

No. 403. UNITED STATES *v.* VAN LEEUWEN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. *Richard James Waters* for respondent. Reported below: 414 F. 2d 758.

No. 445. STANDARD INDUSTRIES, INC. *v.* TIGRETT INDUSTRIES, INC., ET AL. C. A. 6th Cir. Certiorari granted. *Maximilian Bader* and *I. Walton Bader* for petitioner. *Ralph W. Kalish* for respondents. Reported below: 411 F. 2d 1218.

Certiorari Denied. (See also No. 430, *ante,* p. 18; and No. 608, Misc., *supra.*)

No. 360. MANCUSO *v.* FRAIMAN. Ct. App. N. Y. Certiorari denied. *Fabian G. Palomino* and *Jeremiah B. Bloom* for petitioner.

No. 58. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN *v.* ELGIN, JOLIET & EASTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Alex Elson* and *Harold C. Heiss* for petitioner. *Harlan L. Hackbert* for respondent. Reported below: 404 F. 2d 80. [For earlier order herein, see 395 U. S. 931.]

No. 352. STICE *v.* STATE BOARD OF BAR EXAMINERS OF KANSAS. Sup. Ct. Kan. Certiorari denied. *John S. Carroll* for petitioner. *Kent Frizzell,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent.

No. 355. HAYER, AKA HAGAN, ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Edward Bennett Williams, Harold Ungar,* and *Patrick M. Wall* for petitioners. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 24 N. Y. 2d 395, 248 N. E. 2d 588.

No. 378. BEAL *v.* PORTSMOUTH SALVAGE CO., INC. Sup. Ct. App. Va. Certiorari denied. *Jerrold G. Weinberg* for petitioner. *John W. Winston* for respondent.

No. 394. DELIA *v.* COURT OF COMMON PLEAS OF CUYAHOGA COUNTY ET AL. C. A. 6th Cir. Certiorari denied. *Alan M. Wolk* for petitioner. *John T. Corrigan* and *John L. Dowling* for Court of Common Pleas of Cuyahoga County, and *Joseph L. Newman* for Shaker Air Conditioning Co., respondents.

No. 408. SCUDDER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Gordon B. Davidson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *Carolyn R. Just* for respondent. Reported below: 405 F. 2d 222.

No. 407. SCALF *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied. *James R. McManus* for petitioner. Reported below: 408 F. 2d 325.

No. 415. PARKER *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *William H. Colona, Jr.,* for petitioner.

No. 417. GORDON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Abraham Gertner* for petitioner. *Shelby V. Hutchins* for respondent.

No. 422. CALIFORNIA CO., NOW CHEVRON OIL CO., ET AL. *v.* KUCHENIG. C. A. 5th Cir. Certiorari denied. *Lawrence K. Benson* for California Co., and *Jack P. F. Gremillion,* Attorney General of Louisiana, and *John L. Madden* and *Edward M. Carmouche,* Assistant Attorneys General, for Louisiana State Mineral Board, petitioners. Reported below: 410 F. 2d 222.

No. 423. POWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William C. Calhoun* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 413 F. 2d 1030.

No. 425. HUGHES *v.* STANDIDGE. Sup. Ct. La. Certiorari denied. *Floyd J. Reed* for petitioner. Reported below: 254 La. 6, 222 So. 2d 64.

No. 429. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 7th Cir. Certiorari denied. *Edward J. Hickey, Jr., William J. Hickey,* and *William J. Donlon* for petitioner. *S. R. Brittingham, Jr.,* and *C. G. Niebank, Jr.,* for respondents. Reported below: 410 F. 2d 520.

No. 285. FEDERAL BROADCASTING SYSTEM, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION; and

No. 532. STAR TELEVISION, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. *Edward J. Grenier, Jr.*, for petitioner in No. 285, and *Benedict P. Cottone* and *John C. Eldridge* for petitioners in No. 532. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Henry Geller, John H. Conlin,* and *Lenore G. Ehrig* for respondent Federal Communications Commission in both cases, and *Thomas N. Dowd, Harold David Cohen,* and *J. Laurent Scharff* for respondent Flower City Television Corp., in No. 532. Reported below: 135 U. S. App. D. C. 71, 416 F. 2d 1086.

No. 357. GENERAL TELEPHONE COMPANY OF CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 450. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions. *Victor H. Kramer* and *Melvin Spaeth* for General Telephone Company of California et al., *Edmund E. Harvey* and *Lloyd D. Young* for United Inter-Mountain Telephone Co. et al., and *Hugh B. Cox* for Chesapeake & Potomac Telephone Company of Virginia et al., petitioners in No. 357; and *Paul Rodgers* for petitioner in No. 450. *Solicitor General Griswold, Assistant Attorney General McLaren, Henry Geller, John H. Conlin,* and *Lenore G. Ehrig* for respondents Federal Communications Commission et al., in both cases. Reported below: 134 U. S. App. D. C. 116, 413 F. 2d 390.

No. 386. International Association of Machinists, District Lodge 94, AFL–CIO, et al. *v.* National Labor Relations Board et al. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. *Herbert M. Ansell, Abe Levy,* and *Plato E. Papps* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for National Labor Relations Board, *Richard W. Lund, Paul R. Watkins, Dana Latham,* and *Henry J. Steinman* for Lou Ehlers Cadillac, and *Henry W. Low* and *Edward A. McDermott* for Thomas Cadillac, Inc., respondents. Reported below: 134 U. S. App. D. C. 239, 414 F. 2d 1135.

No. 329. Mancusi, Warden *v.* Pugach. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this motion and petition. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for petitioner. Reported below: 411 F. 2d 177.

No. 397. Holding *v.* Holding. Sup. Ct. App. Va. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied.

No. 406. Woodward *v.* Lawson et al. Sup. Ct. Ga. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. Reported below: 225 Ga. 261, 167 S. E. 2d 660.

No. 127, Misc. Gendron et al. *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *Bernard J. Mellman* for petitioners. Reported below: 41 Ill. 2d 351, 243 N. E. 2d 208.

No. 110, Misc. OUGHTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 128, Misc. RUFFIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 129, Misc. LAINHART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Gordon Gooch* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 449 and 409 F. 2d 5.

No. 135, Misc. BANDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 518.

No. 144, Misc. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 146, Misc. GADSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *George B. Mickum III* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States.

No. 305, Misc. ROSS *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. *John B. Culbertson* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 408 F. 2d 882.

No. 329, Misc. MCGURRIN *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 150, Misc. MANNING *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 320, Misc. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Kenneth S. Jacobs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 408 F. 2d 1000.

No. 327, Misc. FINLEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 342, Misc. MITCHELL *v.* FITZHARRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 344, Misc. SCOTT *v.* HUNT OIL CO. Sup. Ct. La. Certiorari denied.

No. 359, Misc. CORNITCHER *v.* DWYER ET AL. C. A. 3d Cir. Certiorari denied.

No. 362, Misc. EATON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Reuben A. Garland, Sr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 409 F. 2d 1355.

No. 363, Misc. LAZAROFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 567.

No. 393, Misc. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 408 F. 2d 1073.

No. 385, Misc. WARTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 400 F. 2d 25.

No. 386, Misc. COLEMAN *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 392, Misc. MINK *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 394, Misc. WEBSTER *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 395, Misc. GILREATH *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 407 F. 2d 811.

No. 397, Misc. LAWRENCE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 399, Misc. WELCH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Richard W. Ervin III* for petitioner.

No. 403, Misc. PADGITT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 264 Cal. App. 2d 443, 70 Cal. Rptr. 345.

No. 404, Misc. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 407, Misc. MASON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 221 So. 2d 10.

No. 406, Misc. SEMIDEY *v.* MCKENDRICK, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 410, Misc. BOLISH *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 409 F. 2d 1404.

No. 413, Misc. STONE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 448 P. 2d 299.

No. 414, Misc. STONE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 442 P. 2d 519.

No. 415, Misc. PENA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 418, Misc. PALMER *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 419, Misc. BATES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 422, Misc. STEDTNITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States.

No. 433, Misc. THOMPSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. *James D. Santini* for petitioner. *Addeliar D. Guy* for respondent. Reported below: 85 Nev. 134, 451 P. 2d 704.

No. 444, Misc. DEVOE *v.* DUNCAN. Sup. Ct. Fla. Certiorari denied.

No. 443, Misc. McDONALD *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 445, Misc. WALLACE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 447, Misc. McGUCKEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Donald H. Dalton* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 187 Ct. Cl. 284, 407 F. 2d 1349.

No. 455, Misc. SYLVIA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 459, Misc. EDWARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 461, Misc. LEWIS *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 464, Misc. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 470, Misc. BOUTWELL *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 408 F. 2d 629.

No. 473, Misc. WALKER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 409 F. 2d 1311.

No. 474, Misc. JAMES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 476, Misc. YOUNG *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 478, Misc. FINK *v.* HEYD, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 408 F. 2d 7.

No. 479, Misc. DEVARGAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. *Albert Armendariz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for respondent. Reported below: 409 F. 2d 335.

No. 493, Misc. NELSON *v.* PINTO, PRISON FARM SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *Robert N. McAllister, Jr.,* for respondent. Reported below: 409 F. 2d 842.

No. 496, Misc. TOLIVER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 270 Cal. App. 2d 492, 75 Cal. Rptr. 819.

No. 527, Misc. STEBBINS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied. *Earle K. Shawe* and *Robert E. Anderson* for State Farm Mutual Automobile Insurance Co. et al., *Allan C. Swingle* for Nationwide Mutual Insurance Co. et al., and *James F. Bromley* for Keystone Insurance Co. et al., respondents. Reported below: 134 U. S. App. D. C. 193, 413 F. 2d 1100.

No. 522, Misc. DEARMAN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 203 Kan. 94, 453 P. 2d 7.

No. 482, Misc. HERNDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *F. M. Apicella* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 553, Misc. FULLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States.

No. 521, Misc. LILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 621, Misc. CHONTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Albert M. Horn* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 251.

No. 730, Misc. MURPHY ET UX. *v.* U. S. COMMISSIONER OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 641, Misc. MURPHY *v.* JOHNSON, CLERK, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 763, Misc. MURPHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 1129.

No. 426, Misc. DUVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States.

No. 358, Misc. WARNOCK *v.* WARNOCK. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Peter P. Barry* for respondent.

No. 518, Misc. DUKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 407 F. 2d 863.

OCTOBER 31, 1969

Dismissal Under Rule 60

No. 1098, Misc. GILLINGHAM *v.* SUPREME COURT OF TEXAS. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 6, 1969

Dismissals Under Rule 60

No. 704, Misc. HOSKINS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John D. Buchanan, Jr.,* for petitioner. Reported below: 221 So. 2d 447.

No. 649, Misc. Aros-Gonzales *v.* United States. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 1224.

November 10, 1969

Miscellaneous Orders

No. 1173, October Term, 1968. Jones *v.* Illinois By Its Electoral Board, 395 U. S. 162. Motion to require state and local officials of Illinois promptly to conduct an election for office of Lieutenant Governor of Illinois denied. The Chief Justice took no part in the consideration or decision of this motion. *William J. Scott,* Attorney General of Illinois, and *Francis T. Crowe, Herman Tavins,* and *A. Zola Groves,* Assistant Attorneys General, in opposition.

No. 11. Samuels et al. *v.* Mackell, District Attorney of Queens County, et al. Appeal from D. C. S. D. N. Y. Motion of appellants to strike brief of appellee Mackell denied. *Victor Rabinowitz* on the motion. *Thomas J. Mackell, pro se,* in opposition. [For earlier orders herein, see, *e. g.,* 395 U. S. 957.]

No. 13. Maxwell *v.* Bishop, Penitentiary Superintendent. C. A. 8th Cir. Motion of *Gerald H. Gottlieb* and *Earl Klein, pro sese,* for leave to file the *amici curiae* brief in the case of *Boykin* v. *Alabama,* No. 642, October Term, 1968, in this case, denied. [For earlier orders herein, see, *e. g.,* 395 U. S. 918.]

No. 429, Misc. Szijarto *v.* Oberhauser et al. C. A. 9th Cir. Application for bail presented to Mr. Justice Brennan, and by him referred to the Court, denied.

No. 84. UNITED STATES *v.* JORN. Appeal from D. C. Utah. [Probable jurisdiction noted, *ante,* p. 810.] Motion of appellee for the appointment of counsel granted. It is ordered that *Denis R. Morrill, Esquire,* of Salt Lake City, Utah, be, and he is hereby, appointed to serve as counsel in this case.

No. 540. ROSADO ET AL. *v.* WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 815.] Motion of People for Adequate Welfare for leave to file a brief as *amicus curiae* granted. *Floyd Sarisohn* on the motion.

No. 453, Misc. SIERRAS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. *Solicitor General Griswold* for the United States in opposition.

No. 584, Misc. WEST *v.* LLOYD, CORRECTIONAL SUPERINTENDENT, ET AL.;

No. 595, Misc. MCGARRY *v.* HOCKER, WARDEN;

No. 610, Misc. THOMPSON *v.* NORTH CAROLINA;

No. 698, Misc. MEEK *v.* THOMAS, JUDGE, ET AL.; and

No. 810, Misc. WATKINS *v.* BOUNDS, CORRECTION COMMISSIONER. Motions for leave to file petitions for writs of habeas corpus denied.

No. 701, Misc. WALSH *v.* U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Solicitor General Griswold* for the United States in opposition.

No. 843, Misc. WENDT *v.* DILLIN ET AL., JUDGES, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 560, Misc. LEWIS ET AL. *v.* MONTGOMERY, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL WELFARE, ET AL. Appeal from D. C. N. D. Cal. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Rubin Tepper* and *Steven J. Antler* for appellants. *Thomas C. Lynch,* Attorney General of California, and *Elizabeth Palmer* and *Jay S. Linderman,* Deputy Attorneys General, for appellees. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for the United States as *amicus curiae* in support of appellants. Reported below: 312 F. Supp. 197.

Certiorari Granted. (See also No. 439, *ante,* p. 23.)

No. 175. MORAGNE *v.* STATES MARINE LINES, INC., ET AL. C. A. 5th Cir. Certiorari granted. *Charles Jay Hardee, Jr.,* for petitioner. *William A. Gillen* for States Marine Lines, Inc., and *George Ericksen* for Gulf Florida Terminal Co., respondents. Reported below: 409 F. 2d 32.

No. 440. NATIONAL LABOR RELATIONS BOARD *v.* RAYTHEON CO. ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for petitioner. *Charles H. Resnick* for respondent Raytheon Co. Reported below: 408 F. 2d 681.

No. 81, Misc. CHAMBERS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Robert W. Duggan* for respondent. Reported below: 408 F. 2d 1186.

No. 477. Atlantic Coast Line Railroad Co. *v.* Brotherhood of Locomotive Engineers et al. C. A. 5th Cir. Certiorari granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Dennis G. Lyons, Frank X. Friedmann, Jr., David M. Foster, John W. Weldon,* and *John S. Cox* for petitioner. *Allan Milledge* and *Richard L. Horn* for respondents.

Certiorari Denied. (See also No. 434, *ante,* p. 22; No. 474, *ante,* p. 24; No. 482, *ante,* p. 25; No. 502, *ante,* p. 25; and No. 632, Misc., *ante,* p. 23.)

No. 146. Kern et al. *v.* Whirl. C. A. 5th Cir. Certiorari denied. *B. Jeff Crane, Jr.,* for Kern, and *Sam H. Hood, Jr.,* for Fidelity & Deposit Co. of Maryland, petitioners. *Charles Kipple* for respondent. Reported below: 407 F. 2d 781.

No. 187. A & S Tropical, Inc. *v.* Hiram Walker, Inc., et al. C. A. 5th Cir. Certiorari denied. *Milton E. Grusmark* and *Natalie Baskin* for petitioner. *James C. McKay* and *George V. Allen, Jr.,* for Hiram Walker, Inc., and *George H. Salley* and *Paul D. Barns, Jr.,* for South Florida Liquor Distributors, Inc., respondents. Reported below: 407 F. 2d 4.

No. 245. Derrington *v.* City of Portland. Sup. Ct. Ore. Certiorari denied. *Frank M. Ierulli* for petitioner. *Marian C. Rushing* for respondent. Reported below: 253 Ore. 289, 451 P. 2d 111.

No. 400. Fowler et al. *v.* City of Charlottesville et al. Corp. Ct. of Charlottesville, Va. Certiorari denied. *D. Nelson Sutton* for petitioners. *George Gilmer* for respondents.

No. 290. BLOUNT, POSTMASTER GENERAL *v.* UNITED FEDERATION OF POSTAL CLERKS, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Ralph A. Fine* for petitioner. *Herbert S. Thatcher* and *Donald M. Murtha* for respondents. Reported below: 133 U. S. App. D. C. 176, 409 F. 2d 462.

No. 310. UNITED STATES FOR THE USE OF MOORE ET AL. *v.* GENERAL INSURANCE COMPANY OF AMERICA. C. A. 5th Cir. Certiorari denied. *Artie P. Stephens* for petitioners. *M. R. Irion* for respondent. Reported below: 406 F. 2d 442.

No. 438. SEARS, ROEBUCK & CO. *v.* HANNIGAN ET AL. C. A. 7th Cir. Certiorari denied. *Burton Y. Weitzenfeld* for petitioner. *W. P. Butler* for respondents. Reported below: 410 F. 2d 285.

No. 442. CONRAD *v.* GRAF BROS., INC., ET AL. C. A. 1st Cir. Certiorari denied. *Lawrence F. O'Donnell* for petitioner. *Stanley M. Epstein* for respondents. Reported below: 412 F. 2d 135.

No. 443. CONTINENTAL INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Frederick T. Shea* and *Irving Brand* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 409 F. 2d 727.

No. 452. HALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. H. Gearinger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 410 F. 2d 147.

No. 446. LANG ET AL. *v.* THOMPSON ET AL. Sup. Ct. Ill. Certiorari denied. *Timothy W. Swain* for petitioners. *Kenneth H. Lemmer* for respondents.

No. 448. FARMERS' COOPERATIVE COMPRESS *v.* UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari denied. *John Edward Price* for petitioner. *Eugene Cotton*, *Richard F. Watt*, and *Michael H. Gottesman* for United Packinghouse, Food & Allied Workers International Union, AFL–CIO, and *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for National Labor Relations Board, respondents. Reported below: 135 U. S. App. D. C. 111, 416 F. 2d 1126.

No. 459. KNIGHT *v.* UNITED STATES; and

No. 460. CHAPMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* for petitioner in No. 459 and for petitioners in No. 460. *Solicitor General Griswold* for the United States in both cases. Reported below: No. 459, 413 F. 2d 445; No. 460, 413 F. 2d 440.

No. 454. MARTIRE *v.* LABORERS' LOCAL UNION 1058 ET AL. C. A. 3d Cir. Certiorari denied. *J. M. Maurizi* for petitioner. *William T. Coleman, Jr.,* and *Leo I. Shapiro* for respondents. Reported below: 410 F. 2d 32.

No. 461. HEVI-DUTY ELECTRIC CO., A DIVISION OF SOLA BASIC INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Herbert P. Wiedemann* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 410 F. 2d 757.

No. 463. JOHNSON *v.* STUCKER, REFORMATORY SUPERINTENDENT. Sup. Ct. Kan. Certiorari denied. *Melvin L. Wulf* and *Eleanor Holmes Norton* for petitioner. *J. Richard Foth, Edward G. Collister, Jr.,* and *Ray L. Borth,* Assistant Attorneys General of Kansas, for respondent. Reported below: 203 Kan. 253, 453 P. 2d 35.

No. 455. ONESTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 783.

No. 465. SERZYSKO *v.* CHASE MANHATTAN BANK. C. A. 2d Cir. Certiorari denied. *Arthur C. Fink* for petitioner. *A. Donald MacKinnon* for respondent. Reported below: 409 F. 2d 1360.

No. 466. ST. HELENA PARISH SCHOOL BOARD ET AL. *v.* HALL ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *John F. Ward, Jr., Harry Kron, Jr., Bernard Boudreaux, Thompson Clarke, Albin Lassiter, Richard Kilbourne, E. O. Ware III, Leonard E. Yokum, Frank Salter, Charles Riddle,* and *Nolan Edwards* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Leonard* for respondent United States. *Mr. Gremillion* and *Victor A. Sachse* filed a brief for the State of Louisiana as *amicus curiae* in support of the petition. Reported below: 417 F. 2d 801.

No. 469. NATIONAL LABOR RELATIONS BOARD *v.* PEPSI-COLA BUFFALO BOTTLING CO. ET AL. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for petitioner. *Stuart Goldstein* for respondents. Reported below: 409 F. 2d 676.

No. 467. KAUFMAN *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Morton Liftin* for petitioner. *John G. Bonomi* and *Michael Franck* for respondent.

No. 468. SEGUROS TEPEYAC, S. A. COMPANIA MEXICANA DE SEGUROS GENERALES *v.* JERNIGAN. C. A. 5th Cir. Certiorari denied. *Edward Gallagher* for petitioner. *Cornelius C. O'Brien, Jr.,* for respondent. Reported below: 410 F. 2d 718.

No. 470. CONVERSANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert A. Polin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 412 F. 2d 1143.

No. 471. LYNCH *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *James Manahan* for petitioner. *Theodore L. Sendak,* Attorney General of Indiana, and *William F. Thompson,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 245 N. E. 2d 334.

No. 472. IN RE SEMEL. C. A. 3d Cir. Certiorari denied. Reported below: 411 F. 2d 195.

No. 473. LYN-BEV DEVELOPMENT, INC. *v.* COMMERCIAL NATIONAL BANK ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Tyler Abell* for petitioner.

No. 483. ATLANTIC RICHFIELD CO. ET AL. *v.* HILTON ET AL. Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. *Jack W. Flock* for petitioners. *Edward Kliewer, Jr.,* for respondents. Reported below: 437 S. W. 2d 347.

No. 478. SACHS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Edward Bennett Williams, Steven M. Umin, Morris A. Shenker,* and *Bernard J. Mellman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 412 F. 2d 357.

No. 481. NOBLE DRILLING CORP. *v.* SMITH. C. A. 5th Cir. Certiorari denied. *W. Ford Reese* for petitioner. Reported below: 412 F. 2d 952.

No. 485. GALEWITZ ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Murray Kurman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Michael B. Arkin* for respondent. Reported below: 411 F. 2d 1374.

No. 487. WILKERSON ET AL. *v.* WATERFORD PARK, INC., ET AL. Sup. Ct. App. W. Va. Certiorari denied. *Williamson Pell, Jr.,* for petitioners.

No. 489. SHELTON ET AL. *v.* CITY OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. *Bernard E. Epton* and *Alan R. Miller* for petitioners. *Raymond F. Simon* and *Marvin E. Aspen* for City of Chicago, and *Daniel P. Coman, Dean H. Bilton,* and *Thomas E. Brannigan* for County of Cook, respondents. Reported below: 42 Ill. 2d 468, 248 N. E. 2d 121.

No. 492. SAILORS HAVEN FIRE ISLAND, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Seymour S. Ross* for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa,* and *Roger P. Marquis* for the United States. Reported below: 412 F. 2d 347.

No. 493. SNYDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 413 F. 2d 288.

No. 494. COLE, ADMINISTRATRIX *v.* SUNRAY DX OIL CO. ET AL. Sup. Ct. Okla. Certiorari denied. *Thomas G. Smith* for petitioner. *John F. Curran* for respondent Sunray DX Oil Co., and *C. Harold Thweatt* for respondent Ambassador Oil Corp.

No. 501. HOWELL *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Morgan L. Amaimo* for petitioner.

No. 182. SECURITY SEWAGE EQUIPMENT CO. *v.* WOODLE. Sup. Ct. Ohio. Certiorari denied. *Ralph Rudd* for petitioner.

MR. JUSTICE BLACK, dissenting.

Respondent Woodle, an attorney, sued petitioner, a corporation, for lawyer's fees. The company defended in part on the ground that Woodle had been guilty of malpractice in rendering the contested services. The corporation also wanted to file a counterclaim for damages arising from this alleged malpractice, but the company's lawyer would not do so. Petitioner was unable to find any lawyer who would file the claim and so the company's manager, not himself a lawyer, filed a counterclaim. The trial court dismissed the pleading, apparently because it had not been prepared by a lawyer and under Ohio law corporations can appear in court only when represented by counsel.

After considerable procedural juggling the Supreme Court of Ohio dismissed the company's appeal, stating that "no substantial constitutional question exists

herein." It is uncertain whether this dismissal rested on some state rule of appellate procedure, or whether the Supreme Court decided that petitioner did not have a right to present its claim without the assistance of a lawyer.

Petitioner argues that it has been denied due process of law and that, since a natural person could have presented this claim without counsel, it has been denied equal protection of the laws. A fundamental basis of our courts is that their doors are always open to suitors with arguable claims, and a decision denying a corporation the right to appear without counsel would present a substantial constitutional issue. Since the record is not altogether clear as to why the dismissal of the company's claim was upheld, I would grant certiorari, vacate the judgment below, and remand the case to the Supreme Court of Ohio for clarification of the grounds of decision in this case.

No. 362. REEVES *v.* PACIFIC FAR EAST LINES, INC. Sup. Ct. Ore. Certiorari denied. *Marvin S. Nepom* for petitioner. Reported below: 253 Ore. 105, 452 P. 2d 313.

MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN joins, dissenting.

I would grant certiorari and reverse. In its opinion below, the Oregon Supreme Court held that the existence of a causal link between a particular accident and a particular injury to a seaman is essentially a question for the medical witnesses and the judge and not for the jury. This holding is flatly contrary to the decision of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U. S. 107 (1959). In *Sentilles* we reversed a federal court of appeals for doing exactly what the Oregon Supreme Court did here. *Sentilles,* like this case, was brought under the Jones Act, 41 Stat. 1007, 46

U. S. C. § 688, and involved the question of whether plaintiff's injuries were caused by the accident for which defendant was liable. The United States Court of Appeals for the Fifth Circuit held that the question of causation should not have been sent to the jury. This Court reversed. The majority opinion said that: "The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation," 361 U. S., at 109. This rule should also apply in a state court trying a Jones Act case. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957).

In light of these cases, it is clear to me that the Oregon Supreme Court was in error and that this Court should grant certiorari and hold that the trial court properly allowed the question of causation to go to the jury. On this record petitioner is plainly entitled to the $3,000 judgment awarded him by the jury, and this Court should reinstate that judgment.

No. 428. BROWN *v.* HARDIN ET AL. C. A. D. C. Cir. Motion for leave to proceed as a veteran granted. Certiorari and other relief denied. *Solicitor General Griswold* for respondents Hardin et al.

No. 488. POPP ET UX. *v.* EBERLEIN ET AL. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Steven E. Keane* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett* for respondent United States. Reported below: 409 F. 2d 309.

No. 490. SINCLAIR *v.* BOUGHTON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 447. BARNETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joel W. Westbrook* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, and *Sam L. Jones, Jr.,* and *Robert C. Flowers,* Assistant Attorneys General, for respondent.

No. 499. FEDERAL TRADE COMMISSION *v.* TEXTILE & APPAREL GROUP, AMERICAN IMPORTERS ASSN., ET AL.; and

No. 500. NATIONAL KNITTED OUTERWEAR ASSN. ET AL. *v.* TEXTILE & APPAREL GROUP, AMERICAN IMPORTERS ASSN., ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for petitioner in No. 499, and *Eugene Gressman* for petitioners in No. 500. *Michael P. Daniels* and *Milton M. Gottesman* for respondents in both cases. Reported below: 133 U. S. App. D. C. 353, 410 F. 2d 1052.

No. 6, Misc. LASSITER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Eugene J. Brenner* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Michael Buzzell,* Deputy Attorney General, for respondent.

No. 115, Misc. CLIFT *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Kent Frizzell,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent. Reported below: 202 Kan. 512, 449 P. 2d 1006.

No. 8, Misc. YARNAL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 429 Pa. 6, 239 A. 2d 318.

No. 78, Misc. STERLING *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *John Powers Crowley* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 403 F. 2d 425.

No. 108, Misc. MOORE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William E. Hellerstein* for petitioner. *Thomas J. Mackell* and *Peter J. O'Connor* for respondent.

No. 118, Misc. GERAWAY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Robert H. Quinn,* Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, *Lawrence P. Cohen,* Deputy Assistant Attorney General, *Barbara Macey,* Special Assistant Attorney General, *George G. Burke* and *Richard W. Barry* for respondent. Reported below: 355 Mass. 433, 245 N. E. 2d 423.

No. 119, Misc. YANT *v.* WILSON, JUDGE. Ct. App. Ky. Certiorari denied.

No. 121, Misc. RIZZO, AKA ROSENHECK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Lee B. McTurnan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 409 F. 2d 400.

No. 142, Misc. MULLEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 132, Misc. McDERMOTT *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 202 Kan. 399, 449 P. 2d 545.

No. 133, Misc. LEWIS *v.* FRYE, WARDEN, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 42 Ill. 2d 58, 245 N. E. 2d 483.

No. 141, Misc. NOLAN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS ET AL. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States in opposition.

No. 147, Misc. SLAUGHTER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 251, Misc. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Arthur John Keeffe* for petitioner. *Lloyd H. Butterfield* for respondent.

No. 291, Misc. PEARSALL *v.* FLORIDA. Ct. App. Fla., 1st Dist. Certiorari denied. *Luke G. Galant* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for respondent. Reported below: 215 So. 2d 58.

No. 368, Misc. BOWEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Robert J. Corcoran* and *Jay Dushoff* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 104 Ariz. 138, 449 P. 2d 603.

No. 371, Misc. WHITE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 349, Misc. SANDERS, AKA WHITE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 219 So. 2d 913.

No. 396, Misc. EATON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 401, Misc. BOGART ET UX. *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Peter D. Bogart, pro se,* and for other petitioner. Reported below: 409 F. 2d 25.

No. 430, Misc. AMALFITANO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *Matthew Muraskin* and *Francis J. Valentino* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler,* Assistant Attorney General, for respondent.

No. 439, Misc. SWAIN *v.* BARFIELD ET AL. C. A. 4th Cir. Certiorari denied.

No. 442, Misc. CLANCY *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 448, Misc. ADAMS, TRADING AS VITAMIN PRODUCTS CO. OF MARYLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 410 F. 2d 755.

No. 451, Misc. HAKEEM *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Corinne S. Shulman* for petitioner. Reported below: 268 Cal. App. 2d 877, 74 Cal. Rptr. 511.

No. 452, Misc. TIMMONS *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 460, Misc. ABEL *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied. *Livingston Hall* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Robert C. Flowers* and *Allo B. Crow, Jr.,* Assistant Attorneys General, and *Hawthorne Phillips,* Executive Assistant Attorney General, for respondent.

No. 485, Misc. PITTMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 411 F. 2d 635.

No. 487, Misc. ODES *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied.

No. 489, Misc. KEMPLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 491, Misc. HARDISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 492, Misc. BOWEN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 497, Misc. HENDERSON *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 409 F. 2d 507.

No. 501, Misc. GRAY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 502, Misc. JARRETT *v.* BRITT ET AL. C. A. 4th Cir. Certiorari denied.

No. 504, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 406 F. 2d 1111.

No. 508, Misc. HOWARD *v.* COPINGER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 511, Misc. ROBERTS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 523, Misc. WALDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States.

No. 530, Misc. BOURASSA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 69.

No. 539, Misc. LUGO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 540, Misc. COURTNEY *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 409 F. 2d 1185.

No. 541, Misc. RYAN *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 543, Misc. MILNE *v.* LAFLAMME. Sup. Ct. Vt. Certiorari denied.

No. 544, Misc. MILNE *v.* SHELL OIL CO. Sup. Ct. Vt. Certiorari denied.

No. 554, Misc. WENSTLEY *v.* MCMANN, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 555, Misc. BOYDEN *v.* CURTIS, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 562, Misc. KENNELLY *v.* DAVIS. Sup. Ct. Fla. Certiorari denied. *Irma Robbins Feder* for petitioner. *Mac Mermell* for respondent. Reported below: 221 So. 2d 415.

No. 563, Misc. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 1017.

No. 573, Misc. MOREFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 1186.

No. 576, Misc. DEMES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 578, Misc. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 580, Misc. BURTON *v.* LLOYD, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 585, Misc. WILLIAMS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 85 Nev. 169, 451 P. 2d 848.

No. 588, Misc. CHISHOLM *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Michael F. Dillon* for respondent.

No. 590, Misc. DURAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 413 F. 2d 596.

No. 591, Misc. DAVIS *v.* GERNERT ET AL. C. A. 3d Cir. Certiorari denied.

No. 592, Misc. COLLETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 596.

No. 598, Misc. PALMITER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Stephen W. Shaughnessy* for petitioner.

No. 601, Misc. MILANI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States.

No. 602, Misc. NEELY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 612, Misc. BASS *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 613, Misc. HOWARD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 604, Misc. GWIN *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 410 F. 2d 321.

No. 605, Misc. TOMAIOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 609, Misc. VILLAHERMOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 599.

No. 623, Misc. RESTREPO *v.* FLORIDA SUPREME COURT. Sup. Ct. Fla. Certiorari denied.

No. 624, Misc. THOMAS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 75 Wash. 2d 882, 454 P. 2d 202.

No. 626, Misc. VALENTINE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 627, Misc. MARTINEZ *v.* OLIVER ET AL. C. A. 9th Cir. Certiorari denied.

No. 628, Misc. RUDICK *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari denied. *Leonard B. Boudin* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 412 F. 2d 16.

No. 642, Misc. ELKSNIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 643, Misc. COBB *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 644, Misc. FRANKLIN *v.* SHORTMAN ET AL. C. A. 2d Cir. Certiorari denied. *Aaron Benenson* for respondent Shortman.

No. 646, Misc. HOLLAND *v.* NASOU, MEDICAL DIRECTOR, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 647, Misc. WINN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 415.

No. 650, Misc. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 654, Misc. BOGGUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 110.

No. 662, Misc. HOLLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 851.

No. 664, Misc. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Perry Langford* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 412 F. 2d 491.

No. 666, Misc. HOBBS *v.* BRANTLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 667, Misc. CONYERS *v.* HEROLD, HOSPITAL DIRECTOR, ET AL. C. A. 2d Cir. Certiorari denied.

No. 668, Misc. PETERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 411 F. 2d 1074.

No. 669, Misc. STEINLAUF *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 671, Misc. ROCKERFELLER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 9 Ariz. App. 265, 451 P. 2d 623.

No. 680, Misc. CHASE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Tom Karas* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 780.

No. 689, Misc. ADAMS *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 413 F. 2d 991.

No. 690, Misc. SANFORD ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John C. Emery, Jr.,* for petitioners. *Solicitor General Griswold* for the United States.

No. 691, Misc. WINTERS *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Moses M. Falk* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 140.

No. 694, Misc. MINK *v.* BUCHKOE, WARDEN. Sup. Ct. Mich. Certiorari denied.

No. 695, Misc. MARTIN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States et al.

No. 696, Misc. HALL *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 697, Misc. LINTS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 31 App. Div. 2d 983, 299 N. Y. S. 2d 399.

No. 702, Misc. BROWN *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 711, Misc. HARKINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 712, Misc. HALPERN *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 728, Misc. GARZA *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 735, Misc. PEPITONE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 741, Misc. SLEZIAK *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 454 P. 2d 252.

No. 751, Misc. TISNADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 412 F. 2d 401.

No. 754, Misc. WATKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 409 F. 2d 1382.

No. 752, Misc. JAKALSKI *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 409 F. 2d 494.

No. 755, Misc. WILSON *v.* MACBRIDE, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 9th Cir. Certiorari denied.

No. 756, Misc. THIBADOUX *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 761, Misc. MARCUS *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 771, Misc. MULLIGAN *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 774, Misc. IN RE SANCRANT ET AL. Sup. Ct. Ohio. Certiorari denied. *Harry Friberg* for the State of Ohio, respondent, in opposition.

No. 775, Misc. FLEISCHMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 523.

No. 800, Misc. LEYSITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 1184.

No. 801, Misc. STANCATO, DBA STANCATO SCHOOL OF ACCORDION, ET AL. *v.* SERVICE BUREAU CORP., SUBSIDIARY OF INTERNATIONAL BUSINESS MACHINES, INC. Sup. Ct. Cal. Certiorari denied. *Everett B. Clary* for respondent.

No. 806, Misc. RICHMOND *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 807, Misc. MINOR *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 812, Misc. STUART *v.* CORAL GABLES FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Fla. Certiorari denied.

No. 814, Misc. BROADNAX *v.* CALIFORNIA ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 837, Misc. LEWIS *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 411 F. 2d 414.

No. 893, Misc. POWERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Leonard H. Dickstein* for the United States. Reported below: 413 F. 2d 834.

No. 933, Misc. MASSENGALE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Ugast,* and *Gilbert E. Andrews* for respondent. Reported below: 408 F. 2d 1373.

No. 324, Misc. CRAWFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Solicitor General Griswold* for the United States.

No. 510, Misc. CACHOIAN *v.* MITCHELL, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for respondent.

No. 818, Misc. WOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 437.

No. 687, Misc. LONG *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States.

No. 731, Misc. O'CONNOR *v.* RODGERS, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Solicitor General Griswold* for respondent.

Rehearing Denied

No. 496, October Term, 1967. WIEN ALASKA AIRLINES, INC. *v.* UNITED STATES, 389 U. S. 940; and

No. 313, Misc., October Term, 1968. SMITH *v.* UNITED STATES, 393 U. S. 885. Motions for leave to file petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions.

No. ——. ANDERSON *v.* RAIMONDI, *ante,* p. 805. Petition for rehearing denied.

NOVEMBER 17, 1969

Miscellaneous Orders

No. 85. ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL. C. A. 8th Cir. [Certiorari granted, 395 U. S. 976.] Motion of petitioners for additional time for oral argument denied. *Bert M. Gross* on the motion.

No. —. STEWART *v.* UNITED STATES. C. A. 2d Cir. Application for stay of removal pending appeal presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Herbert Monte Levy* for applicant. *Solicitor General Griswold* in opposition.

No. 135. WALZ *v.* TAX COMMISSION OF THE CITY OF NEW YORK. Appeal from Ct. App. N. Y. [Probable jurisdiction noted, 395 U. S. 957.] Motion of National Jewish Commission on Law and Public Affairs for leave to file a brief as *amicus curiae* granted. Motion of Society of Separationists, Inc., et al., for leave to participate in oral arguments as *amici curiae* denied. *Nathan Lewin* and *Julius Berman* on the motion for National Jewish Commission on Law and Public Affairs.

No. 249. BARLOW ET AL. *v.* COLLINS, EXECUTIVE DIRECTOR, ALABAMA AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ET AL. C. A. 5th Cir. [Certiorari granted, 395 U. S. 958.] Motion of Harold Edgar for leave to argue *pro hac vice* granted. *Lee A. Albert* on the motion.

No. 520. CITY OF SHERIDAN ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. Wyo. Motion to advance denied. *C. C. Sheldon,* Assistant Attorney General of Nebraska, *Gordon P. MacDougall,* and *William G. Mahoney* for appellants on the motion. Reported below: 303 F. Supp. 990.

No. 713, Misc. GROSS *v.* JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* in opposition.

No. 533, Misc. KLINES *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT, ET AL.;

No. 758, Misc. WOLENSKI *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT;

No. 841, Misc. HAYES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 889, Misc. PARK *v.* CALIFORNIA ADULT AUTHORITY ET AL.; and

No. 906, Misc. GARNER *v.* YEAGER, PRINCIPAL KEEPER, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 877, Misc. WION *v.* WILLINGHAM, WARDEN. Motion for leave to file petition for writ of habeas corpus and other relief denied.

*Certiorari Granted**

No. 476. SEARS, ROEBUCK & CO. *v.* CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL–CIO, ET AL. C. A. 10th Cir. Motion of American Retail Federation for leave to file a brief as *amicus curiae* granted. Motion of Terminal Freight Handling Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. *Gerard C. Smetana* and *Alan Raywid* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent Waers, NLRB Regional Director. *Brice I. Bishop* and *Phil B. Hammond* for American Retail Federation as *amicus curiae* in support of the petition. *Charles C. Kieffer* for Terminal Freight Handling Co. et al. as *amici curiae* in support of the petition. Reported below: 410 F. 2d 1148.

*[REPORTER'S NOTE: An order granting certiorari in No. 524, *Carlos* v. *New York,* issued on November 17, 1969, was revoked the same day.]

Certiorari Denied. (See also No. 509, *ante,* p. 39; and No. 526, *ante,* p. 40.)

No. 239. COLLETTI ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *Julius Lucius Echeles* for petitioner Colletti. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 101 Ill. App. 2d 51, 242 N. E. 2d 63.

No. 340. LUDWIG *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Gerald Kogan* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Melvin B. Grossman,* Assistant Attorney General, for respondent. Reported below: 215 So. 2d 898.

No. 486. BRAWNER *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. *Jack Greenberg, Norman C. Amaker,* and *Howard Moore, Jr.,* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Marion O. Gordon* and *Courtney Wilder Stanton,* Assistant Attorneys General, for respondent. Reported below: 225 Ga. 296, 167 S. E. 2d 753.

No. 505. JERNIGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *E. Coleman Madsen* and *John L. Briggs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 411 F. 2d 471.

No. 506. BAKER OIL TOOLS, INC. *v.* KIVA CORP. C. A. 5th Cir. Certiorari denied. *Oscar A. Mellin* and *Carlisle M. Moore* for petitioner. *Allan D. Montgomery* and *Jerry J. Dunlap* for respondent. Reported below: 412 F. 2d 546.

No. 503. SAWYER ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Robert S. Bailey* for petitioners. Reported below: 42 Ill. 2d 294, 251 N. E. 2d 230.

No. 507. BAY SOUND TRANSPORTATION CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John A. Bailey* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Elmer J. Kelsey* for the United States. Reported below: 410 F. 2d 505.

No. 510. FLORIDA CITRUS EXPOSITION, INC., AKA FLORIDA CITRUS SHOWCASE, INC. *v.* HUNGERFORD CONSTRUCTION CO. ET AL.; and

No. 588. HUNGERFORD CONSTRUCTION CO. ET AL. *v.* FLORIDA CITRUS EXPOSITION, INC., AKA FLORIDA CITRUS SHOWCASE, INC. C. A. 5th Cir. Certiorari denied. *J. A. McClain, Jr.,* for petitioner in No. 510 and for respondent in No. 588. *Anthony S. Battaglia* and *Raymond J. Malloy* for respondents in No. 510 and for petitioners in No. 588. Reported below: 410 F. 2d 1229.

No. 511. PRUDENTIAL INSURANCE CO. OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Jerome Ackerman* and *William H. Allen* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 412 F. 2d 77.

No. 512. BOWIE ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF HOWARD COUNTY ET AL. Ct. App. Md. Certiorari denied. *Earl L. Carey, Jr.,* and *Harry Goldman, Jr.,* for petitioners. *John Martin Jones, Jr., Francis M. Shea,* and *William H. Dempsey, Jr.,* for respondents Howard Research & Development Corp. et al. Reported below: 253 Md. 602, 253 A. 2d 727.

No. 514. RAMIREZ *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied. *David Carliner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for respondent. Reported below: 134 U. S. App. D. C. 131, 413 F. 2d 405.

No. 517. LUMAN *v.* TANZLER ET AL. C. A. 5th Cir. Certiorari denied. *Robert P. Smith, Jr.,* for petitioner. *William Lee Allen* and *Claude L. Mullis, Sr.,* for respondents. Reported below: 411 F. 2d 164.

No. 518. HENDLER ET AL. *v.* WOLOZIN ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Leo S. Karlin* for petitioners. *Alvin G. Hubbard* for Wolozin et al., and *Jerome F. Dixon* and *George J. Schaller* for Chicago Transit Authority et al., respondents. Reported below: 105 Ill. App. 2d 132, 245 N. E. 2d 74.

No. 521. FIDANZI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 411 F. 2d 1361.

No. 523. TRI-VALLEY GROWERS, FORMERLY TRI-VALLEY PACKING ASSN. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *Ricardo J. Hecht* for petitioner. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Henry Osterman,* and *Harold D. Rhynedance, Jr.,* for respondent. Reported below: 411 F. 2d 985.

No. 525. WELLING *v.* WELLING. App. Ct. Ind. Certiorari denied. *John H. Baldwin* for petitioner. Reported below: —— Ind. App. ——, 245 N. E. 2d 173.

No. 519. In re Bricker. Ct. App. N. Y. Certiorari denied. *Melvin L. Wulf* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Daniel M. Cohen,* Assistant Attorney General, for the Committee on Character and Fitness in opposition.

No. 196. Eckerstrom *v.* Field, Men's Colony Superintendent, et al. Sup. Ct. Cal. Motion to dispense with printing the petition granted. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondents.

No. 292. Fuller *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Robert G. Brockmann* and *Fletcher Jackson* for petitioner. *Joe Purcell,* Attorney General of Arkansas, and *Don Langston,* Deputy Attorney General, for respondent. Reported below: 246 Ark. 681, 439 S. W. 2d 801.

No. 522. Spillman *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Philip M. Haggerty* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 413 F. 2d 527.

No. 138, Misc. Mitchell *v.* United States. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 408 F. 2d 996.

No. 432. RAY *v.* CITY OF PRICHARD. Ct. App. Ala. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III,* and *Melvyn Zarr* for petitioner. *Mayer W. Perloff* for respondent. Reported below: —— Ala. App. ——, 222 So. 2d 345.

No. 122, Misc. MEAD *v.* GRUDE. C. A. 9th Cir. Certiorari denied.

No. 369, Misc. MONTS *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, for respondent. Reported below: 409 F. 2d 17.

No. 376, Misc. ALONZO *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 283 Ala. 607, 219 So. 2d 858.

No. 416, Misc. SOSTRE *v.* JENSEN. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 468, Misc. HALLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Bruce R. Jacob* for petitioner. *Solicitor General Griswold* for the United States.

No. 536, Misc. MATHEWSON *v.* MCGRATH, TRUSTEE. C. A. 3d Cir. Certiorari denied. Reported below: 406 F. 2d 406.

No. 558, Misc. WALDEN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 1109.

No. 520, Misc. ALMOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States.

No. 552, Misc. AMASS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Benjamin Vinar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 413 F. 2d 272.

No. 561, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William M. Kunstler, Arthur Kinoy, Murphy Bell, Howard Moore, Jr., Morton Stavis,* and *Dennis J. Roberts* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 410 F. 2d 212.

No. 565, Misc. WITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Perry Langford* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 413 F. 2d 303.

No. 574, Misc. ELKSNIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 634, Misc. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 975.

No. 638, Misc. FRYE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 433 Pa. 473, 252 A. 2d 580.

No. 572, Misc. RAYSOR *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 693, Misc. HELSEL *v.* HARRISON, CORRECTIONS DIRECTOR. C. A. 6th Cir. Certiorari denied.

No. 703, Misc. WINDES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 413 F. 2d 1407.

No. 714, Misc. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 1313.

No. 723, Misc. LICO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for respondent.

No. 740, Misc. MELFA ET AL. *v.* A. S. ABELL CO. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioners. *Francis D. Murnaghan, Jr., Joseph H. H. Kaplan,* and *Alan M. Wilner* for respondent.

No. 745, Misc. MOORE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *William C. Donnino* for respondent. Reported below: 32 App. Div. 2d 515, 299 N. Y. S. 2d 532.

No. 764, Misc. FREEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 410 F. 2d 1209.

No. 739, Misc. PEARCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 895.

No. 746, Misc. WRIGHT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Wade H. Penny, Jr.,* for petitioner. *Robert Morgan,* Attorney General of North Carolina, and *Bernard A. Harrell,* Assistant Attorney General, for respondent. Reported below: 275 N. C. 242, 166 S. E. 2d 681.

No. 767, Misc. HASTON *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 798, Misc. FERRELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Thurman L. Dodson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States.

No. 817, Misc. BURGE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Emmett Colvin, Jr.,* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, and *Sam L. Jones, Jr.,* and *Robert C. Flowers,* Assistant Attorneys General, for respondent. Reported below: 443 S. W. 2d 720.

No. 821, Misc. BANDY *v.* UNITED STATES PAROLE BOARD. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 823, Misc. YOUNG *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 796, Misc. TUDOR *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 822, Misc. RODRIGUEZ *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 826, Misc. ROLAND *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 270 Cal. App. 2d 639, 76 Cal. Rptr. 72.

No. 829, Misc. FEAR *v.* JOHNSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 413 F. 2d 88.

No. 832, Misc. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 271 Cal. App. 2d 754, 77 Cal. Rptr. 59.

No. 833, Misc. BARRETT *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 834, Misc. CARMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 835, Misc. ORTIZ *v.* BAKER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 411 F. 2d 263.

No. 836, Misc. ADAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 839, Misc. WARD *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 850, Misc. LUDLOW *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 844, Misc. SMITH ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Edwin Jason Dryer* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 135 U. S. App. D. C. 284, 418 F. 2d 1120.

No. 848, Misc. RUDERER *v.* MEYER ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 413 F. 2d 175.

No. 857, Misc. JEFFERSON *v.* PEERLESS PUMPS HYDRODYNAMIC, DIVISION OF FMC CORP. C. A. 9th Cir. Certiorari denied. *Earl Johnson, Jr.,* for petitioner. *Leonard S. Janofsky* for respondent.

No. 882, Misc. HENDERSON *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 433 Pa. 585, 253 A. 2d 109.

No. 409, Misc. SOLOMON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Herald Price Fahringer* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Hillel Hoffman,* Assistant Attorney General, for respondent. Reported below: 412 F. 2d 88.

No. 538, Misc. HILBRICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Albert Ritchie* and *David Boyd* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 406 F. 2d 850.

No. 913, Misc. SPAIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 24 N. Y. 2d 550, 249 N. E. 2d 383.

No. 917, Misc. DEWEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

Rehearing Denied

No. 847, Misc., October Term, 1967. BOGART *v.* CALIFORNIA, 390 U. S. 929. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 353, October Term, 1968. RATCLIFF *v.* BRUCE ET AL., 393 U. S. 848, 956. Petition for rehearing from denial of motion for reinstatement of the petition for writ of certiorari [*ante,* p. 872] denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 948, Misc., October Term, 1968. MURRAY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., 393 U. S. 1041. Motion for leave to file petition for rehearing and other relief denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 119. LARIS *v.* PENNSYLVANIA, *ante,* p. 849;

No. 229. DOBBINS ET AL. *v.* UNITED STATES, *ante,* p. 829;

No. 313. KALISH *v.* UNITED STATES, *ante,* p. 835;

No. 324. SHIKARA *v.* MARYLAND CASUALTY CO., *ante,* p. 8; and

No. 332. BERNE *v.* GOVERNMENT OF THE VIRGIN ISLANDS, *ante,* p. 837. Petitions for rehearing denied.

No. 93, Misc. HEIRENS *v.* PATE, WARDEN, *ante,* p. 853;

No. 106, Misc. MILLER *v.* UNITED STATES, *ante,* p. 854;

No. 166, Misc. ROWLES *v.* MYERS ET AL., *ante,* p. 856;

No. 176, Misc. PATTERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante,* p. 857; and

No. 250, Misc. BOOKER *v.* UNITED STATES, *ante,* p. 862. Petitions for rehearing denied.

NOVEMBER 18, 1969

Dismissal Under Rule 60

No. 258, Misc. MCBRIDE *v.* UNITED STATES. C. A. 10th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 409 F. 2d 1046.

NOVEMBER 19, 1969

Dismissal Under Rule 60

No. 484. GORDON *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Fred A. Semaan* and *James R. Gillespie* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 1121.

NOVEMBER 21, 1969

Dismissal Under Rule 60

No. 265. BODDIE ET AL. *v.* CONNECTICUT ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 395 U. S. 974.] Appeal as to appellant Perez dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 286 F. Supp. 968.

NOVEMBER 24, 1969

Miscellaneous Orders

No. 887, Misc. PARK *v.* NELSON, WARDEN, ET AL.; No. 989, Misc. STERNGASS *v.* FITZPATRICK, WARDEN; and

No. 1049, Misc. SANDERS *v.* DEEGAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 293, Misc. BOWMAN *v.* KROPP, WARDEN, ET AL. Motion for leave to file petition for writ of mandamus denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, in opposition.

Certiorari Denied

No. 117. WALLACE *v.* WALLACE. Sup. Ct. Ga. Certiorari denied. *Wesley R. Asinof* for petitioner. Reported below: 225 Ga. 102, 166 S. E. 2d 718.

No. 530. SARELLI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 105 Ill. App. 2d 167, 245 N. E. 2d 49.

No. 531. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA *v.* BOB LEROY'S, INC. C. A. 5th Cir. Certiorari denied. *James F. Hulse* for petitioner. *William Duncan* and *James F. Garner* for respondent. Reported below: 413 F. 2d 819.

No. 537. TRANSAMERICAN FREIGHT LINES, INC., ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Abraham Breitbart* for petitioners. *Sidney Goldstein* and *Lewis Rosenberg* for respondent. Reported below: 24 N. Y. 2d 727, 249 N. E. 2d 880.

No. 534. CARVEL CORP. *v.* GRISWOLD, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 1st Cir. Certiorari denied. *Leonard Toboroff* for petitioner. *George D. Reycraft* for respondents. Reported below: 408 F. 2d 1338.

No. 538. MILLER *v.* MILLER. Sup. Ct. Conn. Certiorari denied. *P. Lawrence Epifanio* and *James F. Bingham* for petitioner. Reported below: 158 Conn. 217, 258 A. 2d 89.

No. 541. MISSISSIPPI-ALABAMA STATE FAIR *v.* MISSISSIPPI STATE TAX COMMISSION. Sup. Ct. Miss. Certiorari denied. *Thomas Y. Minniece* for petitioner. *John E. Stone, Robert Taylor Carlisle,* and *James E. Williams* for respondent. Reported below: 222 So. 2d 664.

No. 543. POSEY *v.* CLARK EQUIPMENT CO. C. A. 7th Cir. Certiorari denied. *Dean A. Robb* for petitioner. *Martin J. Flynn* for respondent. Reported below: 409 F. 2d 560.

No. 545. CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* HENRY ET AL. C. A. 5th Cir. Certiorari denied. *Hardy Lott* for petitioners. Reported below: 409 F. 2d 682.

No. 547. CARNATION CO. *v.* GENERAL FOODS CORP., INC. C. A. 7th Cir. Certiorari denied. *Richard R. Trexler* for petitioner. *Arthur G. Connolly* for respondent. Reported below: 411 F. 2d 528.

No. 548. NASH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome J. Londin* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 234.

No. 549. BUSCAGLIA, DIRECTOR, DIVISION OF SALES TAX, ERIE COUNTY, ET AL. *v.* LIBERTY NATIONAL BANK & TRUST CO. Ct. App. N. Y. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Robert W. Bush,* Assistant Attorney General, for petitioners. *Manly Fleischmann* for respondent. Brief of *amici curiae* in support of the petition was filed by: *Robert K. Killian,* Attorney General, and *F. Michael Ahern,* Assistant Attorney General, for the State of Connecticut; *Earl Faircloth,* Attorney General, and *Winifred Wentworth,* Assistant Attorney General, for the State of Florida; *Arthur J. Sills,* Attorney General, and *Charles Landesman,* Assistant Attorney General, for the State of New Jersey; and *William C. Sennett,* Attorney General, and *John Gaines,* Assistant Attorney General, for the State of Pennsylvania. Reported below: 25 N. Y. 2d 776, 250 N. E. 2d 582.

No. 121. PRESSMAN *v.* CITY OF PLAINFIELD ET AL. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanley J. Reiben* for petitioner. *William A. Dreier* and *Edward W. Beglin, Jr.,* for respondents.

No. 158. SULTON ET UX. *v.* SCHOEN ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, Norman C. Amaker, Melvyn Zarr,* and *Anthony G. Amsterdam* for petitioners. *Elsbeth Levy Bothe* and *Ronald A. Willoner* for respondents. Reported below: 411 F. 2d 793.

No. 495, Misc. LOCKHART *v.* HOENSTINE, PROTHONOTARY, SUPERIOR COURT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 411 F. 2d 455.

No. 554. CHAMBERS *v.* BEAUCHAMP, ADMINISTRATOR, ET AL. Sup. Ct. N. M. Certiorari denied. *J. Redwine Patterson* for petitioner. *Merrill L. Norton* for respondents. Reported below: 80 N. M. 290, 454 P. 2d 772.

No. 318. HAMER ET AL. *v.* ELY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Morton Stavis, William M. Kunstler, Arthur Kinoy, Benjamin E. Smith,* and *Alvin J. Bronstein* for petitioners. *A. F. Summer,* Attorney General of Mississippi, and *Will S. Wells,* Assistant Attorney General, for respondents. Reported below: 410 F. 2d 152.

No. 533. COX, PENITENTIARY SUPERINTENDENT *v.* JONES ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III* and *W. Luke Witt,* Assistant Attorneys General, for petitioner. Reported below: 411 F. 2d 857.

No. 550. JACKSON ET VIR *v.* GENERAL MOTORS CORP., OLDSMOBILE DIVISION. Sup. Ct. Tenn. Motion to dispense with printing petition granted. Certiorari denied. *Leo J. Buchignani* for respondent. Reported below: —— Tenn. ——, 441 S .W. 2d 482.

No. 160, Misc. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg,* Deputy Attorney General, for respondent.

No. 534, Misc. BORREGE *v.* GABBA, GUARDIAN. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 179, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *J. Christian Meffert,* Assistant Attorney General, for respondent.

No. 467, Misc. SIMS *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. *Theodore L. Sendak,* Attorney General of Indiana, and *William F. Thompson,* Deputy Attorney General, for respondent. Reported below: 411 F. 2d 661.

No. 526, Misc. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Paul Lowery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 412 F. 2d 818.

No. 586, Misc. ROME *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 409 F. 2d 1329.

No. 597, Misc. JELINSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Floyd McGown, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 476.

No. 618, Misc. AYERS *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 413 F. 2d 1049.

No. 658, Misc. LANE *v.* PUCCI ET AL. C. A. 7th Cir. Certiorari denied.

No. 631, Misc. LIZARRAGA *v.* UNDERWOOD ET AL. C. A. 5th Cir. Certiorari denied. *W. Edward Morgan* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 406 F. 2d 1253.

No. 633, Misc. CAMACHO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John P. Frank* and *John J. Flynn* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 407 F. 2d 39.

No. 639, Misc. MCEVERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 76 Wash. 2d 34, 454 P. 2d 832.

No. 653, Misc. ARRINGTON *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. *Paul W. Brown,* Attorney General of Ohio, and *Leo J. Conway* and *Stephen M. Miller,* Assistant Attorneys General, for respondent. Reported below: 409 F. 2d 849.

No. 659, Misc. MCFADDEN *v.* DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, SPRINGFIELD, ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 681, Misc. NUS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, and *Lonny F. Zwiener* and *Hawthorne Phillips,* Assistant Attorneys General, for respondent. Reported below: 440 S. W. 2d 310.

No. 733, Misc. SIMONS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 743, Misc. DICKERSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 684, Misc. JONES, AKA ALEXANDER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. *Melvin G. Rueger* and *Leonard Kirschner* for respondent.

No. 688, Misc. SLAUGHTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 439 S. W. 2d 836.

No. 732, Misc. RHODES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 104 Ariz. 451, 454 P. 2d 993.

No. 757, Misc. SHUFORD *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 762, Misc. FOREMAN *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 773, Misc. BENTHIEM *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* in opposition.

No. 782, Misc. WOLFF *v.* FOLEY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 785, Misc. WESSLING *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 410 F. 2d 205.

No. 819, Misc. KOVACH, EXECUTRIX *v.* NOYES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *James C. Bigler* for respondent Goodman.

No. 853, Misc. BARBER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 852, Misc. ROBINSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 42 Ill. 2d 371, 247 N. E. 2d 898.

No. 856, Misc. BAHR *v.* BREWER, WARDEN. Sup. Ct. Iowa. Certiorari denied.

No. 858, Misc. WINEGAR *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 861, Misc. WATKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 863, Misc. PARTON *v.* NEWELL, SHERIFF. C. A. 6th Cir. Certiorari denied. *David M. Pack,* Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

No. 871, Misc. BALLARD ET AL. *v.* HUGHES, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 879, Misc. NEAL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 880, Misc. MINTZER *v.* SHIVITZ, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied.

No. 883, Misc. SHEER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Nicholas J. Capuano* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 414 F. 2d 122.

No. 886, Misc. VASQUEZ *v.* JONES. Sup. Ct. Cal. Certiorari denied.

No. 914, Misc. HOAG *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 920, Misc. ROBINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 413 F. 2d 1290.

No. 922, Misc. MANOLOTO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for respondent.

No. 952, Misc. SPELLER *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 956, Misc. HILBERT *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 957, Misc. TUCKER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 959, Misc. DAUGHERTY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 961, Misc. KENDRICK *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 962, Misc. BURKS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 978, Misc. CANTRELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 413 F. 2d 629.

No. 971, Misc. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 415 F. 2d 753.

No. 979, Misc. MANUEL *v.* MANUEL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 984, Misc. BATES *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 993, Misc. LEWIS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 997, Misc. BENNETT *v.* CALIFORNIA. Super. Ct. Cal., County of Sacramento. Certiorari denied.

No. 1002, Misc. HECTOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1005, Misc. DOMER *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 412 F. 2d 199.

No. 651, Misc. WANAMAKER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John W. Packel* for petitioner.

No. 859, Misc. ANDERSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 252 S. C. 650, 168 S. E. 2d 305.

No. 1016, Misc. FLETCHER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 413 F. 2d 15.

No. 1014, Misc. HUNT *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 514, Misc. RICHARDSON *v.* SOKOL, COMMISSIONER, BUREAU OF ACCOUNTS, FISCAL SERVICE, U. S. TREASURY DEPARTMENT. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold* for respondent. Reported below: 409 F. 2d 3.

Rehearing Denied

No. 1042, October Term, 1968. GOULD ET UX. *v.* AMERICAN WATER WORKS SERVICE CO., INC., ET AL., 394 U. S. 943, 1025; and

No. 1355, October Term, 1968. BLUMCRAFT OF PITTSBURGH *v.* CITIZENS & SOUTHERN NATIONAL BANK OF SOUTH CAROLINA ET AL., 395 U. S. 961, and *ante*, p. 870. Motions for leave to file second petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions.

No. 177. ROSENBERG ET AL. *v.* MINICHIELLO, EXECUTRIX, ET AL., *ante*, p. 844;

No. 191. RISTUCCIA ET UX. *v.* ADAMS ET AL., *ante*, p. 1;

No. 199. WHEELER *v.* VERMONT, *ante*, p. 4;

No. 263. CRUMLEY *v.* ALABAMA, *ante*, p. 831;

No. 264. MILLER ET UX. *v.* CAMP, COMPTROLLER OF THE CURRENCY, *ante*, p. 832;

No. 312. MEYERS *v.* UNITED STATES, *ante*, p. 835;

No. 348. WASHINGTON *v.* GOLDEN STATE MUTUAL LIFE INSURANCE CO., *ante*, p. 839;

No. 364. CAMPBELL *v.* GOOCH ET AL., *ante*, p. 840; and

No. 83, Misc. HAYWOOD *v.* UNITED STATES, *ante*, p. 852. Petitions for rehearing denied.

No. 98, Misc. CARROLL *v.* BETO, CORRECTIONS DIRECTOR, *ante,* p. 854;

No. 243, Misc. RODES *v.* MUNICIPAL AUTHORITY OF THE BOROUGH OF MILFORD, *ante,* p. 861;

No. 295, Misc. BASS *v.* UNITED STATES, *ante,* p. 863; and

No. 483, Misc. LEWIS *v.* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO, *ante,* p. 866. Petitions for rehearing denied.

No. 171. IMPERIAL REFINERIES OF MINNESOTA, INC. *v.* CITY OF ROCHESTER, *ante,* p. 4. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 316. POWELL *v.* NATIONAL SAVINGS & TRUST CO., *ante,* p. 849. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

NOVEMBER 25, 1969

Miscellaneous Orders

No. ——. ADAMS ET AL. *v.* BOARD OF REGENTS OF FLORIDA ET AL. D. C. M. D. Fla. Application for writ of injunction presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Melvin L. Wulf* for applicants.

No. 879. COUNTY OF SANTA BARBARA ET AL. *v.* MALLEY ET AL. C. A. 9th Cir. Application for injunction pending appeal, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN took no part in the consideration or decision of this application and petition. *John J. Mitchell, Jr.,* and *Marvin Levine*

for applicant County of Santa Barbara, and *A. L. Wirin, Fred Okrand,* and *Lawrence R. Sperber* for applicants Weingand et al. Briefs in opposition were filed by: *Solicitor General Griswold* for Malley; *Charles A. Horsky* and *Philip K. Verleger* for Humble Oil & Refining Co. et al.; *Bruce A. Bevan, Jr., J. Patrick Whaley, Abe Krash, Daniel A. Rezneck,* and *Richard J. Wertheimer* for Sun Oil Co.; and *Warren Christopher, Allyn O. Kreps,* and *Richard H. Zahm* for Union Oil Co. of California et al. *Messrs. Mitchell* and *Levine* for petitioner County of Santa Barbara; and *Messrs. Wirin, Okrand, Sperber,* and *Lawrence Speiser* for petitioners Weingand et al.

Certiorari Denied. (See No. 879, *supra.*)

DECEMBER 1, 1969

Dismissals Under Rule 60

No. 1172, Misc. FITZGERALD *v.* STATE'S ATTORNEY FOR THE SECOND JUDICIAL CIRCUIT OF FLORIDA. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

No. 756. CUTLER-HAMMER, INC. *v.* SKIL CORP. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Albert H. Pendleton, Gregory B. Beggs,* and *Richard J. Flynn* for petitioner. Reported below: 412 F. 2d 821.

DECEMBER 4, 1969

Dismissal Under Rule 60

No. 760. TECHNOGRAPH, INC., ET AL. *v.* BECKER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Aaron Lewittes* and *Walter J. Blenko, Jr.,* for petitioners.

DECEMBER 8, 1969

Miscellaneous Orders

No. ——. O'NEIL *v.* NELSON, WARDEN. C. A. 9th Cir. Application for release on personal recognizance denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg,* Deputy Attorney General, in opposition.

No. ——. DURHAM ET UX. *v.* INDEPENDENCE HOMES, INC. Sup. Ct. Ill. Application for stay and approval of supersedeas appeal bond presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Thomas B. McNeill* for applicants. *Burton Y. Weitzenfeld* and *John F. McClure* in opposition.

No. 175. MORAGNE *v.* STATES MARINE LINES, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante,* p. 900.] The Solicitor General is invited to submit a brief as *amicus curiae* and to participate in oral argument. The parties and the Solicitor General requested to brief, in addition to other issues presented, question whether *The Harrisburg,* 119 U. S. 199, should be overruled.

No. 403. UNITED STATES *v.* VAN LEEUWEN. C. A. 9th Cir. [Certiorari granted, *ante,* p. 885.] Motion of respondent for the appointment of counsel granted. It is ordered that *Craig G. Davis, Esquire,* of Bellingham, Washington, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 817. MASTRIPPOLITO *v.* UNITED STATES. C. A. 9th Cir. Application for bail presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. *Burton Marks* for applicant. *Solicitor General Griswold* in opposition.

No. —. SNYDER *v.* WISDOM, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file application for mandamus remedy denied. *J. Minos Simon* for applicant.

No. 1382, Misc. IN RE DISBARMENT OF EDWARDS. It is ordered that William D. Edwards of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule to show cause issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 440, Misc. DARNELL *v.* MOSELEY, WARDEN;

No. 932, Misc. EISENHARDT *v.* UNITED STATES;

No. 936, Misc. HITCHCOCK *v.* EYMAN, WARDEN, ET AL.;

No. 1105, Misc. NORTH *v.* BETO, CORRECTIONS DIRECTOR;

No. 1110, Misc. MULLIS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 1116, Misc. JENKINS *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 600, Misc. HALL ET AL. *v.* CARTER, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 919, Misc. NEW MEXICO STATE GAME COMMISSION *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted. *James A. Maloney,* Attorney General of New Mexico, and *James E. Sperling, George T. Harris, Jr.,* and *Peter J. Broullire III,* Special Assistant Attorneys General, on the motion.

Probable Jurisdiction Noted

No. 565. BATCHELOR ET AL. *v.* STEIN. Appeal from D. C. N. D. Tex. Probable jurisdiction noted and case set for oral argument immediately following Nos. 11, 20, and 4 [No. 11, *Samuels et al.* v. *Mackell, District Attorney of Queens County, et al.*, and No. 20, *Fernandez* v. *Mackell, District Attorney of Queens County, et al.*, restored to calendar, 395 U. S. 957; and No. 4, *Younger, District Attorney of Los Angeles County* v. *Harris et al.*, restored to calendar, 395 U. S. 955]. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Lonny F. Zwiener,* Assistant Attorney General, *W. V. Geppert, Henry Wade, Wilson Johnston, N. Alex Bickley, James E. Barlow,* and *Preston Dial* for appellants. Reported below: 300 F. Supp. 602.

Certiorari Granted. (See also No. 524, *ante,* p. 119.)

No. 528. UNITED STATES *v.* HILTON HOTELS CORP. C. A. 7th Cir. Certiorari granted and case set for oral argument immediately following No. 412 [certiorari granted, *ante,* p. 875]. *Solicitor General Griswold, Assistant Attorney General Walters, Matthew J. Zinn, Gilbert E. Andrews,* and *Stuart A. Smith* for the United States. *Burton W. Kanter* for respondent. Reported below: 410 F. 2d 194.

No. 529. MACKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted and case set for oral argument immediately following No. 8 [*United States* v. *United States Coin and Currency in the Amount of $8,674 (Angelini, Claimant)*, restored to calendar, 395 U. S. 918]. *William M. Ward* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 411 F. 2d 504.

No. 595. NELSON, WARDEN *v.* GEORGE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien* and *Louise H. Renne,* Deputy Attorneys General, for petitioner. Reported below: 410 F. 2d 1179.

No. 606. ILLINOIS *v.* ALLEN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum,* Assistant Attorney General, for petitioner. *Paul Levenfeld* for respondent. Reported below: 413 F. 2d 232.

No. 323, Misc. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Richard Kanner* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Jesse J. McCrary, Jr.,* Assistant Attorney General, for respondent. Reported below: 224 So. 2d 406.

Certiorari Denied. (See also No. 563, *ante,* p. 121; No. 617, *ante,* p. 116; No. 72, Misc., *ante,* p. 117; No. 620, Misc., *ante,* p. 114; No. 816, Misc., *ante,* p. 115; and No. 1017, Misc., *ante,* p. 116.)

No. 337. GALTIERI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Milton E. Grusmark, Natalie Baskin,* and *Jerome Lewis* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Harold Mendelow,* Assistant Attorney General, for respondent. Reported below: 218 So. 2d 180.

No. 559. RICHARDSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. *Philip Wittenberg* for petitioner. Reported below: 253 S. C. 468, 171 S. E. 2d 717.

No. 390. COMMISSIONER OF INTERNAL REVENUE *v.* GUARDIAN AGENCY, INC., ET AL.; and

No. 561. LOCAL FINANCE CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for petitioner in No. 390, and *William A. Cromartie* and *Edward W. Rothe* for petitioners in No. 561. *Mr. Griswold, Assistant Attorney General Walters, Gilbert E. Andrews,* and *Stuart A. Smith* for respondent in No. 561. Reported below: 407 F. 2d 629.

No. 555. SCHINDELAR *v.* MICHAUD ET AL. C. A. 10th Cir. Certiorari denied. *Robert C. Hawley* for petitioner. *Lowell White* for respondents. Reported below: 411 F. 2d 80.

No. 560. LAW *v.* JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, ET AL. C. A. 9th Cir. Certiorari denied. *Howard B. Crittenden, Jr.,* for petitioner. Reported below: 412 F. 2d 795.

No. 562. DE LUE ET AL. *v.* PUBLIC UTILITIES COMMISSION OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. *Herbert M. Boyle* for De Lue et al., and *John J. Conway* for Contract Carriers Conference of Colorado Motor Carriers Assn., petitioners. *Duke W. Dunbar,* Attorney General of Colorado, and *Robert Lee Kessler* and *Warren D. Braucher,* Assistant Attorneys General, for respondent Public Utilities Commission of Colorado. Reported below: —— Colo. ——, 454 P. 2d 939.

No. 571. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Dominic H. Frinzi* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 927.

No. 556. SOUTHERN CALIFORNIA EDISON CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Rollin E. Woodbury* and *Ransom W. Chase* for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Raymond N. Zagone,* and *Jacques B. Gelin* for the United States. Reported below: 415 F. 2d 758.

No. 564. FOY, TUTRIX *v.* ED TAUSSIG, INC., ET AL. Sup. Ct. La. Certiorari denied. *Samuel C. Gainsburgh* for petitioner. *Edmund E. Woodley* for respondents. Reported below: 254 La. 135, 222 So. 2d 884.

No. 566. WHITE ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Alfred A. Affinito* and *Wallace L. Duncan* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *George R. Hyde* for the United States. Reported below: 187 Ct. Cl. 564, 410 F. 2d 773.

No. 568. WILSON *v.* STATE BAR OF GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. *Frank C. Jones* for respondents. Reported below: 225 Ga. 343, 168 S. E. 2d 584.

No. 574. UNITED BONDING INSURANCE CO. *v.* DEVELOPMENT CORPORATION OF AMERICA, INC. C. A. 5th Cir. Certiorari denied. *Erik J. Blomqvist, Jr.,* for petitioner. *Donald S. Rosenberg* for respondent. Reported below: 413 F. 2d 823.

No. 576. FAHEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Richard H. Foster* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 411 F. 2d 1213.

No. 572. CLANCY *v.* FIRST NATIONAL BANK OF COLORADO SPRINGS. C. A. 10th Cir. Certiorari denied. *Alan Woods* for petitioner. *Byron L. Akers, Jr.,* for respondent. Reported below: 408 F. 2d 899.

No. 575. SEWELL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Ralph Rudd* for petitioner. *John T. Corrigan* for respondent.

No. 578. CORALLO *v.* UNITED STATES; and
No. 620. FRIED ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Kossman* and *Barry I. Slotnick* for petitioner in No. 578, and *Arthur Karger* and *Alfred Donati, Jr.,* for petitioners in No. 620. *Solicitor General Griswold* for the United States in both cases. Reported below: 413 F. 2d 1306.

No. 581. HOFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 415 F. 2d 14.

No. 583. ANDERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *R. Eugene McGannon* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Meyer Rothwacks* for respondent. Reported below: 414 F. 2d 1283.

No. 587. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *George G. Gallantz* and *Marvin Dicker* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 413 F. 2d 947.

No. 584. SCHMITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Edward R. Kirkland* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Mervyn Hamburg* for the United States. Reported below: 413 F. 2d 219.

No. 579. CURTISS-WRIGHT CORP. *v.* BRANIFF AIRWAYS, INC. C. A. 2d Cir. Certiorari denied. *George Warner Clark* for petitioner. Reported below: 411 F. 2d 451.

No. 586. STANLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Robert W. Stanley,* petitioner, *pro se. Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Leonard H. Dickstein* for the United States. Reported below: 411 F. 2d 514.

No. 589. CURIALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Rosenberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 414 F. 2d 744.

No. 594. FERGUSON *v.* FOUNTAIN. Sup. Ct. Tex. Certiorari denied. *Charles L. Cobb* for petitioner. *Buck W. McNeil* for respondent. Reported below: 441 S. W. 2d 506.

No. 604. WEBER *v.* AOKI, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Robert G. Dodge* for petitioner. *James M. Morita* for respondent. Reported below: 409 F. 2d 844.

No. 605. BEACON JOURNAL PUBLISHING CO. *v.* AKRON TYPOGRAPHICAL UNION NO. 182 ET AL. C. A. 6th Cir. Certiorari denied. *Charles R. Iden* for petitioner. *R. C. Sheppard* for respondents.

No. 602. GOLLAHER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Gerald H. Gottlieb* and *Earl Klein* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 419 F. 2d 520.

No. 608. CORNMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for the United States. Reported below: 187 Ct. Cl. 486, 409 F. 2d 230.

No. 609. PIERCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William E. Ladin* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 163.

No. 610. MACKAY *v.* NESBETT, CHIEF JUSTICE, SUPREME COURT OF ALASKA, ET AL. C. A. 9th Cir. Certiorari denied. *Joseph A. Ball* for petitioner. *George Cochran Doub* for respondents. Reported below: 412 F. 2d 846.

No. 615. TEXTILE WORKERS UNION OF AMERICA, AFL–CIO *v.* SCHWARZENBACH-HUBER CO. ET AL. C. A. 2d Cir. Certiorari denied. *Patricia E. Eames* for petitioner. *Marshall C. Berger* and *Robert Abelow* for Schwarzenbach-Huber Co., and *Solicitor General Griswold* and *Arnold Ordman* for National Labor Relations Board, respondents. Reported below: 408 F. 2d 236.

No. 618. GOWDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Harry M. Philo* and *William G. Reamon* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 525.

No. 612. BROWN *v.* COMMERCIAL NATIONAL BANK OF PEORIA, TRUSTEE, ET AL. Sup. Ct. Ill. Certiorari denied. *Willard L. King* for petitioner. *Joseph Z. Sudow* for respondents. Reported below: 42 Ill. 2d 365, 247 N. E. 2d 894.

No. 614. WICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Jerome J. Duff* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 416 F. 2d 61.

No. 376. AMALGAMATED TRANSIT UNION, LOCAL DIVISION 1309, ET AL. *v.* SAN DIEGO TRANSIT CORP. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Jerry J. Williams* for petitioners.

No. 569. NEW MEXICO STATE GAME COMMISSION *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James A. Maloney,* Attorney General of New Mexico, and *James E. Sperling, George T. Harris, Jr.,* and *Peter J. Broullire III,* Special Assistant Attorneys General, for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Jacques B. Gelin* for respondents. Briefs of *amici curiae* in support of the petition were filed by: *Robert L. Woodahl,* Attorney General, for Fish and Game Commission of Montana; *Duke W. Dunbar,* Attorney General, *John P. Moore,* Deputy Attorney General, and *Gerald W. Wischmeyer,* Assistant Attorney General, for the State of Colorado; and *Martin L. Friedman* for International Association of Game, Fish and Conservation Commissioners. Reported below: 410 F. 2d 1197.

No. 613. VAN HOUTEN *v.* RALLS ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for respondents. Reported below: 411 F. 2d 940.

No. 544. SHOULTZ *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Marshall W. Krause* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Robert L. Keuch* for respondents. Reported below: 413 F. 2d 868.

No. 558. FEASTER, DIRECTOR, DEPARTMENT OF DOCKS OF ALABAMA, ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *MacDonald Gallion,* Attorney General of Alabama, and *Willis C. Darby, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States et al. *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Courtney Stanton,* Assistant Attorney General, for Georgia Ports Authority, and *Robert Morgan,* Attorney General of North Carolina, *Ralph Moody,* Deputy Attorney General, and *Bernard A. Harrell,* Assistant Attorney General, for North Carolina Ports Authority, as *amici curiae* in support of the petition. Reported below: 410 F. 2d 1354.

No. 597. CONROY *v.* CITY OF MIAMI BEACH. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Theodore M. Trushin* for petitioner. *Harris J. Buchbinder* for respondent.

No. 585. Brotherhood of Locomotive Firemen & Enginemen et al. *v.* Seaboard Coast Line Railroad Co. et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Neal P. Rutledge* for petitioners. *Prime F. Osborn, John W. Weldon,* and *Edward A. Charron* for Seaboard Coast Line Railroad Co., and *Allan Milledge* and *Richard L. Horn* for Brotherhood of Locomotive Engineers, respondents. Reported below: 413 F. 2d 19.

No. 598. Founding Church of Scientology of Washington, D. C., et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Morris J. Levin* and *Robert F. Sagle* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 133 U. S. App. D. C. 229, 409 F. 2d 1146.

No. 616. Hatchett *v.* Williams. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *William Key Wilde* for respondent. Reported below: 437 S. W. 2d 334.

No. 749. Motto *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Herald Price Fahringer* and *Eugene Gressman* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 1306.

No. 232, Misc. Pipinos, aka Piche *v.* Peek et al. Sup. Ct. Wash. Certiorari denied. *Slade Gorton,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondents.

No. 99, Misc. FLOWERS *v.* NEBRASKA. Sep. Juvenile Ct., Douglas County. Certiorari denied.

No. 210, Misc. MCCLINDON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William V. Ballough,* Deputy Attorney General, for respondent.

No. 337, Misc. CONTE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *David B. Salzman* for respondent. Reported below: 157 Conn. 209, 251 A. 2d 81.

No. 343, Misc. LOVELL *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. *Russell B. Johnson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for respondent. Reported below: 410 F. 2d 307.

No. 408, Misc. MCDANIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 432, Misc. SURITA *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 454, Misc. RAY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 456, Misc. ENDICOTT *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 458, Misc. DI SILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 466, Misc. DUCKETT *v.* MARSHALL ET AL. C. A. 4th Cir. Certiorari denied.

No. 469, Misc. ANDERSON *v.* CLAY CIRCUIT COURT ET AL. Sup. Ct. Ind. Certiorari denied. *Theodore L. Sendak,* Attorney General of Indiana, and *Mark Peden,* Deputy Attorney General, for respondents.

No. 494, Misc. BANDY *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 408 F. 2d 523.

No. 506, Misc. KEYS *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 516, Misc. BROWN *v.* UNITED STATES; and
No. 593, Misc. VENNING ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States in both cases. Reported below: 409 F. 2d 77.

No. 519, Misc. FIELDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 410 F. 2d 373.

No. 524, Misc. BROWN *v.* PINTO, PRISON FARM SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 546, Misc. RAMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 411 F. 2d 30.

No. 525, Misc. EDMONDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Fred Blanton, Jr.*, and *R. Morel Montgomery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 670.

No. 532, Misc. MOORE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 537, Misc. DAYE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 542, Misc. ELKINS *v.* KELLEY, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. *Richard W. Watkins, Jr.*, for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *Marion O. Gordon* and *Courtney Wilder Stanton,* Assistant Attorneys General, for respondents. Reported below: 410 F. 2d 734.

No. 545, Misc. WING *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 548, Misc. RODRIQUEZ *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 549, Misc. DIMSDLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 456 P. 2d 621.

No. 594, Misc. WILLIAMS *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 186 Ct. Cl. 611, 405 F. 2d 890.

No. 550, Misc. CIPOLLA *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 202 Kan. 624, 451 P. 2d 199.

No. 559, Misc. PRUESS, EXECUTOR, ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *George R. Hyde* for respondent. Reported below: 410 F. 2d 750.

No. 564, Misc. CHASE *v.* ROBBINS, WARDEN. C. A. 1st Cir. Certiorari denied. *Pierce B. Hasler* for petitioner. *James S. Erwin,* Attorney General of Maine, and *John W. Benoit, Jr.,* Assistant Attorney General, for respondent. Reported below: 408 F. 2d 1350.

No. 566, Misc. MCDONALD *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 571, Misc. ALVAREZ *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 606, Misc. RATHBURN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *John J. Callahan* for petitioner. *Harry Friberg* for respondent.

No. 614, Misc. SKINNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 412 F. 2d 98.

No. 619, Misc. HUFF *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 611, Misc. PEPITONE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 617, Misc. ALLISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James F. Hewitt* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 407.

No. 635, Misc. SWANN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 413 F. 2d 271.

No. 637, Misc. FONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 1181.

No. 661, Misc. WEBB *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Robert C. Flowers* and *Dunklin Sullivan,* Assistant Attorneys General, for respondent. Reported below: 439 S. W. 2d 342.

No. 670, Misc. CAMP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Morris Brown* and *Reber F. Boult, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 413 F. 2d 419.

No. 676, Misc. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 272 Cal. App. 2d 833, 77 Cal. Rptr. 745.

No. 675, Misc. KIRK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Kyle R. Weems* for petitioner. *Solicitor General Griswold* for the United States.

No. 677, Misc. COOK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *James Hunter III* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 412 F. 2d 293.

No. 682, Misc. GASTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Charles R. Burton* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips, Robert C. Flowers,* and *Lonny F. Zwiener,* Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 440 S. W. 2d 297.

No. 683, Misc. JOHNSON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 710, Misc. DECKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 306.

No. 715, Misc. ROBINSON *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 720, Misc. TUDELA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Phillip A. Hubbart* for petitioner. Reported below: 212 So. 2d 387.

No. 734, Misc. BARNES *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 742, Misc. MENDOZA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 744, Misc. BIRBECK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 750, Misc. SHORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James F. Hewitt* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 412 F. 2d 428.

No. 759, Misc. TIMMONS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 214 So. 2d 11.

No. 760, Misc. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *W. W. Koontz* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 410 F. 2d 653.

No. 765, Misc. RABON *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 772, Misc. CROSS *v.* BRUNING, COUNTY CLERK, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 413 F. 2d 678.

No. 776, Misc. DUARTE *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 781, Misc. DVORSKY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 805, Misc. RECH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Fred W. Vondy* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 410 F. 2d 1131.

No. 791, Misc. MURRAY *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 408 F. 2d 498.

No. 793, Misc. MINK *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 803, Misc. SWAN *v.* YOUNG, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 413 F. 2d 991.

No. 815, Misc. WALKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 820, Misc. LANG *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 842, Misc. STEVENSON *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 845, Misc. ALLEN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *Nathan Silverberg* for petitioner. Reported below: 411 F. 2d 241.

No. 846, Misc. ROSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 415 F. 2d 742.

No. 864, Misc. HARLIN *v.* BREWER, WARDEN. Sup. Ct. Iowa. Certiorari denied.

No. 866, Misc. RESSEGUIE *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 849, Misc. BEDFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 855, Misc. MCGUIRK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty* and *Marshall J. Hartman* for petitioner. Reported below: 106 Ill. App. 2d 266, 245 N. E. 2d 917.

No. 867, Misc. CLARKE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 873, Misc. TURPYN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Eugene Van Voorhis* for petitioner.

No. 875, Misc. SMOGOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Nathan Levy* and *George N. Beamer, Jr.*, for petitioner. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 501 and 415 F. 2d 296.

No. 884, Misc. STALLINGS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Palmer K. Ward* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Robert G. Maysack,* and *Jerome M. Feit* for the United States. Reported below: 413 F. 2d 200.

No. 892, Misc. POLLARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 899, Misc. RILEY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Reported below: 76 Wash. 2d 32, 454 P. 2d 820.

No. 891, Misc. WRIGHT *v.* BREWER, WARDEN. Sup. Ct. Iowa. Certiorari denied.

No. 894, Misc. WALKER *v.* WILLIE ET AL. C. A. 2d Cir. Certiorari denied.

No. 900, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 1183.

No. 901, Misc. HUERTO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 902, Misc. WEINSHENKER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Tobias Simon* for petitioner. Reported below: 223 So. 2d 561.

No. 903, Misc. BECK *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 905, Misc. SCOTT *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 911, Misc. SULLIVAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 271 Cal. App. 2d 531, 77 Cal. Rptr. 25.

No. 977, Misc. WATKINS *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 981, Misc. COX *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1024, Misc. AUSTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Perry Langford* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 1187.

No. 987, Misc. HODGE *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. *David M. Pack,* Attorney General of Tennessee, for respondent.

No. 991, Misc. LEIKETT *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1009, Misc. DAY *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 411 F. 2d 810.

No. 1032, Misc. KING ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 737.

No. 1060, Misc. WADE *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. *John G. Thevos* for respondent. Reported below: 415 F. 2d 570.

No. 999, Misc. HARRISON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Alfred V. J. Prather* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 136 U. S. App. D. C. 109, 419 F. 2d 691.

No. 335, Misc. GEORGE ET UX. *v.* BERTRAND ET AL. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Camille F. Gravel, Jr.,* for petitioners. *Hopkins P. Breazeale, Jr.,* for respondents Bulk Transport, Inc., et al. Reported below: 253 La. 647, 219 So. 2d 177.

No. 797, Misc. CROSS *v.* MUNICIPAL COURT OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari and other relief denied.

No. 513, Misc. STASILOWICZ *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Eugene P. Kenny* for petitioner. Reported below: 53 N. J. 497, 251 A. 2d 441.

No. 517, Misc. CASTLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *W. Edward Morgan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 1347.

No. 616, Misc. MIGLIORE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Phillip A. Hubbart* for petitioner Migliore. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 786.

No. 656, Misc. ARELLANES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *F. Conger Fawcett* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 1392.

No. 716, Misc. MILLER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari and other relief denied.

Rehearing Denied

No. 1279, October Term, 1968. UNITED STATES *v.* IDEAL BASIC INDUSTRIES, INC., 395 U. S. 936. Petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 415. PARKER *v.* VIRGINIA, *ante,* p. 887;

No. 428. BROWN *v.* HARDIN ET AL., *ante,* p. 909;

No. 344, Misc. SCOTT *v.* HUNT OIL CO., *ante,* p. 891;

No. 623, Misc. RESTREPO *v.* FLORIDA SUPREME COURT, *ante,* p. 918; and

No. 752, Misc. JAKALSKI *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL., *ante,* p. 922. Petitions for rehearing denied.

No. 391. FITZGERALD ET AL. *v.* FREEMAN ET AL., *ante,* p. 875. Motion to stay effectiveness of order denying certiorari denied. Petition for rehearing denied.

No. 632. ALEXANDER ET AL. *v.* HOLMES COUNTY BOARD OF EDUCATION ET AL., *ante,* p. 19. Petition for rehearing, or in the alternative, clarification of judgment, denied.

DECEMBER 9, 1969

Dismissal Under Rule 60

No. 457. RADERMAN *v.* KAINE ET AL. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *William M. Kunstler* and *Michael J. Kunstler* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 411 F. 2d 1102.

DECEMBER 15, 1969

Miscellaneous Orders

No. ——. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY *v.* KARALEXIS ET AL. D. C. Mass. Motion for stay of temporary injunction issued by United States District Court for the District of Massachusetts presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted pending timely filing and disposition of an appeal. Should such an appeal not be filed,

this stay to expire automatically. Should such appeal be timely docketed, this stay to continue pending Court's action on jurisdictional aspect of the case. In the event appeal is dismissed or judgment below summarily affirmed, this stay to expire automatically. Should Court note probable jurisdiction of appeal or postpone further consideration of question of jurisdiction to hearing on the merits, this stay to remain in effect pending issuance of the judgment of this Court.

MR. JUSTICE DOUGLAS, dissenting.

Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County, Mass., Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass. Gen. Laws, c. 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege *scienter*. The indictments were then dismissed, and new indictments were thereafter returned. Respondents' request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

Respondents were convicted of the state obscenity offense on November 12, 1969. The applicant in this proceeding, the District Attorney of Suffolk County,

has not agreed that respondents may exhibit the film pending the appeal of their convictions. On November 19, 1969, applicant moved the District Court to abstain from deciding the constitutionality of the Massachusetts statute, pending the resolution of that issue in the state courts. On November 28, 1969, the District Court, by a 2–1 vote, denied the motion and authorized a temporary injunction enjoining applicant from interfering with respondents as respects future showings of the film, "I Am Curious (Yellow)," pending a final disposition by the District Court on the merits.

Applicant now requests this Court to stay the temporary injunction that was issued by the District Court.

The injunction issued by the District Court does not interfere in any way with the criminal conviction already obtained in the Massachusetts courts. That case will proceed unaffected by anything the federal court does, save for final execution of the state judgment. *Dombrowski* v. *Pfister,* 380 U. S. 479, is different. There we did not force petitioners to risk vindication of their constitutional rights in a state prosecution under an "overly broad" state statute. *Id.,* at 486. But in this case that risk was faced and resolution of the constitutional issues is being undertaken in the state courts. All that the federal court proposes is protection of respondents against repeated prosecutions, while both the state courts and the federal courts are resolving the constitutional issues. Enjoining one state prosecution, though perhaps permissible under *Ex parte Young,* 209 U. S. 123, would not be in keeping with more recent decisions. *Douglas* v. *Jeannette,* 319 U. S. 157. But I read the sparse record before us differently from MR. JUSTICE STEWART and believe that we deal here with threats of repeated prosecutions; and those threats seem to me to be no less ominous to the federal constitutional regime than the threatened harassment of union

leaders in *Hague* v. *CIO,* 307 U. S. 496, who were asserting First Amendment rights in explaining the purposes of the new National Labor Relations Act. See the opinion of Mr. Justice Roberts, in which MR. JUSTICE BLACK concurred, *id.,* at 504–506.

There may in time be a collision between the two systems for us to resolve. Meanwhile I would let the two orderly processes go ahead. For I can imagine no better and smoother accommodation of the needs of the two regimes than that designed by the District Court.

Underlying the state case and the federal case is an important First Amendment question. Some people think that "obscenity" is not protected by the Free Speech and Free Press Clauses of the First Amendment. They believe that both Congress and the States can set up regimes of censorship to weed out "obscenity" from literature, movies, and other publications so as to rid the press of what they, the judges, deem to be beyond the pale.

I have consistently dissented from that course but not because, as frequently charged, I relish "obscenity." I have dissented before and now because I think the First Amendment bars all kinds of censorship. *Ginsberg* v. *New York,* 390 U. S. 629, 650 (DOUGLAS, J., dissenting); *Ginzburg* v. *United States,* 383 U. S. 463, 482 (DOUGLAS, J., dissenting); *Roth* v. *United States,* 354 U. S. 476, 508 (DOUGLAS, J., dissenting). To impose a regime of censors requires, in my view, a constitutional amendment. "Obscenity" is no exception. "Obscenity" certainly was not an established exception to free speech and free press when the Bill of Rights was adopted. See my concurring opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 428–433. It is a relatively new arrival on the American scene, propelled by dedicated zealots to cleanse all thought.

Prior to the Bill of Rights, state law, when it spoke of freedom of the press, meant only freedom from prior restraint. But an author or publisher could be held accountable for publishing what the statehouse thought was against "the public good." In other words, the First Amendment did not build on existing law; it broke with tradition, set a new standard, and exalted freedom of expression. There is no trace of a suggestion that "obscenity," however defined, was excepted.

That does not mean that "obscenity" is good or that it should be encouraged. It only means that we cannot be faithful to our constitutional mandate and allow any form or shadow of censorship over speech and press.*

When our rewards go to people for thinking alike, it is no surprise that we become frightened at those who take exception to the current consensus. Then the hue and cry goes up for censors; and that is the start of an ominous trend. What can be done to literature under the banner of "obscenity" can be done to other parts of the spectrum of ideas when party or majoritarian demands mount and propagandists start declaiming the law.

The "obscenity" issue raises large questions. To what extent may government watch over one's shoulder as he reads?

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*John Hohenberg recently stated this First Amendment philosophy in a slightly different setting:

"As Aleksandr Solzhenitsyn wrote in bitter response to his removal from the rolls of the Russian Writers' Union late in 1969 following the West's sympathetic reception of two of his novels that he could not have published in his own country: 'It is time to remember that the first thing we belong to is humanity. And humanity is separated from the animal world by thought and speech, and they should naturally be free. If they are fettered, we go back to being animals. Publicity and openness, honest and complete—that is the prime condition for the health of every society, and ours too.'

"Wherever freedom is denied, these words will live on." 52 Saturday Review 72 (Dec. 13, 1969).

Judge Jerome Frank said in *Roth* v. *Goldman,* 172 F. 2d 788, 792:

> "I think that no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects, such as perfumes, for example, which notoriously produce that result. But the constitutional power to suppress obscene publications might well exist if there were ample reason to believe that reading them conduces to socially harmful sexual conduct on the part of normal human beings. . . . Macaulay, replying to demands for suppression of obscene books, said: 'We find it difficult to believe that in a world so full of temptations as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them.' Substitute 'Waggish Tales from the Czech' for 'Aristophanes and Juvenal,' and those remarks become relevant here."

If "obscenity" can be carved out of the First Amendment, what other like exceptions can be created? Is "sacrilege" also beyond the pale? Are utterances or publications made with "malice" unprotected? How about "seditious" speech or articles? False, scandalous, and malicious writings or utterances against the Congress or the President "with intent to defame" or to bring them "into contempt or disrepute" or to "excite" against them "the hatred of the good people" or "to stir up sedition," or to "excite" people to "resist, oppose, or defeat" any law were once made a crime. (1 Stat. 596–597.) Now that the First Amendment applies to the States, *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697, may the States embark on such totalitarian

controls over thought or over the press? May Congress do so?

We forget today that under our constitutional system neither Congress nor the States have any power to pass on the value, the propriety, the Americanism, the soundness of any idea or expression. It is that insulation from party or majoritarian control provided by the First Amendment—not our gross national product or mass production or pesticides or space ships or nuclear arsenal—that distinguishes our society from the other planetary regimes.

Opinion of MR. JUSTICE BLACK.

I agree completely with MR. JUSTICE DOUGLAS that state criminal punishment of these respondents for showing an allegedly "obscene" film is absolutely prohibited by the First and Fourteenth Amendments. That, however, does not end for me the constitutional problems involved. In this case a Federal District Court stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case. One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the District Attorney of Suffolk County.

Opinion of MR. JUSTICE STEWART.

Without reaching the First and Fourteenth Amendment issues discussed by MR. JUSTICE BLACK and MR.

JUSTICE DOUGLAS, I join the Court's decision to stay the injunction for the reason indicated by MR. JUSTICE BLACK—*i. e.*, the general rule that "requires that federal courts refrain from interfering in pending state criminal prosecutions . . . ." This case does not now present the "highly unusual and very limited circumstances" that would justify a departure from that rule—such as would be presented by the threat or actuality of repetitive prosecutions for exhibition of the film in question.

No. —. SCHMID *v.* EYMAN, WARDEN, ET AL. Application for writ of habeas corpus presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. —. PETUSKEY ET AL. *v.* RAMPTON, GOVERNOR OF UTAH, ET AL. Motion for further extension of time to docket appeal granted. *A. Wally Sandack* on the motion.

No. 74. TAGGART ET AL. *v.* WEINACKER'S, INC. Sup. Ct. Ala. [Certiorari granted, *ante,* p. 813.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* on the motion.

No. 830. CHAMBERS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. [Certiorari granted, *ante,* p. 900.] Motion of petitioner for appointment of counsel granted. It is ordered that *Vincent J. Grogan, Esquire,* of Pittsburgh, Pennsylvania, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1178, Misc. LESER *v.* UNITED STATES ET AL. D. C. C. D. Cal. Application for bail presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 240. COVELLO *v.* UNITED STATES, *ante,* p. 879. The Solicitor General is requested to file a response to petition for rehearing within 30 days. MR. JUSTICE MARSHALL took no part in the entry of this order.

No. 1162, Misc. SOGOIAN *v.* CRAVEN, WARDEN;
No. 1182, Misc. RAWLS *v.* BLACKWELL, WARDEN;
No. 1216, Misc. LONEY *v.* BREWER, WARDEN;
No. 1251, Misc. VINSON *v.* ARIZONA ET AL.; and
No. 1253, Misc. COLLINS *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 988, Misc. WALTZ *v.* DAVIS, CLERK OF THE UNITED STATES SUPREME COURT. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (See also No. 603, *ante,* p. 269.)

No. 515. UNITED STATES ET AL. *v.* GIFFORD-HILL-AMERICAN, INC., ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Griswold* and *Assistant Attorney General McLaren* for petitioners. *Stanley E. Neely* for Gifford-Hill-American, Inc., and *Julian O. von Kalinowski* for United Concrete Pipe Corp., respondents. Reported below: 413 F. 2d 1244.

No. 628. SCHACHT *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to file petition for writ of certiorari out of time granted. Certiorari granted. THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would deny the motion. *Arthur Mandell* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 414 F. 2d 630.

Certiorari Denied

No. 409. WILKINSON, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND, VIRGINIA, ET AL. *v.* TYRONE, INC., TRADING AS LEE ART THEATRE, ET AL.; and

No. 418. TYRONE, INC., TRADING AS LEE ART THEATRE, ET AL. *v.* WILKINSON, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. *James B. Wilkinson, pro se,* and for other petitioner in No. 409, and *pro se* and for other respondent in No. 418. *Joseph S. Bambacus* for respondents in No. 409 and for petitioners in No. 418. Reported below: 410 F. 2d 639.

No. 421. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO. ET AL. *v.* CITY OF ST. PAUL. C. A. 8th Cir. Certiorari denied. *Arthur J. Donnelly* and *Richard M. Freeman* for petitioners. *Robert E. O'Connell* for respondent. Reported below: 413 F. 2d 762.

No. 462. SCOTT *v.* OHIO CITIZENS TRUST CO. Ct. App. Ohio, Lucas County. Certiorari denied. *Harland M. Britz* for petitioner. *Fred A. Smith* for respondent.

No. 464. HAMILTON ET AL. *v.* MUNICIPAL COURT FOR THE BERKELEY-ALBANY JUDICIAL DISTRICT. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Marshall W. Krause* for petitioners. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Clifford K. Thompson, Jr.,* Deputy Attorney General, for respondent. Reported below: 270 Cal. App. 2d 797, 76 Cal. Rptr. 168.

No. 592. FLOYD *v.* CITY OF ROCKFORD. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 104 Ill. App. 2d 161, 243 N. E. 2d 837.

No. 591. CLEVELAND *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 104 Ill. App. 2d 415, 244 N. E. 2d 212.

No. 596. ILLMAN *v.* TOLEDO BAR ASSN. Sup. Ct. Ohio. Certiorari denied. *Nelson Lancione* for petitioner. *Charles E. Ide, Jr.,* for respondent. Reported below: 18 Ohio St. 2d 122, 247 N. E. 2d 758.

No. 600. BAMBULAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 42 Ill. 2d 419, 247 N. E. 2d 873.

No. 619. MANCHESTER BAND OF POMO INDIANS, INC. *v.* ZIRPOLI, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. *George F. Duke* for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Edmund B. Clark,* and *Jacques B. Gelin* for respondent.

No. 622. PIZZARELLO *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *James G. Starkey* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States et al. Reported below: 408 F. 2d 579.

No. 624. RAY SMITH TRANSPORT CO. *v.* SCHULTZ, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *T. S. Christopher* for petitioner. *Solicitor General Griswold* and *Bessie Margolin* for respondent. Reported below: 409 F. 2d 954.

No. 626. FARLEY *v.* KRAMER, JUDGE, ET AL. Sup. Ct. App. W. Va. Certiorari denied. *Stanley E. Preiser* for petitioner. Reported below: —— W. Va. ——, 169 S. E. 2d 106.

No. 629. WHITE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. *Philip Wittenberg* for petitioner. Reported below: 253 S. C. 475, 171 S. E. 2d 712.

No. 631. CARLINER ET AL. *v.* COMMISSIONER OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. *David Carliner, pro se,* and *Arthur W. Jackson* and *Reuben Robertson III* for petitioners. *Hubert B. Pair, Richard W. Barton,* and *David P. Sutton* for respondents. Reported below: 134 U. S. App. D. C. 43, 412 F. 2d 1090.

No. 633. MULLER ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *John C. Moran* for petitioners. Reported below: 456 P. 2d 903.

No. 634. WEERSING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *David Finkel* and *Hugh R. Manes* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 415 F. 2d 130.

No. 635. CRAIG, ADMINISTRATRIX *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioner. *Charles W. Rees, Jr.,* for respondent Litton Systems, Inc. Reported below: 413 F. 2d 854.

No. 636. CITY OF NEWARK *v.* PORT OF NEW YORK AUTHORITY. Sup. Ct. N. J. Certiorari denied. *Philip E. Gordon* and *Sam Weiss* for petitioner. *Sidney Goldstein* and *Francis A. Mulhern* for respondent. Reported below: 54 N. J. 171, 254 A. 2d 513.

No. 640. SCARSELLETTI *v.* AETNA CASUALTY & SURETY Co. Sup. Ct. Pa. Certiorari denied.

No. 638. CRUMLEY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *Norman D. Lane* for petitioner. *Thomas E. Fox,* Deputy Attorney General of Tennessee, and *C. Hayes Cooney,* Assistant Attorney General, for respondent.

No. 166. SIGLER, WARDEN *v.* LOSIEAU. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Melvin Kent Kammerlohr,* Assistant Attorney General, for petitioner. Reported below: 406 F. 2d 795.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE STEWART joins, dissenting.

I would grant certiorari and summarily reverse. The United States Court of Appeals for the Eighth Circuit has erroneously interpreted the decision of this Court in *Burgett* v. *Texas,* 389 U. S. 109 (1967), and also has effectively overruled the Nebraska Supreme Court on a question of state law—the interpretation of Nebraska's Habitual Criminal Act.

Losieau was convicted of burglary in 1952. Under Nebraska practice, after the jury had made the guilty finding, the trial court held a hearing outside the jury's presence to determine whether or not the penalty for burglary should be enhanced under the Nebraska Habitual Criminal Act, Neb. Rev. Stat. § 29–2221 (1964 Reissue). A 1945 conviction for stealing a car was one of the prior convictions alleged, and the trial court found it and another conviction to be valid for enhancement purposes. Losieau was given a 20-year sentence. He then brought unsuccessful state post-conviction actions, contending that the 1952 sentence was invalid because he was denied counsel (1) when he pleaded guilty to the 1945 charge and (2) when he was thereafter sentenced to a prison term of three years for the

conviction based on the charge. Thereafter Losieau sought habeas corpus on a claim before the United States District Court for the District of Nebraska that he had been denied counsel at the 1945 proceedings in the state court. The federal court denied relief after hearing, finding that Losieau had been represented by counsel when he actually pleaded guilty to the auto theft charge in 1945. It also held that the validity of the 1945 sentence and the underlying issue of lack of counsel at sentencing one day following the plea were irrelevant, noting that any defect in sentencing would not affect the validity of the *conviction,* and observing that under Nebraska law it was solely the validity of the conviction, not the sentence, which was important. On appeal, the Eighth Circuit reversed, deciding that, because the Nebraska Habitual Criminal Act applied where a defendant had been twice previously "convicted of crime, sentenced and committed to prison," *Burgett* required that the sentence also be valid to give effect to the right to counsel at sentencing in 1945.

The Nebraska Habitual Criminal Act, Neb. Rev. Stat. § 29–2221 (1964 Reissue), provides in part:

> "(1) Whoever has been twice convicted of crime, sentenced and committed to prison, . . . for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ."

The Supreme Court of Nebraska has indicated that "an unauthorized or erroneous sentence does not void a lawful conviction" for the purposes of § 29–2221. *Kennedy* v. *State,* 171 Neb. 160, 176, 105 N. W. 2d 710, 721 (1960). See also *State* v. *Burnside,* 181 Neb. 20, 146 N. W. 2d 754 (1966), cert. denied, 387 U. S. 936 (1967); *Haswell* v. *State,* 167 Neb. 169, 92 N. W. 2d 161 (1958).

Burgett v. *Texas, supra,* held that a conviction obtained in violation of *Gideon* v. *Wainwright,* 372 U. S.

335 (1963), could not be used "to support guilt or enhance punishment for another offense . . ." (389 U. S., at 115), because such use would be giving renewed effect to the denial of Sixth and Fourteenth Amendment rights. *Burgett* did not require the Eighth Circuit to reinterpret Nebraska's § 29–2221 to require that a sentence as well as a conviction be validly entered.

No. 456. TIJERINA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Richard F. Watt, John M. Bowlus, Morton Stavis,* and *William Kunstler* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 412 F. 2d 661.

No. 458. JOHNSON ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment below reversed. *Robert Eugene Smith* for petitioners. *Robert H. Quinn,* Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, and *Garrett H. Byrne* for respondent.

No. 607. DAILY PRESS, INC. *v.* UNITED PRESS INTERNATIONAL ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Eugene Driker* for petitioner. *H. William Butler* and *Richard F. Stevens* for United Press International, *Leslie W. Fleming* for Evening News Assn., and *Kenneth Murray* and *Brownson Murray* for Knight Newspapers, Inc., respondents. Reported below: 412 F. 2d 126.

No. 641. UNITED AIR LINES, INC. *v.* THOMAS, EXECUTRIX, ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William J. Junkerman* for petitioner. *Edward M. O'Brien* for respondents. Reported below: 24 N. Y. 2d 714, 249 N. E. 2d 755.

No. 109, Misc. LAMBRIGHT *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert F. Katz,* Deputy Attorney General, for respondents.

No. 284, Misc. MADKINS *v.* O'NEIL, JUDGE, ET AL. Sup. Ct. Wis. Certiorari denied. *Robert W. Warren,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondents.

No. 325, Misc. HENDERSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. *S. Carter McMorris* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for respondent.

No. 353, Misc. BERG *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. *James M. Weinberg* for petitioner. *Roger Arnebergh, Philip E. Grey,* and *Michael T. Sauer* for respondent.

No. 367, Misc. KAGAN *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondent.

No. 438, Misc. DICKINSON *v.* BRIDGES, SHERIFF. C. A. 5th Cir. Certiorari denied. *James L. Highsaw, Jr.*, for respondent.

No. 446, Misc. BARNETT ET AL. *v.* PONTESSO, CORRECTIONS DIRECTOR, ET AL. C. A. 10th Cir. Certiorari denied. *H. L. McConnell*, Assistant Attorney General of Oklahoma, for respondents.

No. 449, Misc. KENYATTA *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Lawrence E. Freedman* for petitioner.

No. 475, Misc. ALONZO *v.* BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. *M. Roland Nachman, Jr.*, for respondent. Reported below: 284 Ala. 183, 223 So. 2d 585.

No. 505, Misc. CARLTON ET UX. *v.* GERSTEIN. C. A. 5th Cir. Certiorari denied.

No. 557, Misc. PENCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Thomas A. Conroy* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Jerome M. Feit* for the United States.

No. 587, Misc. GANTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg*, and *Roger A. Pauley* for the United States. Reported below: 410 F. 2d 1375.

No. 648, Misc. CARNEGIE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *David M. Reilly* for petitioner. *David B. Salzman* for respondent. Reported below: 158 Conn. 264, 259 A. 2d 628.

No. 569, Misc. In re Lipscomb. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* in opposition. Reported below: 408 F. 2d 1003.

No. 663, Misc. Evans *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 673, Misc. Moss *v.* United States. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 410 F. 2d 386.

No. 725, Misc. Ferrara *v.* United States. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 411 F. 2d 793.

No. 736, Misc. Withridge *v.* New York. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* for respondent.

No. 794, Misc. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 787.

No. 862, Misc. Williams *v.* Cox, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 876, Misc. Archie *v.* New Mexico. C. A. 10th Cir. Certiorari denied.

No. 924, Misc. Gowdy *v.* Tahash, Warden. Sup. Ct. Minn. Certiorari denied. *John S. Connolly* for petitioner. Reported below: 284 Minn. 528, 169 N. W. 2d 30.

No. 964, Misc. Swain *v.* North Carolina. C. A. 4th Cir. Certiorari denied.

No. 965, Misc. GARNER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 985, Misc. HUTCHINSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 71 Cal. 2d 342, 455 P. 2d 132.

No. 990, Misc. LLUVERAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1042, Misc. DOZIE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1043, Misc. MINTZER *v.* DEEGAN, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1046, Misc. GRAHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1047, Misc. ALSTON *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1068, Misc. LANDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1077, Misc. HESLIP *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 1086, Misc. MORALES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1141, Misc. DANIELS *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 415 F. 2d 323.

No. 1089, Misc. HALLOWELL *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1135, Misc. SCANLAN *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1142, Misc. STEVENSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 636, Misc. PRITCHARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David Rein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 413 F. 2d 663.

Rehearing Denied

No. 748, October Term, 1968. JENKINS *v.* DELAWARE, 395 U. S. 213. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

DECEMBER 17, 1969

Dismissals Under Rule 60

No. 412, Misc. WILFONG *v.* MISSOURI. Sup. Ct. Mo. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John C. Danforth,* Attorney General of Missouri, and *Dale L. Rollings* and *Michael L. Boicourt,* Assistant Attorneys General, for respondent. Reported below: 438 S. W. 2d 265.

No. 1152, Misc. KNOX *v.* PATUXENT INSTITUTION DIRECTOR. Ct. Sp. App. Md. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

DECEMBER 18, 1969

Dismissal Under Rule 60

No. 895. CARPENTER *v.* COX ET AL. Sup. Ct. Tenn. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *William J. Harbison* for petitioner. *Charles L. Cornelius, Jr.,* for respondents.

DECEMBER 19, 1969

Miscellaneous Order

No. 944. CARTER ET AL. *v.* WEST FELICIANA PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Motion for emergency reconsideration of granting of injunctive order [*ante,* p. 226] denied. *John F. Ward, Jr.,* on the motion.

DECEMBER 22, 1969

Dismissal Under Rule 60

No. 126, Misc. YATES *v.* KANSAS. Sup. Ct. Kan. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Kent Frizzell,* Attorney General of Kansas, and *J. Richard Foth* and *Ernest C. Ballweg,* Assistant Attorneys General, for respondent. Reported below: 202 Kan. 406, 449 P. 2d 575.

JANUARY 8, 1970

Dismissal Under Rule 60

No. 54. CAVITT *v.* NEBRASKA. Appeal from Sup. Ct. Neb. [Probable jurisdiction noted, 393 U. S. 1078.] Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Richard A. Huebner* for appellant. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Melvin Kent Kammerlohr,* Assistant Attorney General, for appellee. Reported below: 182 Neb. 712, 157 N. W. 2d 171; 183 Neb. 243, 159 N. W. 2d 566.

JANUARY 12, 1970

Dismissals Under Rule 60

No. 678, Misc. MYLES *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Cal. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Paul Ligda* for petitioner.

No. 911. AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA *v.* YOUNG, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Robert E. Curran* and *Kevin D. Moloney* for petitioner. *Herman Cahn* for respondents. Reported below: 416 F. 2d 906.

Miscellaneous Orders

No. ——. COFFEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Petition presented to MR. JUSTICE DOUGLAS for reconsideration of denial of bail, and by him referred to the Court, denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Joyce Ferris Nedde,* Deputy Attorney General, in opposition.

No. ——. SIGNORELLI *v.* MALLECK. C. A. 2d Cir. Application for restraining order presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Solicitor General Griswold* in opposition.

No. 74. TAGGART ET AL. *v.* WEINACKER'S, INC. Sup. Ct. Ala. [Certiorari granted, *ante,* p. 813.] Motions of American Retail Federation and Homart Development Co. for leave to file briefs as *amici curiae* granted. *Brice I. Bishop* and *Phil B. Hammond* on the motion for American Retail Federation.

No. 53. BAIRD *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. [Certiorari granted, 394 U. S. 957.] Case restored to calendar for reargument.

No. 230. H. K. PORTER CO., INC., DISSTON DIVISION-DANVILLE WORKS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 817.] Motion of United Steelworkers of America for leave to participate in oral argument granted and 15 minutes allotted for that purpose. An additional 15 minutes allotted to counsel for petitioner. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *George H. Cohen* and *Bernard Kleinman* on the motion.

No. 234. CZOSEK ET AL. *v.* O'MARA ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 814.] Motion of respondents for permission for two attorneys to participate in oral argument granted. *William B. Mahoney* for O'Mara et al., and *Thomas G. Rickert, Richard F. Griffin,* and *Courtland R. LaVallee* for Erie Lackawanna Railroad Co. on the motion.

No. 300. TATE ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. [Certiorari granted, *ante,* p. 815.] Motion of Richard B. Stone for leave to argue *pro hac vice* in behalf of Hickel granted. Motion of respondent, Dorita High Horse, to remove case from summary calendar denied. Fifteen additional minutes allotted to each side. *Solicitor General Griswold* on the motion for Stone, and *Houston Bus Hill* on the motion for Dorita High Horse.

No. 692. PUBLIC SERVICE COMMISSION OF WYOMING ET AL. *v.* TRI-STATE GENERATION & TRANSMISSION ASSN., INC. C. A. 10th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 75. IN RE STOLAR. Sup. Ct. Ohio. [Certiorari granted, *ante,* p. 816.] Case restored to calendar for reargument.

No. 730. HILL *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, *ante,* p. 818.] Motion of petitioner for appointment of counsel granted. It is ordered that *Joseph Amato, Esquire,* of Palos Verdes Estates, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1074, Misc. HALL *v.* WINGO, WARDEN; and

No. 1264, Misc. MAISONAVE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1178, Misc. LESER *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 262, Misc. POGGI *v.* GRAY, U. S. DISTRICT JUDGE; and

No. 310, Misc. POGGI *v.* GRAY, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 696. LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., ET AL. *v.* WADMOND ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted and case set for argument immediately following No. 75 [restored to calendar, *supra*]. *Alan H. Levine, Jeremiah S. Gutman,* and *Leonard B. Boudin* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, and *Daniel M. Cohen,* Assistant Attorney General, for appellees. Reported below: 299 F. Supp. 117.

No. 726. MITCHELL ET AL. *v.* DONOVAN, SECRETARY OF STATE OF MINNESOTA, ET AL. Appeal from D. C. Minn. Probable jurisdiction noted. MR. JUSTICE HARLAN is of the opinion that further consideration of question of jurisdiction should be postponed to hearing on the merits. *Lynn S. Castner* and *Melvin L. Wulf* for appellants. *Douglas M. Head,* Attorney General of Minnesota, *pro se, Arne L. Schoeller,* Chief Deputy Attorney General, and *John R. Kenefick* and *James M. Kelley,* Special Assistant Attorneys General, for appellees. Reported below: 300 F. Supp. 1145.

Certiorari Granted

No. 661. HELLENIC LINES LTD. ET AL. *v.* RHODITIS. C. A. 5th Cir. Motion of Royal Greek Government for leave to file a brief as *amicus curiae* granted. Motion of Union of Greek Shipowners et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. *George F. Wood* for petitioners. *James M. Estabrook* and *David P. H. Watson* for Royal Greek Government, and *John R. Sheneman* for Union of Greek Shipowners et al. on the motions. Reported below: 412 F. 2d 919.

No. 678. NASH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Alex W. Newton* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 627.

No. 768. BOYS MARKETS, INC. *v.* RETAIL CLERKS UNION, LOCAL 770. C. A. 9th Cir. Certiorari granted. *Joseph M. McLaughlin* for petitioner. *Kenneth M. Schwartz* for respondent. *Carl M. Gould* and *Stanley E. Tobin* for Plumbing-Heating & Piping Employers Council of Southern California, Inc., as *amicus curiae* in support of the petition. Reported below: 416 F. 2d 368.

No. 387. CALIFORNIA *v.* GREEN. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *Thomas C. Lynch,* Attorney General of California, and *William E. James,* Assistant Attorney General, for petitioner. Reported below: 70 Cal. 2d 654, 451 P. 2d 422.

Certiorari Denied. (See also No. 662, *ante,* p. 278; No. 714, *ante,* p. 277; No. 738, *ante,* p. 279; No. 748, *ante,* p. 279; No. 787, Misc., *ante,* p. 280; and No. 897, Misc., *ante,* p. 276.)

No. 242. PEREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Vincent Hallinan* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Gloria F. DeHart,* Deputy Attorneys General, for respondent.

No. 504. DONALDSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Robert S. Bailey* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent.

No. 567. METTLER ET UX. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *McPherson Berrien E. Moore* for petitioners. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James L. Markman,* Deputy Attorney General, for respondent.

No. 627. MARINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *David P. Schippers* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 413 F. 2d 214.

No. 379. LEMKE *v.* CITY OF NEWPORT NEWS. Sup. Ct. App. Va. Certiorari denied.

No. 643. FRILETTE ET AL. *v.* KIMBERLIN ET AL. C. C. P. A. Certiorari denied. *Oswald G. Hayes, Raymond W. Barclay, Richard K. Stevens, Davidson C. Miller,* and *John F. Witherspoon* for petitioners. *Malvin R. Mandelbaum* for respondents. Reported below: 56 C. C. P. A. (Pat.) 1242, 412 F. 2d 1390.

No. 644. SOUTHERN RAILWAY CO. *v.* CITY OF KNOXVILLE. Sup. Ct. Tenn. Certiorari denied. *Charles A. Horsky* and *Clyde W. Key* for petitioner. *W. P. Boone Dougherty* for respondent. Reported below: —— Tenn. ——, 442 S. W. 2d 619.

No. 645. FLOERSHEIM, DBA FLOERSHEIM SALES CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *Marion Edwyn Harrison* for petitioner. *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Alvin L. Berman* for respondent. Reported below: 411 F. 2d 874.

No. 648. HAMMOND MILLING CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *E. David Rosen* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Leonard H. Dickstein* for the United States. Reported below: 413 F. 2d 608.

No. 665. BRUSH-MOORE NEWSPAPERS, INC., DBA PORTSMOUTH TIMES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Earle K. Shawe* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 413 F. 2d 809.

No. 646. ARIZONA EX REL. MERRILL, SHERIFF *v.* TURTLE. C. A. 9th Cir. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for petitioner. *Theodore R. Mitchell* for respondent. Reported below: 413 F. 2d 683.

No. 650. HUMAN ENGINEERING INSTITUTE, INC. *v.* WELCH SCIENTIFIC CO. C. A. 7th Cir. Certiorari denied. *Bruce B. Krost* for petitioner. *John D. Dewey* for respondent. Reported below: 416 F. 2d 32.

No. 651. FIRST NATIONAL BANK OF LINCOLNWOOD *v.* CARROLL ET AL. C. A. 7th Cir. Certiorari denied. *Martin S. Gerber* for petitioner. *Sidney R. Zatz* and *John J. Enright* for respondents. Reported below: 413 F. 2d 353.

No. 652. PENROD DRILLING CO. *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. *Thomas A. Harrell* for petitioner. *Scott Baldwin* for respondents. Reported below: 414 F. 2d 1217.

No. 657. ACKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Ugast, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 415 F. 2d 328.

No. 658. LOCAL NO. 380, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Gerry M. Miller* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for National Labor Relations Board, and *Walter S. Davis* for Flambeau Plastics Corp., respondents. Reported below: 411 F. 2d 249.

No. 659. CERRITO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 413 F. 2d 1270.

No. 660. WEINER *v.* CUYAHOGA COMMUNITY COLLEGE DISTRICT ET AL. Sup. Ct. Ohio. Certiorari denied. *Thomas J. McDermott* for petitioner. *George I. Meisel* for respondents. Reported below: 19 Ohio St. 2d 35, 249 N. E. 2d 907.

No. 667. PATTON MANUFACTURING CO. ET AL. *v.* KIMBERLING, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *Ford W. Ekey* for petitioners. *Bradley J. Schaeffer* for respondent. Reported below: 413 F. 2d 1258.

No. 671. PRESTO MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Abraham J. Harris* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent National Labor Relations Board. Reported below: 135 U. S. App. D. C. 197, 417 F. 2d 1144.

No. 673. GLEN & MOHAWK MILK ASSN., INC. *v.* WICKHAM, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK. Ct. App. N. Y. Certiorari denied. *John R. Davison* for petitioner. *Robert G. Blabey* for respondent.

No. 680. FIEDLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Herald Price Fahringer* for petitioner. *Michael F. Dillon* for respondent. Reported below: 24 N. Y. 2d 960, 250 N. E. 2d 75.

No. 682. General Electric Co. *v.* National Labor Relations Board et al. C. A. 4th Cir. Certiorari denied. *William W. Sturges* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *Irving Abramson* and *Ruth Weyand* for International Union of Electrical, Radio & Machine Workers, AFL–CIO, et al., respondents. Reported below: 414 F. 2d 918.

No. 684. Markham Advertising Co., Inc., et al. *v.* Zahn et al. C. A. 9th Cir. Certiorari denied. *Alfred J. Schweppe* and *Thomas R. Beierle* for petitioners. *Slade Gorton,* Attorney General of Washington, *Robert J. Doran,* Deputy Attorney General, and *Delbert W. Johnson,* Special Assistant Attorney General, for respondents. Reported below: 415 F. 2d 772.

No. 685. Harris *v.* Pennsylvania Turnpike Commission. C. A. 3d Cir. Certiorari denied. *Theodore Kostos* for petitioner. Reported below: 410 F. 2d 1332.

No. 686. Bugden *v.* Bugden. Sup. Ct. Ga. Certiorari denied. *Roland D. Hartshorn* for petitioner. Reported below: 225 Ga. 413, 169 S. E. 2d 337.

No. 689. Boyles *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. *P. J. Townsend, Jr.,* for petitioner. Reported below: 223 So. 2d 651.

No. 691. Baird *v.* United States. C. A. 2d Cir. Certiorari denied. *Simon H. Rifkind, Jay H. Topkis, Thomas R. Farrell,* and *Boris Kostelanetz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 414 F. 2d 700.

No. 690. JAMES TALCOTT, INC. *v.* IVOR B. CLARK CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Thomas B. Leary* and *David Hartfield, Jr.*, for petitioner. *Arthur S. Friedman* and *Hyman Frankel* for respondents. Reported below: 411 F. 2d 788.

No. 695. SIRBU ET AL. *v.* SIRBU. Sup. Ct. Ohio. Certiorari denied. *John R. Vintilla* for petitioners. *C. Kenneth Clark, Jr.*, for respondent. Reported below: 19 Ohio St. 2d 162, 249 N. E. 2d 887.

No. 697. MORTON ET AL., TRADING AS PENNBROOK MILK CO. *v.* NATIONAL DAIRY PRODUCTS CORP. C. A. 3d Cir. Certiorari denied. *Frederic L. Ballard* for petitioners. *William H. Lowery* and *Owen B. Rhoads* for respondent. Reported below: 414 F. 2d 403.

No. 698. SCOTT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Raymond J. Smith* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 413 F. 2d 932.

No. 699. LICAUSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Allen David Stolar* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 1118.

No. 700. BASSICK CO. ET AL. *v.* BLAKE ET AL. C. A. 7th Cir. Certiorari denied. *Dugald S. McDougall* and *A. G. Douvas* for petitioners. *John D. Dewey* for respondents.

No. 709. THOMAS *v.* PETERSON MARINE SERVICE, INC. C. A. 5th Cir. Certiorari denied. *Charles R. Maloney* for petitioner. Reported below: 411 F. 2d 592.

No. 702. A. H. Belo Corp. (WFAA–TV) *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Joseph Alton Jenkins* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. *L. N. D. Wells, Jr.,* for Local 1257, International Brotherhood of Electrical Workers, AFL–CIO, intervenor below. Reported below: 411 F. 2d 959.

No. 704. Pyle *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. *William H. Thornburgh* for petitioner. *R. K. Wilson* for respondent. Reported below: 19 Ohio St. 2d 64, 249 N. E. 2d 826.

No. 707. Pennaluna & Co., Inc., et al. *v.* Securities and Exchange Commission. C. A. 9th Cir. Certiorari denied. *Richard Maguire* for petitioners. *Solicitor General Griswold* and *Philip A. Loomis, Jr.,* for respondent. Reported below: 410 F. 2d 861.

No. 708. Sacks *v.* United States. C. A. 7th Cir. Certiorari denied. *Alan G. Wilsey* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 607.

No. 710. First National City Bank of New York *v.* American Fire & Casualty Co. C. A. 1st Cir. Certiorari denied. *Victor House* for petitioner. Reported below: 411 F. 2d 755.

No. 716. Leslie et ux. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *M. Bernard Aidinoff* and *Kendyl K. Monroe* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Harry Baum,* and *Robert I. Waxman* for respondent. Reported below: 413 F. 2d 636.

No. 711. TAYLOR ET AL. *v.* DEALERS TRANSPORT CO. ET AL. C. A. 6th Cir. Certiorari denied. *George J. Long* for petitioners. *Newell N. Fowler* for Dealers Transport Co., and *Edgar A. Zingman* for E & L Transport Co., respondents.

No. 712. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Clarence H. Pease* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 791.

No. 717. CENTRAL OF GEORGIA RAILWAY CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 5th Cir. Certiorari denied. *Charles A. Horsky, John B. Miller,* and *Julian C. Sipple* for petitioner. *Harold A. Ross* for respondents. Reported below: 415 F. 2d 403.

No. 718. BESSMAN ET AL., DBA BESSMAN INSURANCE AGENCY *v.* BACALIS. Sup. Ct. Mich. Certiorari denied. Reported below: 382 Mich. 764.

No. 719. WRIGHT ET UX. *v.* DADE COUNTY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Richard H. W. Maloy* for petitioners. Reported below: 216 So. 2d 494.

No. 720. BAUER *v.* STERN FINANCE CO. ET AL. Sup. Ct. Iowa. Certiorari denied. *Dan Johnston* for petitioner. *Joseph Z. Marks* for respondents. Reported below: —— Iowa ——, 169 N. W. 2d 850.

No. 721. WYNN ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Sherwin T. McDowell* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Harry Baum,* and *Robert I. Waxman* for the United States. Reported below: 411 F. 2d 614.

No. 723. WAINWRIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *George J. Francis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 413 F. 2d 796.

No. 724. SWINDLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James Lewis Mann Cromer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 416 F. 2d 25.

No. 733. MERCHANTS NATIONAL BANK & TRUST CO. OF INDIANAPOLIS *v.* PROFESSIONAL MEN'S ASSN., INC., ET AL. C. A. 5th Cir. Certiorari denied. *Donald A. Schabel* for petitioner. *Robert W. Smith* for respondents. Reported below: 409 F. 2d 600.

No. 734. WHITE CONSOLIDATED INDUSTRIES, INC. *v.* ALLIS-CHALMERS MANUFACTURING CO. C. A. 3d Cir. Certiorari denied. *George I. Meisel* for petitioner. *S. Hazard Gillespie* and *S. Samuel Arsht* for respondent. Reported below: 414 F. 2d 506.

No. 744. ROSSI *v.* FLETCHER. C. A. D. C. Cir. Certiorari denied. *William D. Donnelly* for petitioner. Reported below: 135 U. S. App. D. C. 333, 418 F. 2d 1169.

No. 745. COX'S FOOD CENTER, INC. *v.* RETAIL CLERKS UNION, LOCAL NO. 1653, ET AL. Sup. Ct. Idaho. Certiorari denied. *Eli Weston* for petitioner. *Donald Grody* and *Hugh Hafer* for respondents. Reported below: 93 Idaho 179, 457 P. 2d 418.

No. 751. MAZZOCHI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Irving Anolik* for petitioner.

No. 740. CANTRELL *v.* CITY OF OKLAHOMA CITY. Ct. Crim. App. Okla. Certiorari denied. *Don Hamilton* for petitioner. *Roy H. Semtner* and *Giles K. Ratcliffe* for respondent. Reported below: 454 P. 2d 676.

No. 747. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Gordon C. Culp* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 412 F. 2d 1188.

No. 750. NAGELBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irwin Klein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 413 F. 2d 708.

No. 754. POLYMERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Francis J. Vaas* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 414 F. 2d 999.

No. 759. PUBLIC SERVICE COMPANY OF INDIANA, INC., ET AL. *v.* HAMIL, ADMINISTRATOR OF RURAL ELECTRIFICATION ADMINISTRATION, ET AL. C. A. 7th Cir. Certiorari denied. *Alan W. Boyd* for Public Service Company of Indiana, Inc., and *G. R. Redding* and *Fred P. Bamberger* for Southern Indiana Gas & Electric Co., petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Eardley,* and *Alan S. Rosenthal* for respondents. Reported below: 416 F. 2d 648.

No. 765. TORO *v.* JULIO E. GERALDINO, INC. Sup. Ct. Puerto Rico. Certiorari denied.

No. 755. MINNEAPOLIS PARK BOARD *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Raymond A. Haik* for petitioner. *Douglas M. Head,* Attorney General of Minnesota, *Arne L. Schoeller,* Chief Deputy Attorney General, *Richard H. Kyle,* Deputy Attorney General, and *James M. Kelley,* Special Assistant Attorney General, for respondent. Reported below: 284 Minn. 233, 170 N. W. 2d 95.

No. 757. CARROLL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. C. A. 10th Cir. Certiorari denied. *Rebecca L. Bradley* and *Walter L. Gerash* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Alexander P. Humphrey* for respondent. Reported below: 416 F. 2d 585.

No. 758. RUBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Stanley Jay Bartel* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 414 F. 2d 473.

No. 763. INDIANOLA MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hardy Lott* for petitioners. *Solicitor General Griswold, Assistant Attorney General Leonard,* and *J. Harold Flannery* for the United States. Reported below: 410 F. 2d 626.

No. 653. JONES *v.* CITY OF BIRMINGHAM. Ct. App. Ala. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Arthur Parker* for petitioner. *J. M. Breckenridge* and *William C. Walker* for respondent. Reported below: 45 Ala. App. 86, 224 So. 2d 922.

No. 764. FOWLER MANUFACTURING CO. *v.* GORLICK ET AL., DBA THRIFTY SUPPLY CO. ET AL. C. A. 9th Cir. Certiorari denied. *Floyd V. Smith* for petitioner. *Donald G. Cohan* for respondents. Reported below: 415 F. 2d 1248.

No. 769. WYATT *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. *Richard C. Minor* for petitioner.

No. 822. BASAN *v.* UNITED STATES;

No. 825. HUTUL *v.* UNITED STATES; and

No. 826. LOMBARDI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner in No. 825, and *Thomas P. Sullivan* for petitioner in No. 826. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States in all three cases. Reported below: 416 F. 2d 607.

No. 160. HOPPER ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Camille F. Gravel, Jr.,* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, *Harry H. Howard,* Assistant Attorney General, and *Lawrence L. McNamara* for respondent. Reported below: 253 La. 439, 218 So. 2d 551.

No. 546. HEINE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard R. Fernald* for petitioner. *George S. Pappagianis,* Attorney General of New Hampshire, and *David H. Souter,* Assistant Attorney General, for respondent. Reported below: —— N. H. ——, 253 A. 2d 828.

No. 26. ALLEN ET AL. *v.* HARDIN, SECRETARY OF AGRICULTURE, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Charles P. Ryan* and *Edward J. Ryan* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl, Alan S. Rosenthal,* and *Walter H. Fleischer* for Hardin, and *Lawrence D. Hollman* and *Carlyle C. Ring, Jr.,* for Zuber et al., respondents. Reported below: 131 U. S. App. D. C. 109, 402 F. 2d 660.

No. 668. BOROSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Kenneth S. Jacobs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 412 F. 2d 668.

No. 766. KAUFFMAN *v.* SECRETARY OF THE AIR FORCE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leonard B. Boudin, Victor Rabinowitz,* and *David Rein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Robert L. Keuch* for respondent. Reported below: 135 U. S. App. D. C. 1, 415 F. 2d 991.

No. 420. JONES *v.* JONES ET AL. C. A. 7th Cir. Motion to dispense with printing petition for certiorari granted. Certiorari denied. *William J. Scott,* Attorney General of Illinois, and *Francis T. Crowe, Herman Tavins,* and *A. Zola Groves,* Assistant Attorneys General, for respondents McCormick et al. Reported below: 410 F. 2d 365.

No. 639. BERKMAN *v.* UNITED STATES. C. A. 2d Cir. Motion to dispense with printing petition for certiorari granted. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States.

No. 495. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* BARTON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Morton J. Hanlon,* Assistant Attorney General, for petitioner. *Robert E. Jagger* and *Carleton L. Weidemeyer* for respondent. Reported below: 412 F. 2d 229.

No. 647. MCROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Ellis J. Horvitz* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 195.

No. 693. HABIG ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Fred P. Bamberger, Alan W. Boyd,* and *Anton Dimitroff* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 413 F. 2d 1108.

No. 669. RUFFALO *v.* MAHONING COUNTY BAR ASSN. Sup. Ct. Ohio. Motion to use record and appendix in No. 73, October Term, 1967 [*In re Ruffalo,* 390 U. S. 544], granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion and petition. *Eugene Gressman* for petitioner. *Thomas V. Koykka* and *Edward R. Brown* for respondent.

No. 739. OSBORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Maclin P. Davis, Jr.*, for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 1021.

No. 674. HENRY I. SIEGEL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Osmond K. Fraenkel* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *Jacob Sheinkman* for Amalgamated Clothing Workers of America, AFL–CIO, respondents. Reported below: 135 U. S. App. D. C. 142, 417 F. 2d 559.

No. 752. MATZNER ET AL. *v.* BROWN, JUDGE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *F. Lee Bailey* for petitioners. *Arthur J. Sills,* Attorney General of New Jersey, and *Elias Abelson,* Assistant Attorney General, for respondent. Reported below: 410 F. 2d 1376.

No. 63, Misc. MOORE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edward W. Bergtholdt,* Deputy Attorney General, for respondent.

No. 151, Misc. WANE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Russell Iungerich,* Deputy Attorney General, for respondent.

No. 124, Misc. BRYANT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Willard F. Jones,* Deputy Attorneys General, for respondent.

No. 162, Misc. PARK *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Charles R. B. Kirk,* Deputy Attorneys General, for respondents.

No. 217, Misc. VAUGHN *v.* CALIFORNIA. Ct. App. Cal., 4th Jud. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Frederick R. Millar, Jr.,* Deputy Attorney General, for respondent.

No. 259, Misc. COTTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 409 F. 2d 1049.

No. 515, Misc. NICHOLLS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Walter D. Williams* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum, Thomas J. Immel,* and *Roger C. Nauert,* Assistant Attorneys General, for respondent. Reported below: 42 Ill. 2d 91, 245 N. E. 2d 771.

No. 770, Misc. MADRID *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 9 Ariz. App. 207, 450 P. 2d 719.

No. 551, Misc. BROWN, AKA MORRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John Powers Crowley* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 930.

No. 672, Misc. STEPHENS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Henry W. McLaughlin III* for petitioner. *J. Willard Greer* for respondent.

No. 726, Misc. RAKSHYS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 748, Misc. CHROMIAK *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 406 F. 2d 502.

No. 777, Misc. BROADHEAD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Myron J. Hack* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 413 F. 2d 1351.

No. 799, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Leonard R. Mellon* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 402 F. 2d 258.

No. 804, Misc. OBLATORE *v.* BRAUNER. C. A. 8th Cir. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioner.

No. 840, Misc. VIVERO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 971.

No. 809, Misc. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 412 F. 2d 687.

No. 831, Misc. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert G. Pugh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 412 F. 2d 1069.

No. 872, Misc. SISK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Thomas McKinney, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 1192.

No. 874, Misc. SWIFT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Matthew Muraskin* for petitioner. *William Cahn* and *Jules Orenstein* for respondent. Reported below: 32 App. Div. 2d 183, 300 N. Y. S. 2d 639.

No. 888, Misc. GREEN *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *Joseph A. Marino* for petitioner. Reported below: 411 F. 2d 884.

No. 918, Misc. NORMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 413 F. 2d 789.

No. 939, Misc. BRILL ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *John J. Callahan* for petitioners.

No. 935, Misc. CULOTTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert S. Rifkind* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 1343.

No. 951, Misc. ANTHONY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 414 F. 2d 808.

No. 966, Misc. GIBSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *James E. Kennedy* for respondent. Reported below: 75 Wash. 2d 174, 449 P. 2d 692.

No. 967, Misc. WEBB *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Ernest E. Figari, Jr.,* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Robert C. Flowers* and *Gilbert J. Pena,* Assistant Attorneys General, for respondent. Reported below: 415 F. 2d 433.

No. 968, Misc. RONSTADT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 972, Misc. KELLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 973, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 415 F. 2d 653.

No. 982, Misc. JAEGERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *DeWitt F. Blase* for petitioner.

No. 983, Misc. SMITH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Kate Whyner* for petitioner. Reported below: 273 Cal. App. 2d 547, 78 Cal. Rptr. 405.

No. 986, Misc. ELI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 71 Cal. 2d 214, 454 P. 2d 337.

No. 994, Misc. MARVEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 996, Misc. TELLIS *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1003, Misc. CHAMBERS ET UX. *v.* COLONIAL PIPELINE CO. C. A. 6th Cir. Certiorari denied. Reported below: 408 F. 2d 678.

No. 1004, Misc. STEVENS *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1008, Misc. MAROSCIA *v.* DISPATCH PRINTING CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 1011, Misc. EATON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1023, Misc. LOGAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 25 N. Y. 2d 184, 250 N. E. 2d 454.

No. 1013, Misc. LAUGHLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *David E. Wagoner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 411 F. 2d 1224.

No. 1025, Misc. MILLER ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 254 La. 73, 222 So. 2d 862.

No. 1026, Misc. CONOVER *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 1028, Misc. PHILLIPS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Frank O. Walther* for petitioner. Reported below: 270 Cal. App. 2d 381, 75 Cal. Rptr. 720.

No. 1029, Misc. ARNOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 1056.

No. 1031, Misc. OWENS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Morton Stavis* for petitioner. Reported below: 54 N. J. 153, 254 A. 2d 97.

No. 1033, Misc. COOPER ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Gerald T. Foley, Jr.,* for petitioners. Reported below: 54 N. J. 330, 255 A. 2d 232.

No. 1036, Misc. WARRINER *v.* FERNANDEZ ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 1040, Misc. BARTLETT, GUARDIAN *v.* HOLLOPETER. Sup. Ct. Ohio. Certiorari denied. *Arthur R. Cline* for respondent.

No. 1039, Misc. ROGERS *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1041, Misc. ROBERTS *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. *G. Kent Edwards,* Attorney General of Alaska, and *Robert K. Yandell* for respondent. Reported below: 453 P. 2d 898.

No. 1044, Misc. CORRADO ET UX. *v.* PROVIDENCE REDEVELOPMENT AGENCY ET AL. Sup. Ct. R. I. Certiorari denied. *Timothy J. McCarthy* and *Vincent Pallozzi* for respondents. Reported below: —— R. I. ——, 252 A. 2d 920.

No. 1056, Misc. LEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Sam Adam* and *Charles B. Evins* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 910.

No. 1057, Misc. NEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Mark I. Harrison* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 599.

No. 1058, Misc. CZAKO *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1065, Misc. HOLLAND *v.* COINER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 1067, Misc. SMITH *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1070, Misc. WHARTON *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1071, Misc. WHITE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1072, Misc. LYON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 416 F. 2d 91.

No. 1073, Misc. MCALVAIN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 104 Ariz. 445, 454 P. 2d 987.

No. 1075, Misc. STEPHENS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1081, Misc. GABRIEL ET VIR *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for respondent.

No. 1082, Misc. JOHNSON *v.* SARD ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1083, Misc. ORTEGA *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Sup. Ct. Cal. Certiorari denied.

No. 1084, Misc. GROSS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1087, Misc. MITCHELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Cleary* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 416 F. 2d 607.

No. 1088, Misc. HILL *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1090, Misc. ROGERS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Robert Morgan,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent. Reported below: 275 N. C. 411, 168 S. E. 2d 345.

No. 1093, Misc. HAMILTON, AKA LIPSCOMB *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 1099, Misc. BOONE ET AL. *v.* WYMAN, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. *Jonathan Weiss* for petitioners. *J. Lee Rankin* and *Stanley Buchsbaum* for respondents. Reported below: 412 F. 2d 857.

No. 1100, Misc. HAYNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ernest E. Figari, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 347.

No. 1104, Misc. MCGURRIN *v.* SHOVLIN, HOSPITAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1114, Misc. REYES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 273 Cal. App. 2d 769, 78 Cal. Rptr. 733.

No. 1106, Misc. CHUPICH *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 1109, Misc. COLLINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 416 F. 2d 696.

No. 1115, Misc. BLANKENSHIP *v.* NORVELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1117, Misc. ANTHONY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1119, Misc. WALTERS *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1120, Misc. SAUNDERS *v.* MICHIGAN PAROLE BOARD. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 1122, Misc. NEWLIN *v.* SUPERIOR COURT OF ARIZONA, COUNTY OF MARICOPA, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 1125, Misc. ROGERS *v.* SCHMIDT, SECRETARY OF WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES. C. A. 7th Cir. Certiorari denied.

No. 1130, Misc. CLINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 323.

No. 1121, Misc. EVANS *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 415 F. 2d 844.

No. 1127, Misc. TAYLOR *v.* CADY, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 1128, Misc. JOHNS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1131, Misc. BROWN *v.* KEITH. C. A. 8th Cir. Certiorari denied.

No. 1134, Misc. GILMORE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1136, Misc. HUSKEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1143, Misc. GRIX *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 1145, Misc. ROUNTREE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1148, Misc. MCDANIELS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1153, Misc. PARRISH *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 414 F. 2d 770.

No. 1157, Misc. MINK *v.* KENT, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 1160, Misc. CAGLE *v.* CICCONE, U. S. MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied.

No. 1233, Misc. SEWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 416 F. 2d 26.

No. 1242, Misc. MINK *v.* HARRISON, CORRECTIONS DIRECTOR. C. A. 6th Cir. Certiorari denied.

No. 1257, Misc. FLEMMING *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Charles W. Musgrove,* Assistant Attorney General, for respondent.

No. 1276, Misc. PERGOLIZZI ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 11, Misc. HADEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 397 F. 2d 460.

No. 20, Misc. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 27, Misc. McLEAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold* for the United States.

No. 64, Misc. CARRIGAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 405 F. 2d 1197.

No. 86, Misc. NUNLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States.

No. 157, Misc. KING *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Hugh R. Manes* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 267 Cal. App. 2d 814, 73 Cal. Rptr. 440.

No. 391, Misc. SWIFT *v.* COMMANDANT, U. S. DISCIPLINARY BARRACKS, FORT LEAVENWORTH. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for respondent.

No. 49, Misc. ANDREWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold* for the United States.

No. 428, Misc. GOODE *v.* SOMMERS. Baltimore City Ct. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joseph H. H. Kaplan* and *Harold Buchman* for petitioner.

No. 707, Misc. BAIRD *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert H. Quinn,* Attorney General of Massachusetts, *John Wall,* Assistant Attorney General, *Lawrence P. Cohen,* Deputy Assistant Attorney General, *Garrett H. Byrne,* and *Joseph Nolan* for respondent. Reported below: 355 Mass. 746, 247 N. E. 2d 574.

No. 708, Misc. BARNES *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard Newman* for petitioner. Reported below: 54 N. J. 1, 252 A. 2d 398.

No. 898, Misc. BROWN *v.* MARYLAND AND/OR JOHNSON, SHERIFF. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William M. Kunstler, Jonathan W. Lubell,* and *Harold Buchman* for petitioner.

No. 975, Misc. THESSEN *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joseph H. Shortell* for petitioner. *G. Kent Edwards,* Attorney General of Alaska, and *Robert K. Yandell* for respondent. Reported below: 454 P. 2d 341.

No. 896, Misc. MALONEY *v.* E. I. DU PONT DE NEMOURS & CO., INC. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *James C. McKay* and *Michael Boudin* for respondent.

No. 995, Misc. CARR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Darwin Charles Brown* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 135 U. S. App. D. C. 348, 418 F. 2d 1184.

No. 1124, Misc. DEARINGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States.

Rehearing Denied

No. 1190, Misc., October Term, 1967. WARE *v.* PRESTON ET AL., 390 U. S. 1032, 391 U. S. 971. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 40. CONWAY *v.* CALIFORNIA ADULT AUTHORITY ET AL., *ante*, p. 107;

No. 340. LUDWIG *v.* FLORIDA, *ante*, p. 927;

No. 434. JOHNSON *v.* STATE BAR OF CALIFORNIA ET AL., *ante*, p. 22;

No. 480. ARIZONA CORPORATION COMMISSION ET AL. *v.* UNITED STATES ET AL., *ante*, p. 27; and

No. 497. UNION PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL., *ante*, p. 27. Petitions for rehearing denied.

No. 507. BAY SOUND TRANSPORTATION CO. ET AL. *v.* UNITED STATES, *ante,* p. 928;

No. 554. CHAMBERS *v.* BEAUCHAMP, ADMINISTRATOR, ET AL., *ante,* p. 942;

No. 583. ANDERS *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 958;

No. 160, Misc. JACKSON *v.* CALIFORNIA, *ante,* p. 942;

No. 602, Misc. NEELY *v.* UNITED STATES, *ante,* p. 917;

No. 632, Misc. CLINTON *v.* CALIFORNIA, *ante,* p. 23;

No. 658, Misc. LANE *v.* PUCCI ET AL., *ante,* p. 943;

No. 781, Misc. DVORSKY *v.* UNITED STATES, *ante,* p. 970;

No. 782, Misc. WOLFF *v.* FOLEY, *ante,* p. 945;

No. 843, Misc. WENDT *v.* DILLIN ET AL., JUDGES, U. S. DISTRICT COURT, *ante,* p. 899;

No. 866, Misc. RESSEGUIE *v.* FOLLETTE, WARDEN, *ante,* p. 971;

No. 959, Misc. DAUGHERTY *v.* UNITED STATES ET AL., *ante,* p. 947;

No. 978, Misc. CANTRELL *v.* UNITED STATES, *ante,* p. 947; and

No. 1016, Misc. FLETCHER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, *ante,* p. 948. Petitions for rehearing denied.

No. 368. WARD *v.* PENNSYLVANIA NEW YORK CENTRAL TRANSPORTATION CO. ET AL., *ante,* p. 849. Motion for leave to file petition for rehearing denied.

No. 999, Misc. HARRISON *v.* UNITED STATES, *ante,* p. 974. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

JANUARY 14, 1970

Miscellaneous Order

No. 944. CARTER ET AL. *v.* WEST FELICIANA PARISH SCHOOL BOARD ET AL., *ante,* p. 290;

No. 972. SINGLETON ET AL. *v.* JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL., *ante,* p. 290; and

No. 1003. WEST FELICIANA PARISH SCHOOL BOARD ET AL. *v.* CARTER ET AL., *infra.* Motion of Louisiana Teachers Assn. for leave to file a brief as *amicus curiae* granted. *John F. Ward, Jr.,* on the motion.

Certiorari Granted. (See Nos. 944 and 972, *ante,* p. 290.)

Certiorari Denied

No. 1027. JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* SINGLETON ET AL. C. A. 5th Cir. Certiorari denied. *Robert C. Cannada* and *Thomas H. Watkins* for petitioners. Reported below: 419 F. 2d 1211.

No. 1042. HINDS COUNTY SCHOOL BOARD ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *A. F. Summer,* Attorney General of Mississippi, and *John C. Satterfield* for petitioners. Reported below: 417 F. 2d 852, 423 F. 2d 1264.

No. 1003. WEST FELICIANA PARISH SCHOOL BOARD ET AL. *v.* CARTER ET AL. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *John F. Ward, Jr.,* for petitioners. *Mr. Ward* for Louisiana Teachers Assn. as *amicus curiae* in support of the petition. Reported below: 419 F. 2d 1211.

JANUARY 15, 1970

Dismissals Under Rule 60

No. 649. FIDELITY & CASUALTY CO. OF NEW YORK *v.* GRIGSBY ET AL.;

No. 676. COASTAL MARINE SERVICE OF TEXAS, INC., ET AL. *v.* GRIGSBY ET AL.; and

No. 677. WELDER'S SUPPLY CO. OF LAKE CHARLES *v.* GRIGSBY ET AL. C. A. 5th Cir. Petitions for writs of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Fred H. Sievert, Jr.,* for petitioner in No. 649, *Edmund E. Woodley* for petitioners in No. 676, and *Norman F. Anderson* for petitioner in No. 677. Reported below: 412 F. 2d 1011.

JANUARY 16, 1970

Miscellaneous Order

No. 458. JOHNSON ET AL. *v.* MASSACHUSETTS, *ante,* p. 990. Application of Joseph M. Palladino, Sr., to stay effectiveness of order denying petition for certiorari as to him, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE STEWART are of the opinion that the application should be granted. *Robert E. Smith* for applicant.

JANUARY 19, 1970

Miscellaneous Orders

No. —. AVILA, AKA GONZALEZ ET AL., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Application for bail pending appeal presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *Daniel Neal Heller* for applicant Avila. *Solicitor General Griswold* in opposition.

No. 41. CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL.; and

No. 59. CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA *v.* OKLAHOMA ET AL. C. A. 10th Cir. [Certiorari granted, 394 U. S. 972.] Cases restored to calendar for reargument.

No. 153. MCMANN, WARDEN, ET AL. *v.* RICHARDSON ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 813.] Motion of District Attorney of New York County for leave to participate in oral argument as *amicus curiae* granted, and a total of 30 minutes allotted for that purpose. Counsel for respondents allotted an additional 30 minutes. *Frank S. Hogan* and *Michael R. Juviler* on the motion. *Gretchen White Oberman* in opposition.

No. 175. MORAGNE *v.* STATES MARINE LINES, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante,* p. 900.] Motion of *Nathan Baker, pro se,* for leave to file a brief as *amicus curiae* granted. Motion of American Trial Lawyers Assn. for leave to file a brief as *amicus curiae* granted. *David B. Kaplan* on the latter motion.

No. 221. HICKEL, SECRETARY OF THE INTERIOR *v.* OIL SHALE CORP. ET AL. C. A. 10th Cir. [Certiorari granted, *ante,* p. 817.] Forty-five minutes allotted to each side for oral argument. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 699, Misc. ROSS *v.* HARRISON, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of mandamus denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, in opposition.

No. 46. UNITED STATES *v.* WHITE. C. A. 7th Cir. [Certiorari granted, 394 U. S. 957.] Case restored to calendar for reargument.

No. 305. UNITED STATES *v.* SISSON. Appeal from D. C. Mass. [Probable jurisdiction postponed, *ante,* p. 812.] One hour allotted to each side for oral argument. Motion of Frank P. Slaninger, *pro se,* for leave to dispense with printing *amicus curiae* brief denied. Motion to file a brief as *amicus curiae* will be granted provided the size of the print and pages of his brief is made to conform with requirements of Rules 39 (1) and (4) of the Rules of this Court. Motion of Los Angeles Selective Service Law Panel for leave to participate in oral argument as *amicus curiae* denied. *William G. Smith* on the latter motion.

No. 399. ROWAN, DBA AMERICAN BOOK SERVICE, ET AL. *v.* UNITED STATES POST OFFICE DEPARTMENT ET AL. Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, *ante,* p. 885.] Motion of Direct Mail Advertising Assn., Inc., for leave to participate in oral argument as *amicus curiae* denied. *David E. McGiffert* on the motion.

No. 868, Misc. POTEET *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT; and

No. 1442, Misc. WATKINS *v.* WINGO, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 226, Misc. SAFEGUARD MUTUAL INSURANCE CO. *v.* FREEDMAN, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Malcolm W. Berkowitz* and *Malcolm H. Waldron, Jr.,* on the motion.

No. 730. HILL *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, *ante,* p. 818.] Motion of *Keith C. Monroe, pro se,* for leave to file a brief as *amicus curiae* granted.

Probable Jurisdiction Noted

No. 156, Misc. WILLIAMS *v.* ILLINOIS. Appeal from Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Jack Greenberg, Michael Meltsner,* and *Stanley A. Bass* for appellant. *William J. Scott,* Attorney General of Illinois, and *James R. Thompson* and *Joel M. Flaum,* Assistant Attorneys General, for appellee. Reported below: 41 Ill. 2d 511, 244 N. E. 2d 197.

Certiorari Granted

No. 655. MULLOY *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Robert Allen Sedler* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 412 F. 2d 421.

Certiorari Denied. (See also No. 288, *ante,* p. 374; and No. 808, *ante,* p. 373.)

No. 125. MARTIN MARIETTA CORP. *v.* FEDER ET AL. C. A. 2d Cir. Certiorari denied. *Samuel E. Gates, Cecil Wray, Jr.,* and *Clark C. Vogel* for petitioner. *Mordecai Rosenfeld* for Feder and *Charles Pickett* and *Edward C. McLean, Jr.,* for Sperry Rand Corp., respondents. *Solicitor General Griswold, Lawrence G. Wallace, Philip A. Loomis, Jr., David Ferber,* and *Paul Gonson* filed a memorandum for the United States, by invitation of the Court, *ante,* p. 808, in opposition. Reported below: 406 F. 2d 260.

No. 771. BAUMEL ET AL. *v.* ROSEN ET AL.; and
No. 881. ROSEN ET AL. *v.* BAUMEL ET AL. C. A. 4th Cir. Certiorari denied. *Morton E. Yohalem, George Cochran Doub,* and *Eugene Gressman* for petitioners in No. 771. *H. Vernon Eney* and *Robert R. Bair* for respondents in No. 771 and for petitioners in No. 881. Reported below: 412 F. 2d 571.

No. 773. UNITED STATES *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Walters, Matthew J. Zinn,* and *Stuart A. Smith* for the United States. *Robert T. Molloy* and *John P. Downes* for respondent. Reported below: 411 F. 2d 327.

No. 775. NARRAGANSETT RACING ASSN., INC., ET AL. *v.* BERMAN ET AL. C. A. 1st Cir. Certiorari denied. *Stanley M. Brown* for petitioners. *J. Fleet Cowden* for respondents. Reported below: 414 F. 2d 311.

No. 776. WILLIAMS-MCWILLIAMS, INC., ET AL. *v.* MASSEY. C. A. 5th Cir. Certiorari denied. *Brunswick G. Deutsch* and *René H. Himel, Jr.,* for petitioners. Reported below: 414 F. 2d 675.

No. 777. SEVEN SLOT MACHINES ET AL. *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Bobby Wilson Storey* for petitioners. *Kent Frizzell,* Attorney General of Kansas, and *J. Richard Foth, Richard H. Seaton,* and *Edward G. Collister, Jr.,* Assistant Attorneys General, for respondent. Reported below: 203 Kan. 833, 457 P. 2d 97.

No. 780. BRUNER ET AL. *v.* REPUBLIC SUPPLY CO. C. A. 5th Cir. Certiorari denied. *Robert A. Scardino* for petitioners. *David T. Searls* and *John Leroy Jeffers* for respondent. Reported below: 416 F. 2d 763.

No. 779. LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Samuel J. Cohen* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 412 F. 2d 334.

No. 784. SCHREIBER ET AL., TRADING AS SCHREIBER & GOLDBERG *v.* AMERICAN SAFETY TABLE CO. C. A. 2d Cir. Certiorari denied. *Edwin M. Slote* for petitioners. *Arthur S. Olick* and *Leon Edelson* for respondent. Reported below: 415 F. 2d 373.

No. 785. SHANKEY ET AL. *v.* STAISEY ET AL. Sup. Ct. Pa. Certiorari denied. *Thomas B. Sweeney* for petitioners. *Francis A. Barry* and *Thomas M. Rutter, Jr.,* for respondents.

No. 786. ZUBKOFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Nathan Silverberg* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 141.

No. 790. SAVILLE *v.* BANK OF AMERICA, EXECUTOR. C. A. 7th Cir. Certiorari denied. *Owen W. Crumpacker* and *James E. Knox, Jr.,* for petitioner. *Lowell E. Enslen* for respondent. Reported below: 416 F. 2d 265.

No. 791. YOUNG ET UX. *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Arthur J. Sullivan* for petitioners. *Theodore L. Sendak,* Attorney General of Indiana, and *William F. Thompson* and *Walter E. Bravard, Jr.,* Deputy Attorneys General, for respondent. Reported below: —— Ind. ——, 246 N. E. 2d 377.

No. 792. KUNZMAN ET AL. *v.* UNION PACIFIC RAILROAD CO. Sup. Ct. Colo. Certiorari denied. *Charles S. Vigil* for petitioners. *James H. Anderson* and *E. G. Knowles* for respondent. Reported below: —— Colo. ——, 456 P. 2d 743.

No. 795. RETAIL STORE EMPLOYEES UNION, LOCAL 954 *v.* LASALLE & KOCH CO. C. A. 6th Cir. Certiorari denied. *Joseph E. Finley* for petitioner. *Harry L. Browne, Howard F. Sachs,* and *Merritt W. Green* for respondent. Reported below: 413 F. 2d 345.

No. 796. RANDOLPH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Luke McKissack* for petitioner.

No. 797. LOUISIANA INDUSTRIES, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Ewell Lee Smith, Jr.,* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Nancy M. Sherman* for respondent. Reported below: 414 F. 2d 227.

No. 799. AMBERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles S. Conley* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 416 F. 2d 942.

No. 800. UNITED BENEFIT LIFE INSURANCE CO. *v.* MCCRORY. C. A. 8th Cir. Certiorari denied. *Harold W. Kauffman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Thomas L. Stapleton* for respondent. Reported below: 414 F. 2d 928.

No. 802. KONIGSBERG *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. *Frank A. Lopez* for petitioner.

No. 803. WARD *v.* DIFFERDING ET AL. App. Ct. Ind. Certiorari denied. *Arch N. Bobbitt* for petitioner. *William M. Osborn* for respondents. Reported below: —— Ind. App. ——, 242 N. E. 2d 388.

No. 806. FORT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *Edward V. Hanrahan* and *Elmer C. Kissane* for respondent.

No. 807. NATIONAL FOUNDATION *v.* CITY OF FORT WORTH. C. A. 5th Cir. Certiorari denied. *Simon H. Rifkind* and *Gerald D. Stern* for petitioner. *S. G. Johndroe, Jr.*, for respondent. Reported below: 415 F. 2d 41.

No. 810. STATE BOARD OF EQUALIZATION OF CALIFORNIA *v.* MONTGOMERY WARD & CO., INC. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *James E. Sabine* and *Ernest P. Goodman,* Assistant Attorneys General, and *E. Clement Shute, Jr.,* Deputy Attorney General, for petitioner. *Valentine Brookes* for respondent. Reported below: 272 Cal. App. 2d 728, 78 Cal. Rptr. 373.

No. 793. GARRISON, DISTRICT ATTORNEY OF THE PARISH OF ORLEANS *v.* SHERIDAN ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Louise Korns* for petitioner. *Herbert J. Garon* and *H. Richard Schumacher* for respondents. Reported below: 415 F. 2d 699.

No. 384. PRESBYTERIAN CHURCH IN THE UNITED STATES ET AL. *v.* MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH ET AL. Sup. Ct. Ga. Motion to use record in No. 71, October Term, 1968, granted. Motion of William P. Thompson, Stated Clerk of General Assembly of United Presbyterian Church in the United States of America, et al. for leave to file a brief as *amici curiae* granted. Motion of Rt. Rev. John E. Hines, Presiding Bishop of Protestant Episcopal Church in the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. *Robert B. Troutman, Charles L. Gowen, A. Felton Jenkins, Jr.,* and *Frank S. Cheatham, Jr.,* for petitioners. *Frank B. Zeigler* and *James Edward McAleer* for Mary Elizabeth Blue Hull Memorial Presbyterian Church et al., and *Owen H. Page* for Eastern Heights Presbyterian Church et al., respondents. *George Wilson McKeag* for Thompson et al., and *Jackson A. Dykman* for Hines, as *amici curiae* in support of the petition. *Alfred J. Schweppe* for Laurelhurst United Presbyterian Church, Inc., et al. as *amici curiae* urging denial of the petition. Reported below: 225 Ga. 259, 167 S. E. 2d 658.

No. 772. BENN *v.* SANKIN ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Sherman L. Cohn* for petitioner. Reported below: 133 U. S. App. D. C. 361, 410 F. 2d 1060.

No. 781. GIBBONS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for respondent. Reported below: 416 F. 2d 14.

No. 783. BUTLER *v.* CITY OF WINTER GARDEN. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Robert G. Murrell* for petitioner.

No. 787. VELVEL *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Lawrence R. Velvel,* petitioner, *pro se.* Reported below: 415 F. 2d 236.

No. 789. WALKER OIL CO., INC., ET AL. *v.* HUDSON OIL CO. OF MISSOURI, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joe J. Harrell* for petitioners. *Harry Kemker* for respondent. Reported below: 414 F. 2d 588.

No. 203, Misc. BEASLEY *v.* COUNTY COURT, KENOSHA COUNTY. Sup. Ct. Wis. Certiorari denied. *Robert W. Warren,* Attorney General of Wisconsin, and *William A. Platz* and *William F. Eich,* Assistant Attorneys General, for respondent.

No. 235, Misc. PORTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Elizabeth Miller* and *John C. Hamilton,* Deputy Attorneys General, for respondent.

No. 278, Misc. PENNINGTON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 409 F. 2d 757.

No. 143, Misc. BULLOCK *v.* WARDEN, WESTFIELD STATE FARM FOR WOMEN. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein* and *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Murray Sylvester,* Assistant Attorney General, for respondent. Reported below: 408 F. 2d 1326.

No. 352, Misc. GREEN *v.* FITZHARRIS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *George R. Nock,* Deputy Attorney General, for respondent.

No. 372, Misc. VANN *v.* MANCUSI, WARDEN. Ct. App. N. Y. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Calvin M. Berger,* Assistant Attorney General, for respondent.

No. 384, Misc. JAQUISH *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jerold A. Krieger,* Deputy Attorney General, for respondent.

No. 402, Misc. PACHECO *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. *Harvey Dickerson,* Attorney General of Nevada, for respondent. Reported below: 406 F. 2d 1031.

No. 423, Misc. SULLIVAN *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondents.

No. 465, Misc. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Thomas Kallay,* Deputy Attorney General, for respondent. Reported below: 269 Cal. App. 2d 586, 75 Cal. Rptr. 267.

No. 498, Misc. COPAS *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied. *Robert H. Friebert* for petitioner. *Robert W. Warren,* Attorney General of Wisconsin, and *William A. Platz* and *William F. Eich,* Assistant Attorneys General, for respondent.

No. 599, Misc. SCHWARTZ *v.* VICTORY CONTAINER CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioner.

No. 660, Misc. MEEKS *v.* FITZHARRIS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *George R. Nock,* Deputy Attorney General, for respondent.

No. 717, Misc. CHILD *v.* MAINE ET AL. Sup. Jud. Ct. Me. Certiorari denied. *James S. Erwin,* Attorney General of Maine, and *John W. Benoit, Jr.,* Assistant Attorney General, for respondents. Reported below: 253 A. 2d 691.

No. 749, Misc. BROW *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 729, Misc. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 591.

No. 727, Misc. BLANCHEY *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. *James E. Kennedy* for respondents. Reported below: 75 Wash. 2d 926, 454 P. 2d 841.

No. 828, Misc. GIBBS *v.* TURNER ET AL. Ct. Crim. App. Okla. Certiorari denied. Reported below: 457 P. 2d 823.

No. 925, Misc. BELL *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 926, Misc. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John C. Emery, Jr.,* for petitioner. *Solicitor General Griswold* for the United States.

No. 928, Misc. SMITH *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Reuben A. Garland* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General, for respondent. Reported below: 225 Ga. 328, 168 S. E. 2d 587.

No. 929, Misc. HEMMINGER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 203 Kan. 868, 457 P. 2d 141.

No. 931, Misc. STACY *v.* VAN CUREN, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 2d 188, 248 N. E. 2d 603.

No. 947, Misc. CUEVAS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 948, Misc. SANCHEZ *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 949, Misc. REILLY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Phillip A. Hubbart* for petitioner. Reported below: 212 So. 2d 796.

No. 1048, Misc. DE PALMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 394.

No. 1050, Misc. GEARING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 1052, Misc. KLEINHANS *v.* KLEINHANS. Sup. Ct. Wis. Certiorari denied.

No. 1062, Misc. GITTLEMACKER ET UX. *v.* COUNTY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. *William J. O'Brien* for respondent Williamsport Hospital. Reported below: 413 F. 2d 84.

No. 1066, Misc. LAWLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 622.

No. 1111, Misc. MITCHELSON *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1171, Misc. PENRICE *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied.

No. 1277, Misc. WASHINGTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1102, Misc. YOUNG *v.* MCGEE, CORRECTIONS AGENCY ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 415 F. 2d 473.

No. 1312, Misc. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 417 F. 2d 196.

No. 1316, Misc. MCFADDEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1368, Misc. WENNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 417 F. 2d 979.

No. 281, Misc. DUPREE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 42 Ill. 2d 249, 246 N. E. 2d 281.

Rehearing Denied

No. 19. FIRST NATIONAL BANK IN PLANT CITY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL., *ante,* p. 122;

No. 612. BROWN *v.* COMMERCIAL NATIONAL BANK OF PEORIA, TRUSTEE, ET AL., *ante,* p. 961;

No. 505, Misc. CARLTON ET UX. *v.* GERSTEIN, *ante,* p. 992;

No. 569, Misc. IN RE LIPSCOMB, *ante,* p. 993;

No. 594, Misc. WILLIAMS *v.* UNITED STATES, *ante,* p. 966; and

No. 1086, Misc. MORALES *v.* CRAVEN, WARDEN, *ante,* p. 994. Petitions for rehearing denied.

JANUARY 26, 1970

Miscellaneous Orders

No. ——. DYMAN *v.* UNITED STATES. C. A. 2d Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Solicitor General Griswold* in opposition.

No. ——. ARAYA-MURCHIO *v.* UNITED STATES. C. A. 2d Cir. Application for reduction of bail pending trial presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Judah Best* for applicant. *Solicitor General Griswold* in opposition.

No. 387. CALIFORNIA *v.* GREEN. Sup. Ct. Cal. [Certiorari granted, *ante,* p. 1001.] Motion of respondent for appointment of counsel granted. It is ordered that *E. Barrett Prettyman, Jr., Esquire,* of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 445. STANDARD INDUSTRIES, INC. *v.* TIGRETT INDUSTRIES, INC., ET AL. C. A. 6th Cir. [Certiorari granted, *ante,* p. 885.] Motion of respondents to remove case from summary calendar denied. *Ralph W. Kalish* on the motion.

No. 944. CARTER ET AL. *v.* WEST FELICIANA PARISH SCHOOL BOARD ET AL.; and

No. 972. SINGLETON ET AL. *v.* JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL., *ante,* p. 290. Motion of the Governor of Florida for leave to intervene and to recall judgments denied. *Gerald Mager* on the motion.

Certiorari Granted. (See No. 743, *ante,* p. 482.)

Certiorari Denied

No. 687. GINZBURG ET AL. *v.* GOLDWATER. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Harold E. Kohn* and *David H. Marion* for petitioners. *John J. Wilson* for respondent. Reported below: 414 F. 2d 324.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Shortly before the 1964 presidential election, Fact magazine published an issue entitled "The Unconscious of a Conservative: A Special Issue on the Mind of Barry Goldwater." The thrust of the two main articles in this issue of Fact was that Senator Barry Goldwater, the 1964 Republican nominee for the Presidency, had a severely paranoid personality and was psychologically unfit for the high office to which he aspired. The articles in the magazine attempted to support the thesis that Senator Goldwater was mentally ill by citing allegedly factual incidents from his public and private life and by reporting the results of a "poll" of 12,356 psychiatrists, together with a "sampling" of the comments made by the 2,417 psychiatrists who responded to the poll questionnaire that the magazine mailed out. Shortly after the publication of the "special Goldwater issue," Senator Goldwater commenced this libel action for damages against Fact Magazine, Inc., Warren Boroson, the named author of one of the articles, and Ralph Ginzburg, the editor and publisher of Fact. The suit was brought in the United States District Court for the Southern District of New York on the basis of diversity of citizenship. After 15 days of trial, the jury returned a verdict against each of the defendants. Although the jury awarded Goldwater only $1 in compensatory damages against all three defendants, it went on to

award him punitive damages of $25,000 against Ginzburg and $50,000 against Fact Magazine, Inc. In their appeal to the United States Court of Appeals for the Second Circuit, Ginzburg and the other defendants attacked this award of damages, arguing that it severely penalized them for exercising their First Amendment rights to free speech and a free press. The Court of Appeals found, however, that the defendants had been accorded at trial all the First Amendment protection to which they were entitled under this Court's holdings in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and its progeny. *New York Times* and the cases following it permit public figures and officials to recover damages for libelous statements made about them if the publication was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan, supra,* at 280. See, *e. g., Rosenblatt* v. *Baer,* 383 U. S. 75 (1966). The Court of Appeals found that the District Court had properly applied the *New York Times* "actual malice" rule and affirmed Goldwater's libel award. Defendants Ginzburg and Fact Magazine, Inc., then petitioned this Court for a writ of certiorari to review the judgment of the Court of Appeals. It is this petition which this Court today denies.

I cannot subscribe to the result the Court reaches today because I firmly believe that the First Amendment guarantees to each person in this country the unconditional right to print what he pleases about public affairs. See *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 170 (concurring in result and dissenting); and *New York Times Co.* v. *Sullivan, supra,* at 293 (concurring). This case perhaps more than any I have seen in this area convinces me that the *New York Times* constitutional rule is wholly inadequate to assure the "uninhibited,

robust, and wide-open" public debate which the majority in that case thought it was guaranteeing. See *New York Times Co.* v. *Sullivan, supra,* at 270. What I wrote in my separate opinion in *Rosenblatt* v. *Baer, supra,* at 95, seems to me equally applicable here:

> "This case illustrates I think what a short and inadequate step this Court took in the *New York Times* case to guard free press and free speech against the grave dangers to the press and the public created by libel actions. Half-million-dollar judgments for libel damages like those awarded against the New York Times will not be stopped by requirements that 'malice' be found, however that term is defined. Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried. And this Court cannot and should not limit its protection against such press-destroying judgments by reviewing the evidence, findings, and court rulings only on a case-by-case basis. The only sure way to protect speech and press against these threats is to recognize that libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments. I repeat what I said in the *New York Times* case that 'An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.' "

Moreover, there are two special factors in this case that make the holding of the Court of Appeals all the more repressive and ominous. This suit was brought by a man who was then the nominee of his party for the Presidency of the United States. In our times, the person who holds that high office has an almost unbounded power for good or evil. The public has an

unqualified right to have the character and fitness of anyone who aspires to the Presidency held up for the closest scrutiny. Extravagant, reckless statements and even claims that may not be true seem to me an inevitable and perhaps essential part of the process by which the voting public informs itself of the qualities of a man who would be President. The decisions of the District Court and the Court of Appeals in this case can only have the effect of dampening political debate by making fearful and timid those who should under our Constitution feel totally free openly to criticize Presidential candidates. Doubtless, the jury was justified in this case in finding that the Fact articles on Senator Goldwater were prepared with a reckless disregard of the truth, as many campaign articles unquestionably are. But, even if I believed in a balancing process to determine the scope of the First Amendment, which I do not, the grave dangers of prohibiting or penalizing the publication of even the most inaccurate and misleading information seem to me to more than outweigh any gain, personal or social, that might result from permitting libel awards such as the one before the Court today. I firmly believe it is precisely because of these considerations that the First Amendment bars in absolute, unequivocal terms any abridgment by the Government of freedom of speech and press.

Another reason for the particular offensiveness of this case is that the damages awarded Senator Goldwater were, except for $1, wholly punitive. Senator Goldwater neither pleaded nor proved any special damages, and the jury's verdict of $1 nominal compensatory damages establishes that he suffered little if any actual harm. In spite of this, Ginzburg and his magazine are being punished to the extent of being forced to pay Senator Goldwater $75,000 in punitive damages. It is bad enough when the First Amendment is violated to

compensate a person who has actually suffered a provable injury as a result of libelous statements; it is incomprehensible that a person who has suffered no provable harm can recover libel damages imposed solely to punish defendants who have exercised their First Amendment rights.

I would grant certiorari and reverse the Court of Appeals summarily.

No. 798. EDELMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jacob P. Lefkowitz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 414 F. 2d 539.

Rehearing Denied

No. 944. CARTER ET AL. *v.* WEST FELICIANA PARISH SCHOOL BOARD ET AL., *ante,* p. 290; and

No. 1003. WEST FELICIANA PARISH SCHOOL BOARD ET AL. *v.* CARTER ET AL., *ante,* p. 1032. Petitions for rehearing denied.

No. 972. SINGLETON ET AL. *v.* JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL., *ante,* p. 290. Petitions for rehearing of Board of Public Instruction of Alachua County, Florida, and Board of Public Instruction of Bay County, Florida, denied.

JANUARY 27, 1970

Miscellaneous Orders

No. —. RUSSO *v.* NEW JERSEY. Sup. Ct. N. J. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 55 N. J. 249, 261 A. 2d 129.

No. ——. ZICARELLI ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Michael A. Querques* and *Daniel E. Isles* for applicants. *Kenneth P. Zauber* and *Wilbur H. Mathesius* for New Jersey Commission of Investigation in opposition. Reported below: 55 N. J. 249, 261 A. 2d 129.

JANUARY 28, 1970

Dismissal Under Rule 60

No. 842. PROMENADE HOSIERY MILLS, INC. *v.* KIKI UNDIES CORP. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Maximilian Bader* and *I. Walton Bader* for petitioner. Reported below: 411 F. 2d 1097.

FEBRUARY 2, 1970

Miscellaneous Orders

No. 477. ATLANTIC COAST LINE RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 901.] An additional thirty minutes allotted to each side in this case. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.

No. 1136. NORTHCROSS ET AL. *v.* BOARD OF EDUCATION OF MEMPHIS, TENNESSEE, CITY SCHOOLS. C. A. 6th Cir. Motion to advance granted. Brief or briefs opposing petition for writ of certiorari shall be filed on or before February 16, 1970. *Jack Greenberg* and *James M. Nabrit III* on the motion. Reported below: 420 F. 2d 546.

No. —. CULLEN *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Application for bail presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. —. WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL. Emergency application for stay of judgment of United States District Court for the Southern District of Indiana presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted pending timely filing and disposition of an appeal. *Theodore L. Sendak,* Attorney General of Indiana, *Richard C. Johnson,* Chief Deputy Attorney General, and *William F. Thompson,* Assistant Attorney General, for applicant. *James Manahan* in opposition. Reported below: 307 F. Supp. 1362.

No. 1197, Misc. POWELL *v.* HART, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Herbert O. Reid, Arthur Kinoy, Robert L. Carter, Hubert T. Delany, William Kunstler, Frank D. Reeves,* and *Henry R. Williams* for petitioner. *Solicitor General Griswold* in opposition.

Probable Jurisdiction Noted or Postponed; Certiorari Before Judgment Granted

No. 513. IN RE SPENCER. Appeal from Sup. Ct. La. Motion of appellee, Judge R. B. Williams, to file additional record granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. *Jack P. F. Gremillion,* Attorney General of Louisiana, on the motion.

No. 914. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE *v.* SMITH, TRUSTEE OF PROPERTY OF NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., ET AL.;

No. 916. MANUFACTURERS HANOVER TRUST CO., TRUSTEE *v.* UNITED STATES ET AL.;

No. 920. CHASE MANHATTAN BANK, N. A., TRUSTEE *v.* PENN CENTRAL CO. ET AL.;

No. 1038. PENN CENTRAL CO. *v.* MANUFACTURERS HANOVER TRUST CO., TRUSTEE, ET AL.; and

No. 1057. UNITED STATES ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE ET AL. Petitions for certiorari before judgment to C. A. 2d Cir.; and

No. 915. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE *v.* UNITED STATES ET AL.;

No. 917. MANUFACTURERS HANOVER TRUST CO., TRUSTEE *v.* UNITED STATES ET AL.; and

No. 921. CHASE MANHATTAN BANK, N. A., TRUSTEE *v.* UNITED STATES ET AL. Appeals from D. C. S. D. N. Y.

Motion to expedite granted. Probable jurisdiction noted in Nos. 915, 917, and 921. Certiorari granted in Nos. 914, 916, 920, 1038, and 1057. Cases consolidated and a total of three hours allotted for oral argument. The bondholders and the New Haven trustee shall file their main briefs by February 26, 1970; and the briefs of Penn Central, the United States, the Interstate Commerce Commission, and the States of Connecticut and New York shall be filed by March 18, 1970. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters.

Lester C. Migdal and *Lawrence W. Pollack* for petitioner in No. 914, and for appellant in No. 915. *Whitney North Seymour* and *Albert X. Bader, Jr.*, for petitioner in No. 916, and for appellant in No. 917. *Wilkie Bushby*

and *Joseph Schreiber* for petitioner in No. 920, and for appellant in No. 921. *Hugh B. Cox, Roswell B. Perkins, Ulrich Schweitzer, Francis T. P. Plimpton, Samuel E. Gates,* and *Robert L. King* for petitioner in No. 1038. *Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Springer, Howard E. Shapiro, Robert W. Ginnane,* and *Leonard S. Goodman* for the United States et al. in No. 1057. They also filed a memorandum for the United States in Nos. 914, 915, 916, 917, 920, 921, and 1038. *Joseph Auerbach, James Wm. Moore, Robert G. Bleakney, Jr.,* and *Morris Raker* for Smith, respondent in Nos. 914, 916, and 920, and appellee in Nos. 915, 917, and 921. *Messrs. Griswold* and *Ginnane* on the motion to expedite. Reported below: Nos. 915, 917, and 921, 305 F. Supp. 1049. Nos. 914, 916, 920, 1038, and 1057, see 304 F. Supp. 793 and 1136.

Certiorari Granted. (See also Nos. 914, 916, 920, 1038, and 1057, *supra.*)

No. 963, Misc. ELKANICH *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 269 [*Price* v. *Georgia,* certiorari granted, 395 U. S. 975]. *Solicitor General Griswold* for the United States.

Certiorari Denied. (See also No. 832, *ante,* p. 554.)

No. 753. SABATINO, ADMINISTRATOR *v.* CURTISS NATIONAL BANK OF MIAMI SPRINGS; and

No. 959. CURTISS NATIONAL BANK OF MIAMI SPRINGS *v.* SABATINO, ADMINISTRATOR. C. A. 5th Cir. Certiorari denied. *Louis A. Sabatino,* petitioner, *pro se,* in No. 753, and respondent, *pro se,* in No. 959. *Lewis Horwitz* for respondent in No. 753 and for petitioner in No. 959. Reported below: 415 F. 2d 632.

No. 813. SCHROEDER *v.* PRUDENTIAL INSURANCE CO. OF AMERICA. C. A. 5th Cir. Certiorari denied. *Bert Bader* and *Richard T. Marshall* for petitioner. *R. Philip Schulze* and *William Duncan* for respondent. Reported below: 414 F. 2d 1316.

No. 815. MCCABE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 416 F. 2d 957.

No. 816. LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Plato E. Papps* and *Mozart G. Ratner* for petitioners. *Solicitor General Griswold* and *Arnold Ordman* for National Labor Relations Board, and *Guy Farmer, John A. McGuinn,* and *Joseph C. Wells* for United Aircraft Corp., respondents. Reported below: 135 U. S. App. D. C. 52, 416 F. 2d 809.

No. 819. WARE ET AL. *v.* ROYAL INDEMNITY CORP. ET AL. C. A. 10th Cir. Certiorari denied. *Robert J. Woolsey* for petitioners Ware et al. *Philip N. Landa* for respondents. Reported below: 411 F. 2d 1011.

No. 850. C & P PLAZA DEPARTMENT STORE, DIVISION OF C & P SHOPPING CENTER, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Paul C. Gartzke* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent National Labor Relations Board. Reported below: 414 F. 2d 1244.

No. 821. HARGRAVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Stanley E. Sacks* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 966.

No. 827. CHEROKEE LABORATORIES, INC., ET AL. *v.* PIERSON, EXECUTRIX. C. A. 10th Cir. Certiorari denied. *Claude H. Rosenstein* for petitioners. *James R. Eagleton* for respondent. Reported below: 415 F. 2d 85.

No. 817. MASTRIPPOLITO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: See 397 F. 2d 72.

No. 831. ZIRINSKY *v.* SHEEHAN ET AL. C. A. 8th Cir. Certiorari denied. *Bernard G. Heinzen* and *William J. Hempel* for petitioner. *Joe A. Walters* and *Harold J. Soderberg* for respondents Sheehan et al. Reported below: 413 F. 2d 481.

No. 834. GRAYSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 416 F. 2d 1073.

No. 840. LACOB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 416 F. 2d 756.

No. 838. WILLIAMS ET AL. *v.* WISCONSIN BARGE LINE, INC.; and

No. 839. WISCONSIN BARGE LINE, INC. *v.* WILLIAMS ET AL. C. A. 7th Cir. Certiorari denied. *Harold Gruenberg* for petitioners in No. 838. *V. Lee McMahon* for petitioner in No. 839 and for respondent in No. 838. Reported below: 416 F. 2d 28.

No. 849. BROOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *E. David Rosen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 414 F. 2d 804.

No. 855. LOUISIANA & ARKANSAS RAILWAY CO. *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. *W. Scott Wilkinson* and *Robert E. Zimmerman* for petitioner. *Robert H. Stahlheber, William R. McDowell,* and *Murray Hudson* for Missouri Pacific Railroad Co. et al., and *George Mathews* for Greater Baton Rouge Port Commission, respondents. Reported below: 415 F. 2d 751.

No. 857. MITCHELL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Irwin Prince* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for respondent. Reported below: 416 F. 2d 101.

No. 811. NELSON *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to file a supplemental exhibit granted. Certiorari denied. *Hume Cofer* and *John D. Cofer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 415 F. 2d 483.

No. 824. WALKER ET AL. *v.* COUNTY SCHOOL BOARD OF BRUNSWICK COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jack Greenberg, James M. Nabrit III, William Bennett Turner, S. W. Tucker,* and *Henry L. Marsh III* for petitioners. *Frederick T. Gray* for respondents. Reported below: 413 F. 2d 53.

No. 820. NEW YORK STATE BROADCASTERS ASSN., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Robert A. Dreyer* for petitioners. *Solicitor General Griswold, Assistant Attorney General McLaren, Henry Geller, John H. Conlin,* and *Lenore G. Ehrig* for the United States et al. *George S. Pappagianis,* Attorney General, for the State of New Hampshire as *amicus curiae* in support of the petition. Reported below: 414 F. 2d 990.

No. 841. SYLVANIA ELECTRIC PRODUCTS, INC. *v.* COLUMBIA BROADCASTING SYSTEM. C. A. 1st Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *John Hoxie* for petitioner. Reported below: 415 F. 2d 719.

No. 823. WILLIAMS ET AL. *v.* KIMBROUGH ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jack Greenberg, James M. Nabrit III, William Bennett Turner,* and *Murphy W. Bell* for petitioners. Reported below: 415 F. 2d 874.

No. 818. HAWAIIAN OKE & LIQUORS, LTD. *v.* JOSEPH E. SEAGRAM & SONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Joseph L. Alioto* and *Peter J. Donnici* for petitioner. *J. Garner Anthony* for Joseph E. Seagram & Sons, Inc., et al., *Herbert Y. C. Choy* for Barton Distilling Co. et al., and *Livingston Jenks* for McKesson & Robbins, Inc., respondents. Reported below: 416 F. 2d 71.

No. 846. WESTON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied. *James P. Jones, Robert T. Winston,* and *James C. Roberson* for petitioners. Reported below: 417 F. 2d 181.

No. 918. PROVIDENCE & WORCESTER CO., FORMERLY PROVIDENCE & WORCESTER RAILROAD CO. *v.* SMITH, TRUSTEE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Harold I. Meyerson* for petitioner. *Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Springer, Howard E. Shapiro, George Edelstein, Robert E. Ginnane,* and *Leonard S. Goodman* filed a memorandum for the United States et al.

Rehearing Denied

No. 1121, October Term, 1967. PETO *v.* MADISON SQUARE GARDEN CORP. ET AL., 390 U. S. 989, 1046. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 576. FAHEY *v.* UNITED STATES, *ante,* p. 957;

No. 599. NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* UNITED STATES, *ante,* p. 115;

No. 618. GOWDY *v.* UNITED STATES, *ante,* p. 960;

No. 360, Misc. GERARDI *v.* SIPOS ET AL., *ante,* p. 880;

No. 517, Misc. CASTLE *v.* UNITED STATES, *ante,* p. 975; and

No. 772, Misc. CROSS *v.* BRUNING, COUNTY CLERK, ET AL., *ante,* p. 970. Petitions for rehearing denied.

FEBRUARY 3, 1970

Miscellaneous Orders

No. —. SINATRA *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION ET AL. Application for stay pending appeal to United States Court of Appeals denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL are of the opinion that the application should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Bruce W. Kauffman* and *William T. Coleman, Jr.,* for applicant.

No. —. FIRST NATIONAL BANK OF CORNELIA *v.* JACKSON, SUPERINTENDENT OF BANKS OF GEORGIA, ET AL. Application for stay of order of United States District Court for the Northern District of Georgia presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *E. Barrett Prettyman, Jr.,* for applicant. *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Robert J. Castellani,* Assistant Attorney General, for Jackson, and *Wm. B. Gunter* for First National Bank of Gainesville, Georgia, et al., in opposition.

FEBRUARY 6, 1970

Miscellaneous Orders

No. —. WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL. D. C. S. D. Ind. Emergency motion to vacate or modify the stay order of February 2, 1970 [*ante,* p. 1055] denied. Motion to advance denied without prejudice to its renewal following filing of statement as to jurisdiction. *James Manahan* on the motion.

MR. JUSTICE DOUGLAS, dissenting.

After a trial on June 17 and 18, 1969, a three-judge District Court entered an order on July 28, 1969, in which it held the multi-member districting provisions of the present Indiana apportionment statutes unconstitutional as they applied to Marion County, Indiana. The State was given until October 1, 1969, to enact statutes redistricting the State so as to correct the constitutional infirmity. Upon the State's failure to enact such statutes, the District Court, on December 15, 1969, entered an order establishing legislative districts in the State. This Court, on February 2, 1970, granted a stay of the District Court's December 15 order pending the filing and disposition of an appeal from that order.

The respondents have now filed a motion to vacate the stay. I would grant the motion. The constitutionality of the present Indiana apportionment scheme was thoroughly briefed and argued in the three-judge District Court below. There is no reason to disturb the order of that court pending the disposition of the appeal by this Court. The date for the commencement of filing for the November 1970 election to the General Assembly is February 24, 1970. The Governor contends that without a stay the State will be forced to conduct the forthcoming election under the reapportionment plan of the District Court. By granting the stay, however,

this Court has equally forced the respondents to go through the election under the present scheme which was held unconstitutional by the District Court. Under these circumstances, I see no reason to stay the order of the District Court.

No. —. School District of Greenville County, South Carolina, et al. *v.* Whittenberg et al. C. A. 4th Cir. Application for temporary stay presented to The Chief Justice, and by him referred to the Court, denied. *J. Covington Parham, Jr.,* and *C. Thomas Wyche* for applicants. Reported below: See 424 F. 2d 195.

No. 1142. Elkanich *v.* United States. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1057.] It is ordered that *Charles A. Miller, Esquire,* of Washington, District of Columbia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

February 10, 1970

Miscellaneous Orders

No. —. School District of Darlington County, South Carolina, et al. *v.* Stanley et al. C. A. 4th Cir. Application for temporary stay presented to The Chief Justice, and by him referred to the Court, denied. Reported below: See 424 F. 2d 195.

No. —. In re Rosenbaum et al. D. C. D. C. Application for stay presented to The Chief Justice, and by him referred to the Court, denied. *Robert L. Weinberg* for applicants.

FEBRUARY 13, 1970

Dismissals Under Rule 60

No. 330. UNITED STATES *v.* EISDORFER. Appeal from D. C. E. D. N. Y. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. *Michael J. Kunstler* for appellee. Reported below: 299 F. Supp. 975.

No. 637. UNITED STATES *v.* STEWART. Appeal from D. C. N. D. Cal. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 306 F. Supp. 29.

Reporter's Note

Commencing with this volume, opinions in chambers of individual Justices are, pursuant to authorization, being published in the United States Reports. The in-chambers opinions that appear herein were issued since the end of the October Term, 1968. The next page is purposely numbered 1201. The numbers between 1066 and 1201 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM END OF OCTOBER TERM, 1968, THROUGH JANUARY 30, 1970

ATLANTIC COAST LINE RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.

ON APPLICATION FOR STAY

Decided July 16, 1969

The Federal District Court enjoined the enforcement of a state court injunction restraining union picketing in a railway labor dispute. In view of the long-standing policy embodied in 28 U. S. C. § 2283 that a federal court, with limited exceptions, may not enjoin state court proceedings, and the difficult and important question presented here, the District Court's injunction is stayed pending disposition of a petition for certiorari to be expeditiously filed in this Court.

Dennis G. Lyons, Frank X. Friedmann, Jr., David M. Foster, John W. Weldon, and *John S. Cox* on the application.

Allan Milledge and *Richard L. Horn* in opposition.

MR. JUSTICE BLACK, Circuit Justice.

This is an application presented to me by the railroad to stay enforcement of an injunction issued by the United States District Court for the Middle District of Florida against the enforcement of a state court injunction restraining the union from picketing around the Moncrief Yard in Florida, a classification yard owned by the Seaboard Coast Line, the successor company to the Atlantic Coast Line Railroad. The picketing is being carried on because of a strike against the Florida East Coast Railway by its employees; there is

no dispute between the Seaboard Coast Line or the Atlantic Coast Line and their employees. The union wishes to picket the Moncrief Yard, however, because many of the Florida East Coast cars are switched into it in order to carry on that railroad's business.

At the last Term of this Court we had before us a question involving the picketing of the Jacksonville Terminal Company at Jacksonville, Florida, owned and operated by the Florida East Coast, Seaboard, Atlantic Coast Line, and Southern railroads. There an injunction was granted in the Florida state courts to restrain the union from picketing the entire terminal. This Court in a 4-to-3 opinion decided that the picketing was protected by federal law and therefore could not be enjoined by Florida. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369 (1969). The union here substantially relies on that case, insisting that it has the same federally protected right to picket at the Moncrief Yard that this Court held it could exercise at the Jacksonville Terminal. The District Court here enjoined the railroad from utilizing a state court injunction against picketing at Moncrief and refused the railroad's request to stay the effectiveness of its injunction pending appeal. The Court of Appeals, however, did grant an application to suspend the effectiveness of the District Court injunction for ten days, which expires tomorrow—July 17. The question before me is whether I should suspend the effectiveness of that injunction pending a review of the District Court's judgment.

Since 1793 a congressional enactment, now found in 28 U. S. C. § 2283, has broadly provided that federal courts cannot, with certain limited exceptions, enjoin state court proceedings. Whether this long-standing policy is violated by the District Court's injunction here presents what appears to me to be a close, highly complex, and difficult question. Not only does it present

a difficult problem but one of widespread importance, the solution of which might broadly affect the economy of the State of Florida, the United States, and interstate commerce. Under these circumstances I do not feel justified in permitting the District Court injunction to be enforced, changing the status quo at Moncrief Yard, until this Court can act for itself on the questions that will be presented in the railroad's forthcoming petition for certiorari. For this reason an order will be issued staying the enforcement of the District Court injunction pending disposition of the petition for certiorari in this Court. To accomplish this result without undue delay it will be the duty of the railroad to expedite all actions necessary to present its petition for certiorari here.

LEVY *v.* PARKER, WARDEN, ET AL.

ON APPLICATION FOR BAIL

Decided August 2, 1969

Application by military prisoner for release on bail pending determination on merits of habeas corpus petition filed in District Court is granted. Although bail had been denied by the lower courts and the Circuit Justice, referral to the full Court is not immediately possible, since the Court is in recess and the Justices are widely scattered. There are substantial problems of whether Article 134 of the Uniform Code of Military Justice, which, *inter alia,* applicant had been convicted of violating, satisfies the standards of vagueness required by due process, and of First Amendment rights. While applicant's sentence will expire shortly, a live controversy will continue and applicant should be released on bail until the full Court can pass on the application.

Charles Morgan, Jr., Reber F. Boult, Jr., Morris Brown, Henry W. Sawyer III, Anthony G. Amsterdam, Alan H. Levine, Eleanor Holmes Norton, and *Melvin L. Wulf* on the application.

Solicitor General Griswold in opposition.

MR. JUSTICE DOUGLAS.

Applicant has been sentenced to three years' imprisonment after conviction of one charge each for violating Articles 90, 133, and 134 of the Uniform Code of Military Justice, 10 U. S. C. §§ 890, 933, 934. He has exhausted all of his military remedies and has now filed a petition for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania. He seeks release on bail pending determination of the merits. The District Court, the Court of Appeals, and the Circuit Justice, MR. JUSTICE BRENNAN, have each denied bail. This application to me therefore carries a special burden, for we very seldom grant an order that has been denied

by the Circuit Justice. Indeed the practice is to refer such renewed application to the full Conference of this Court. We are now in recess and widely scattered; hence referral to the Conference is not immediately possible.

Some of the problems tendered seem substantial to me. One charge on which applicant stands convicted rests on Article 134 which makes a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." In *O'Callahan* v. *Parker,* 395 U. S. 258, which the lower courts did not have before them when they denied bail, we reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Apart from the question of vagueness is the question of First Amendment rights. While in the Armed Services, applicant spoke out against the war in Vietnam. The extent to which First Amendment rights available to civilians are not available to servicemen is a new and pressing problem.

It is true that applicant's sentence will expire on August 14, 1969. But in light of *Carafas* v. *LaVallee,* 391 U. S. 234, I would not think that the running of the sentence would moot the petition for habeas corpus. A live controversy will continue; and I have concluded that this applicant should be released on bail until the full Court can pass on the application. For, in my view, substantial issues are presented on the merits.

The applicant, Howard B. Levy, is hereby ordered admitted to bail pending final determination of this application by the full Court when it convenes October 6, 1969.

Bail is hereby fixed in the following amount: $1,000.

Ordered this the 2d day of August, 1969.

SCAGGS *v.* LARSEN, COMMANDING GENERAL, ET AL.

ON MOTION FOR STAY

Decided August 5, 1969

Motion by Army reservist for release from military custody pending Court of Appeals' review of District Court's denial of petition for habeas corpus is granted. Reservist's claims that the order requiring him to serve 17 months beyond his enlistment contract was without notice and opportunity to be heard, and in violation of the terms of his enlistment contract, are within the scope of the writ of habeas corpus. There is no statutory provision for a hearing, and the issue is substantial and should be resolved.

Lloyd E. McMurray on the motion.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is a phase of review of the action of respondents in ordering movant to active duty in the United States Army Reserve for a period of approximately 17 months beyond the term of his enlistment contract. His enlistment expires in September 1969. He was directed in January 1969 to join a unit of the Ready Reserve and attend regular drills. If his allegations are to be believed, he made a diligent effort to comply but was rejected, since his enlistment period would expire in September 1969. Up until that time he had met all the requirements of the Army Ready Reserve. He claims that the order thereafter entered requiring him to serve about 17 months beyond the end of his enlistment contract was punitive and unauthorized.

He therefore filed a petition for habeas corpus with the District Court, complaining that the crucial step taken when he was ordered to active duty was taken without notice and an opportunity to be heard in viola-

tion of procedural due process and also was in violation of the terms of his enlistment contract. The District Court denied the petition, and that decision is presently awaiting review by the Court of Appeals. Scaggs seeks by this motion release from military custody pending that review.

He rests on 28 U. S. C. § 2241 [1] to support his claim that the District Court has jurisdiction of the habeas corpus action.

It has been argued in other cases that the word "custody" indicates that § 2241 does not reach cases where military authority is being contested by civilians at a pre-induction stage [2] or by servicemen not yet convicted of an offense who entered the Armed Forces "volun-

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[1] "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

. . . . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

[2] With the apparent lone exception of *Ex parte Fabiani,* 105 F. Supp. 139, the federal courts have held that habeas corpus is not available prior to induction. See, *e. g., DeRozario* v. *Commanding Officer,* 390 F. 2d 532; *Lynch* v. *Hershey,* 93 U. S. App. D. C. 177, 208 F. 2d 523, cert. denied, 347 U. S. 917; *Petersen* v. *Clark,* 285 F. Supp. 700. Pre-induction judicial review is more frequently sought by way of injunction, mandamus, or declaratory judgment. See *Oestereich* v. *Selective Service Bd.,* 393 U. S. 233; *Wolff* v. *Selective Service Bd.,* 372 F. 2d 817; *Townsend* v. *Zimmerman,* 237 F. 2d 376.

tarily." [3] I take the opposed view, though the question has not been authoritatively decided. However that may be, § 2241 is not a measure of the constitutional scope of the guarantee in Art. I, § 9, of the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Great Writ was designed to protect every person from being detained, restrained, or confined by any branch or agency of government. In these days it serves no higher function than when the Selective Service Boards (*Oestereich* v. *Selective Service Bd.*, 393 U. S. 233) or the military act lawlessly. I conclude, in other words, that in spite of the prejudice that exists against review by civilian courts of military action, habeas corpus is in the tradition of *Oestereich* wherever lawless or unconstitutional action is alleged.

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[3] It is settled that illegal induction is properly attacked by a petition for a writ of habeas corpus. *Oestereich* v. *Selective Service Bd., supra.* The remaining debate concerns cases challenging the legality of continued military service that has been entered under a contract of enlistment. Cases denying jurisdiction to issue a writ of habeas corpus where the petitioner enlisted in the military forces include *Fox* v. *Brown,* 402 F. 2d 837; *United States ex rel. McKiever* v. *Jack,* 351 F. 2d 672; *McCord* v. *Page,* 124 F. 2d 68; *In re Green,* 156 F. Supp. 174. Others upholding such jurisdiction are *Hammond* v. *Lenfest,* 398 F. 2d 705; *Crane* v. *Hedrick,* 284 F. Supp. 250; cf. *Jones* v. *Cunningham,* 371 U. S. 236, 240; *Orloff* v. *Willoughby,* 345 U. S. 83, 94; *Tarble's Case,* 13 Wall. 397. In *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F. 2d 371, the petitioner, a member of the Army Reserve, sought exemption from active duty on the basis of personal hardship. Although the court held that "[a]n inquiry into the legality of this restraint would be within the traditional function of the writ," *id.,* at 373, it further held that "[w]hether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus under 28 U. S. C. § 1361." *Id.,* at 374.

As stated, the gravamen of the complaint in this case is that the critical steps forcing petitioner to serve beyond his enlistment contract were taken without notice and opportunity on his part to be heard. The statute makes no provision for a hearing. Neither did the statute in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, authorizing the deportation of aliens. But the Court said that constitutional requirements made a hearing necessary.

Neither deportation nor a military order to active duty is in form penal. But the requirement that a man serve beyond his enlistment contract may be as severe in nature as expulsion from these shores. At least the issue presented is substantial and should be resolved.

It is hereby ordered that petitioner be, and he is hereby, released on his own recognizance from any and all custody of the United States Army or the United States Army Reserve, and from compliance with the orders heretofore issued, requiring that he report for active duty at Fort Ord, California, on July 27, 1969. This order shall remain in effect until a determination of the cause on the merits by the Court of Appeals.

ODEN ET AL. *v.* BRITTAIN ET AL.

ON APPLICATION FOR INJUNCTION

Decided August 13, 1969

Application for injunction to prevent City of Anniston from holding election to choose members of new city council in accordance with state statute authorizing change from commission to council-manager form of government denied. In this case, which is factually distinguishable from *Allen* v. *State Board of Elections*, 393 U. S. 544, the election will not result in the severe irreparable harm needed to justify an injunction; nor has the three-judge panel designated to hear the case as yet considered the injunction request. Since there is room for disagreement on this substantial problem, application is denied without prejudice to request relief from other Court members.

Oscar W. Adams, Jr., Jack Greenberg, James M. Nabrit III, and *Norman C. Amaker* on the application.

MR. JUSTICE BLACK, Circuit Justice.

This is an application presented to me as Circuit Justice for an injunction to prevent the City of Anniston, Alabama, from holding a local election on September 2, 1969—merely a few days from now—to select five members of a newly formed city council in accordance with a state law which authorizes Anniston to change from a commission to a council-manager form of government. See City Manager Act of 1953, Ala. Code App. § 1124 *et seq.* (1958).

The applicants, all Negro citizens of Anniston, claim that the election, if held, would violate the terms of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. I), which provides that certain Southern States or political subdivisions thereof may not make any change in the procedure of elections in effect as of November 1, 1964, unless the change is either

(1) submitted to the United States Attorney General in Washington for review and he does not object, or (2) submitted to the United States District Court for the District of Columbia and that court after a hearing permits the change to be made. This procedure is of course a highly unusual departure from the basic rights of local citizens to govern their own affairs. In this case all Anniston is preparing to do is to change from a three-member commission, elected at large, to a five-member council, also elected at large.

Last Term this Court decided, over my dissent, a case which lends considerable support to the applicants' request that no election be held until officials in Washington approve it. See *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). Even were I to accept the majority's view in that case, I do not feel that decision necessarily controls the present situation which presents many material factual differences. More importantly I remain firmly convinced that the Constitution forbids this unwarranted and discriminatory intervention by the Federal Government in state and local affairs. See *South Carolina* v. *Katzenbach,* 383 U. S. 301, 355–362 (1966) (opinion of BLACK, J.).

Intervention by the federal courts in state elections has always been a serious business. Here the city has already incurred considerable expense in preparing for an election to be held within the next three weeks. If this election were held, applicants could later bring suit to have it set aside. I thus do not see why these plans should be stopped in midstream in a case in which the legal issues are unclear, when the election cannot result in the severe irreparable harm necessary to justify the issuance of the extraordinary remedy of an injunction by an individual Justice.

In addition to the foregoing factors, the three-judge panel designated to hear this case has not yet considered

the request for an injunction. While the applicants allege that the panel cannot be convened prior to the date set for the election, they have not shown that the possibilities of obtaining an immediate hearing before some three-judge court have been exhausted. There is no indication that the assistance of the Chief Judge of the Fifth Circuit, who is statutorily required by 28 U. S. C. § 2284 (1) to designate the members of the panel, has been sought. In this situation I have considerable doubt as to my authority to grant the requested relief. See Sup. Ct. Rules 18 (2), 27, and 51 (2). Therefore I decline to issue the requested injunction. Since, however, the problem is substantial and there is room for disagreement, I deny the application without prejudice to the rights of the applicants to request relief from other members of this Court. See Sup. Ct. Rule 50 (5).

Application denied without prejudice.

ROSADO ET AL. *v.* WYMAN ET AL.

ON APPLICATION FOR STAY AND OTHER RELIEF

Decided August 20, 1969

Application for interim stay and other relief should be passed on by full Court, since factors involved in granting a stay call for the Court's collective judgment, the Court has denied a similar stay at a different stage of the case, and an individual Justice cannot order an accelerated schedule that is importantly related to the stay request.

See: 414 F. 2d 170.

Lee A. Albert and *Robert B. Borsody* on the application.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Amy Juviler,* Assistant Attorney General, and *Philip Weinberg* in opposition.

MR. JUSTICE HARLAN, Circuit Justice.

While I am of the view that this case is not unlikely to be found a worthy candidate for certiorari, I am also of the opinion that the present application for an interim stay and other relief should be passed along to the full Court for consideration.

The latter conclusion follows from my belief that the factors involved in determining whether a stay should issue are such as to call for the collective judgment of the members of the Court and not merely that of an individual Justice; from the circumstance that the Court itself has already denied a similar stay application, albeit at a stage when the case was in a different posture; and from the fact that an individual Justice has no power to order an accelerated schedule for briefing and

hearing on the underlying merits of the case, an aspect of the present application that seems to me importantly related to the request for a stay.

If applicants' petition for certiorari is promptly filed, that should ensure its consideration and disposition by the Court at its first Conference in October. At that time, I shall, pursuant to Rule 50 (6), refer this application to the Court for simultaneous consideration and action.

Opinion in Chambers

KEYES ET AL. *v.* SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO, ET AL.

ON APPLICATION FOR VACATION OF STAY

Decided August 29, 1969

Application for vacation of Court of Appeals' stay of preliminary injunction entered by District Court that had the effect of requiring partial implementation of a school desegregation plan is granted, the Court of Appeals' order is vacated, and the District Court's order is directed to be reinstated. A district court's order granting a preliminary injunction should not be disturbed by a reviewing court unless the grant was an abuse of discretion, which the Court of Appeals did not find here. Nor does the desire to develop public support for the desegregation plan that the Court of Appeals manifested constitute justification for delay in the plan's implementation.

See: 303 F. Supp. 279 and 289.

Jack Greenberg and *Conrad K. Harper* on the application.

Richard C. Cockrell, Thomas E. Creighton, and *Benjamin L. Craig* in opposition.

MR. JUSTICE BRENNAN.

In this school desegregation case I am asked to vacate a stay by the Court of Appeals for the Tenth Circuit of a preliminary injunction entered by the District Court for the District of Colorado. The preliminary injunction has the effect of requiring partial implementation of a school desegregation plan prepared by School District No. 1, Denver, Colorado, and then rescinded by that Board after changes in membership followed a school board election.

The Court of Appeals issued the stay pending decision of an appeal taken by the School Board from the preliminary injunction. I have concluded that the stay was

improvidently granted and must be vacated. An order of a district court granting or denying a preliminary injunction should not be disturbed by a reviewing court unless it appears that the action taken on the injunction was an abuse of discretion. *Alabama* v. *United States,* 279 U. S. 229 (1929). Where a preliminary injunction has issued to vindicate constitutional rights, the presumption in favor of the District Court's action applies with particular force. The Court of Appeals did not suggest that the District Court abused its discretion. On the contrary, the Court of Appeals expressly stated that the District Court's findings of fact "represent a painstaking analysis of the evidence presented. They establish a racial imbalance in certain named schools. From the facts found, the district court either made a conclusion or drew an inference, that de jure segregation exists in named schools. Its grant of the temporary injunction is grounded on the premise that there is de jure segregation."

The Court of Appeals nevertheless stated that it "must decide whether the public interest is best served by the maintenance of the status quo or by the acceptance of the injunctive order," since the time before the Denver schools were to open on September 2 was insufficient to permit an examination of the record to determine whether the District Court correctly held that this was a case of *de jure* segregation. It may be that this inquiry was appropriate notwithstanding the presumption in favor of continuing the preliminary injunction in force. But the reasons given by the Court of Appeals for striking the balance in favor of the stay clearly supplied no support in law for its action. It was not correct to justify the stay on the ground that constitutional principles demanded only "that desegregation be accomplished with all convenient speed." "The time for mere 'deliberate speed' has run out . . . ." *Griffin* v. *County*

School Board, 377 U. S. 218, 234 (1964). "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*" *Green* v. *County School Board,* 391 U. S. 430, 439 (1968). The obligation of the District Court was to assess the effectiveness of the School Board's plans in light of that standard. *Ibid.* Since the Court of Appeals not only was unable to say that the District Court's assessment was an abuse of discretion, but agreed that it "may be correct," the stay of the preliminary injunction was improvident.

The Court of Appeals also seems to have based its action on the premise that public support for the plan might be developed if any order awaited final hearing; the Court of Appeals stated that a plan of desegregation "must depend for its success on the understanding cooperation of the people of the area." But the desirability of developing public support for a plan designed to redress *de jure* segregation cannot be justification for delay in the implementation of the plan. *Cooper* v. *Aaron,* 358 U. S. 1 (1958).

I therefore grant the application, vacate the order of the Court of Appeals, and direct the reinstatement of the order of the District Court.

ALEXANDER ET AL. *v.* HOLMES COUNTY BOARD OF EDUCATION ET AL.

ON APPLICATION TO VACATE SUSPENSION OF ORDER

Decided September 5, 1969

On July 3, 1969, the Court of Appeals entered an order requiring the submission of new plans to be effective this fall to accelerate desegregation in 33 Mississippi school districts. On August 28, on motion of the Department of Justice, that court suspended the July 3 order and postponed the date for submission of new plans to December 1, 1969. The application to vacate the suspension of the July 3 order is denied. Although MR. JUSTICE BLACK believes that the "all deliberate speed" standard is no longer relevant and that unitary school systems should be instituted without further delay, he recognizes that in certain respects his views go beyond anything the Court has held, and he reluctantly upholds the lower court's order.

See: 417 F. 2d 852.

Jack Greenberg, James M. Nabrit III, and *Norman C. Amaker* on the application.

William A. Allain, Assistant Attorney General of Mississippi, and *John C. Satterfield* in opposition.

Solicitor General Griswold filed a memorandum for the United States.

MR. JUSTICE BLACK, Circuit Justice.

For a great many years Mississippi has had in effect what is called a dual system of public schools, one system for white students only and one system for Negro students only. On July 3, 1969, the Court of Appeals for the Fifth Circuit entered an order requiring the submission of new plans to be put into effect this fall to accelerate desegregation in 33 Mississippi school districts. On August 28, upon the motion of the Department of Justice and the recommendation of the Secretary of

Health, Education, and Welfare, the Court of Appeals suspended the July 3 order and postponed the date for submission of the new plans until December 1, 1969. I have been asked by Negro plaintiffs in 14 of these school districts to vacate the suspension of the July 3 order. Largely for the reasons set forth below, I feel constrained to deny that relief.

In *Brown* v. *Board of Education,* 347 U. S. 483 (1954), and *Brown* v. *Board of Education,* 349 U. S. 294 (1955), we held that state-imposed segregation of students according to race denied Negro students the equal protection of the laws guaranteed by the Fourteenth Amendment. *Brown I* was decided 15 years ago, but in Mississippi as well as in some other States the decision has not been completely enforced, and there are many schools in those States that are still either "white" or "Negro" schools and many that are still *all*-white or *all*-Negro. This has resulted in large part from the fact that in *Brown II* the Court declared that this unconstitutional denial of equal protection should be remedied, not immediately, but only "with all deliberate speed." Federal courts have ever since struggled with the phrase "all deliberate speed." Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. "All deliberate speed" has turned out to be only a soft euphemism for delay.

In 1964 we had before us the case of *Griffin* v. *School Board,* 377 U. S. 218, and we said the following:

> "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." *Id.,* at 234.

That sentence means to me that there is no longer any excuse for permitting the "all deliberate speed" phrase to delay the time when Negro children and white children will sit together and learn together in the same public schools. Four years later—14 years after *Brown I*—this Court decided the case of *Green* v. *County School Board of New Kent County,* 391 U. S. 430 (1968). In that case MR. JUSTICE BRENNAN, speaking for a unanimous Court, said:

> " 'The time for mere "deliberate speed" has run out . . . .' The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*" *Id.,* at 438–439.
>
> "The Board must be required to formulate a new plan . . . which promise[s] realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.,* at 442.

These cases, along with others, are the foundation of my belief that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one, receiving and teaching students without discrimination on the basis of their race or color. In my opinion the phrase "with all deliberate speed" should no longer have any relevancy whatsoever in enforcing the constitutional rights of Negro students. The Fifth Circuit found that the Negro students in these school districts are being denied equal protection of the laws, and in my view they are entitled to have their constitutional rights vindicated now without postponement for any reason.

Although the foregoing indicates my belief as to what should ultimately be done in this case, when an indi-

vidual Justice is asked to grant special relief, such as a stay, he must consider in light of past decisions and other factors what action the entire Court might possibly take. I recognize that, in certain respects, my views as stated above go beyond anything this Court has expressly held to date. Although *Green* reiterated that the time for all deliberate speed had passed, there is language in that opinion which might be interpreted as approving a "transition period" during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems.* Although I feel there is a strong possibility that the full Court would agree with my views, I cannot say definitely that it would, and therefore I am compelled to consider the factors relied upon in the courts below for postponing the effective date of the original desegregation order.

On August 21 the Department of Justice requested the Court of Appeals to delay its original desegregation timetable, and the case was sent to the District Court for hearings on the Government's motion. At those

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*"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation." *Green* v. *County School Board, supra,* at 439.

"Where [freedom of choice] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. . . .

"The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. . . ." *Id.,* at 440–441.

hearings both the Department of Justice and the Department of Health, Education, and Welfare took the position that time was too short and the administrative problems too difficult to accomplish a complete and orderly implementation of the desegregation plans before the beginning of the 1969–1970 school year. The District Court found as a matter of fact that the time was too short, and the Court of Appeals held that these findings were supported by the evidence. I am unable to say that these findings are not supported. Therefore, deplorable as it is to me, I must uphold the court's order which both sides indicate could have the effect of delaying total desegregation of these schools for as long as a year.

This conclusion does not comport with my ideas of what ought to be done in this case when it comes before the entire Court. I hope these applicants will present the issue to the full Court at the earliest possible opportunity. I would then hold that there are no longer any justiciable issues in the question of making effective not only promptly but at once—*now*—orders sufficient to vindicate the rights of any pupil in the United States who is effectively excluded from a public school on account of his race or color.

It has been 15 years since we declared in *Brown I* that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause. As this record conclusively shows, there are many places still in this country where the schools are either "white" or "Negro" and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute. I fear that this long denial of constitutional rights is due in large part to the phrase "with all deliberate speed." I would do away with that phrase completely.

Application to vacate suspension of order denied.

MATTHEWS ET AL. *v.* LITTLE, CITY CLERK OF ATLANTA

ON APPLICATION FOR INJUNCTION

Decided September 9, 1969

Applicants claim that a recent Atlanta ordinance will exclude political candidates who cannot afford the filing fees it fixes, and apply to enjoin an election on the ground that the ordinance violates § 5 of the Voting Rights Act of 1965, and on the ground (upheld by the District Court) that it violates the Equal Protection Clause. Since the proximity of the election practicably forecloses this Court's pre-election decision on the substantial constitutional issue involved, and a court-ordered election postponement could be disruptive, an injunction is denied, but the applicants are temporarily relieved from paying the fee, and the candidates' filing time is extended.

Frederic S. LeClercq on the application.

MR. JUSTICE BLACK, Circuit Justice.

Applicant Ethel Mae Matthews is a prospective candidate for alderman in an Atlanta, Georgia, municipal election now scheduled for October 7. Applicant Julia Shields is a duly qualified Atlanta voter. Both applicants claim that their constitutional and statutory rights are abridged by the exclusion of potential candidates for local offices who cannot afford the filing fees fixed by an Atlanta municipal ordinance of August 26, 1969. They challenge the ordinance on the ground that fees sought to be exacted violate the Equal Protection Clause of the Fourteenth Amendment and § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. I). The constitutional question appears to me to be a substantial one which calls for decision by the full Court. This question is all the more serious because a three-judge district court decided in this case that the collection of the filing fees fixed by the ordinance

does unconstitutionally deny equal protection of the laws. The city election is presently set for October 7, and, although this Court meets October 6, it will not have time to consider and decide the merits of the constitutional claim before the election is to be held. The result is that applicants cannot have their case decided unless some provision is made to take care of the problem. A court-ordered postponement of the election could have a serious disruptive effect. On the other hand, the refusal or inability to pay fees deemed unconstitutional might keep serious candidates from running, thus depriving Atlanta voters of an opportunity to select candidates of their choice. Both of these undesirable consequences should be avoided if possible, and to some extent they can be. This can be done by temporarily relieving applicants from payment of the challenged fees until the entire Court has had an opportunity to pass on all the questions raised. Should the applicants' claims be accepted by the Court, they would then never be required to pay the challenged fees. Should their claims be rejected, they would then be subject to the fees. Because the time for candidates to file notice of their candidacy is scheduled to expire on September 10, 1969, a necessary element of this order is that the city should extend the date for candidates to file notice of their candidacy at least until Tuesday, September 16, 1969. This disposition permits Atlanta to proceed with the election as now scheduled. In the alternative, Atlanta officials could decide of their own accord to postpone the municipal election until after this Court has had an opportunity to hear and decide the issues involved.

It is so ordered.

FEBRE *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

Decided September 10, 1969

Application for bail pending appeal from conviction held in abeyance and matter remanded to Circuit Court Judge. The District Court denied bail without making the written explanation mandated by Fed. Rule App. Proc. 9 (b), and it does not appear why the Court of Appeals did not remand the matter to the District Court for compliance with the Rule as it had done in case of a codefendant's similar bail application.

Solicitor General Griswold for the United States.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

This is an application for bail pending applicant's appeal to the Court of Appeals from a narcotics conviction.

The Government, while not contending that the appeal is frivolous or taken for purposes of delay, seeks to support the lower court's denial of bail on the score that it was found that applicant, if released on bail, would present a danger to the community, and further that he was a poor bail risk. See 18 U. S. C. § 3148; Fed. Rule Crim. Proc. 46 (a)(2).

My difficulty with this position is twofold: First, so far as the papers reveal, the District Court in denying bail did not "state in writing the reasons" for its action, as required by Fed. Rule App. Proc. 9 (b). Second, it does not appear why the matter was not remanded to the District Court for compliance with Rule 9 (b), as the Court of Appeals had done in the case of an earlier similar bail application by a codefendant; and neither Judge Smith, nor Judge Anderson on reapplication, otherwise explained his refusal to disturb the District Court's determination. With no record of the proceed-

ings below before me, I cannot assume, as the Government would have me do, that either Judge Smith or Judge Anderson regarded the District Court's findings on remand respecting the codefendant as equally applicable to this applicant.

While I have always been particularly reluctant to interfere with a denial of bail below pending appeal to the Court of Appeals, I do not think that I should act in this instance without more light from the lower courts. I shall therefore remand the matter to Judge Smith or Judge Anderson, as the case may be, for appropriate explication, meanwhile holding this application in abeyance.

JONES *v.* LEMOND, COMMANDING OFFICER, ET AL.

ON APPLICATION FOR STAY

Decided September 15, 1969

Applicant, who had been court-martialed for unauthorized absence, and having exhausted all military administrative remedies, sought release by habeas corpus in the District Court, claiming that the improper processing of his application for discharge from military service should have barred his conviction. A broad and sweeping stay was denied by the Court of Appeals. Pending disposition of applicant's appeal on the merits of this case, which involves the contention that the matter of conscientious objection is one of First Amendment proportions, a stay is granted directing that applicant be confined in "open restricted barracks" and not in the brig where, if his allegations are true, his life may be endangered.

See: 18 U. S. C. M. A. 513, 40 C. M. R. 225.

Donald A. Jelinek on the application.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant, who has been convicted by the military authorities for unauthorized absence, brought suit in the District Court for release by habeas corpus and for other ancillary relief. He apparently has exhausted all military administrative remedies, the Court of Military Appeals having denied him any relief.

His conflict with the Navy arose out of his desire to be discharged as a conscientious objector, a status he claims to have acquired some five months after his enlistment. Department of Defense Directive 1300.6, August 21, 1962, revised May 10, 1968, provides for processing such applications and states that pending decision on the application and "to the extent practicable," the applicant "will be employed in duties which involve the minimum conflict with his asserted beliefs."

According to the allegations, applicant made repeated attempts for 37 days to file and process his application

for discharge as a conscientious objector and, if the allegations are sustained, was unable either to make a filing or obtain a hearing. He thereupon left his place of duty without authorization, thereafter surrendering himself. Once again, if his allegations are believed, he was unable to make a filing or obtain a hearing on his request for discharge as a conscientious objector. He thereupon escaped from Navy custody to obtain legal counsel who surrendered him to Navy authorities while the conscientious objector application is pending.

The basic question of law is whether improper processing of an application for discharge as a conscientious objector is a defense to court-martial proceedings.

The question will in time be decided by the Court of Appeals or by the Supreme Court as applicant has appealed from the dismissal of his petition by the District Court.

The issue tendered in this case—and in others before the Supreme Court—is that the matter of conscientious objection is of First Amendment dimensions whether based on religion, philosophy, or one's views of a particular "war" or armed conflict. Whether that view will obtain, no one as yet knows. But if it does, the question now tendered will be of great constitutional gravity.

I express no views on the merits. But I think a substantial question is presented. A stay of a broad and sweeping character has been denied by the Court of Appeals and I would concur but for one circumstance. Confinement of applicant to the brig is apparently contemplated; and, again, if his allegations are believed, sending him there may endanger his life in view of the cruel regime which obtains in that prison.

Accordingly I have decided to grant a stay directing respondents to confine applicant in the so-called "open restricted barracks" and restraining them from confining applicant in the brig, pending disposition of this appeal on the merits.

BRUSSEL *v.* UNITED STATES

ON APPLICATION FOR BAIL OR OTHER RELIEF

Decided October 10, 1969

Applicant was held in civil contempt, despite his claim of Fifth Amendment privilege, apparently on the ground of the corporate-records doctrine, for his refusal following denial of immunity from prosecution to answer questions before a grand jury and produce corporate records. He made emergency application for bail to the Court of Appeals and applied to the Circuit Justice for the same relief. Applicant is released on his own recognizance pending disposition of his appeal by the Court of Appeals. The circumstances here warrant departure from the usual practice of denying relief where a request for the same relief has not been ruled on by the court below, viz., the corporate-records doctrine can be invoked only against a custodian of the records but no evidence appears here that applicant was the custodian or connected with the corporations; no substantial risk was shown that applicant would not appear at further proceedings; and applicant assertedly has no criminal record.

Ephraim London on the application.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicant was held in civil contempt by the United States District Court for the Northern District of Illinois on October 7, 1969, and was immediately confined to the Cook County jail. On the same day, the District Court denied him bail pending appeal. On October 8, applicant filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from the contempt order, and made an emergency application for bail. The Court of Appeals ordered the United States Attorney to respond to that application by October 13, next Monday. On October 9, the present application was made to me in my capacity as Circuit Justice. Though it is our usual practice to deny such requests

when the courts of appeals have not yet ruled on an application for the same relief, I am constrained by the unusual circumstances of this case to depart from that practice.

Applicant was subpoenaed to appear before a federal grand jury in Chicago and to bring with him certain corporate records. Prior to his appearance before the grand jury, applicant requested, but was denied, immunity from prosecution. Before the grand jury he was asked if he was an officer of the corporations involved. To this and other questions applicant declined to answer, invoking his privilege against self-incrimination. He was taken before the District Judge, who overruled his claim of Fifth Amendment privilege, apparently on the ground of the corporate-records doctrine, *Wilson* v. *United States,* 221 U. S. 361 (1911). When applicant persisted in refusing to answer, the court ordered him jailed for civil contempt.

Curcio v. *United States,* 354 U. S. 118 (1957), raises serious questions concerning the validity of the contempt order. In that case, a union official, admittedly the custodian of the union's records, refused on Fifth Amendment grounds to reveal their whereabouts to the grand jury. This Court upheld the assertion of the privilege, holding that the corporate-records exception applied only to the records themselves, not to testimony concerning them, and reiterating the established principle that "all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." *Id.,* at 124, citing *Shapiro* v. *United States,* 335 U. S. 1, 27 (1948).

It is true that applicant here, unlike Curcio, was cited for failure to produce the subpoenaed records, as well as for failure to testify. But the rule permitting compelled production of corporate records by their custodian may be invoked only against a party who is in fact the

custodian of the records in question. Yet there appears no evidence in the record of this case that applicant is the custodian of the documents subpoenaed, or indeed that he has any connection with the corporations. Applicant thus argues that he has been jailed in the absence of *any evidence* supporting an essential element of the finding that he is in contempt. Cf. *Thompson* v. *Louisville,* 362 U. S. 199 (1960).

Nothing in the record suggests any substantial risk that applicant will not appear at further proceedings in his case. As far as appears, he has complied with previous orders to appear; indeed, he interrupted his honeymoon in Mexico to be present at the grand jury hearing. According to his affidavit, he has no criminal record. Given the imposition of a contempt order for an explicit assertion of the Fifth Amendment privilege, and the other circumstances of the case, I am ordering applicant released on his own recognizance pending disposition of his appeal to the Court of Appeals.

UNITED STATES EX REL. CERULLO *v.* FOLLETTE, WARDEN

ON APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR CERTIORARI; MOTION FOR STAY; AND APPLICATION FOR BAIL PENDING PETITION FOR CERTIORARI

Decided October 16, 1969

Time extension for filing petition for certiorari denied since sufficient time remains for that purpose. Stay of Court of Appeals mandate denied as that mandate has already issued. Application for bail pending action on petition for certiorari is denied since initial ruling on such an application should be made by Court of Appeals, to which request may be made under Fed. Rule App. Proc. 23 (b).

See: 393 F. 2d 879 and 294 F. Supp. 1283.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

Applicant requests an extension of time to file a petition for certiorari. Since, in the posture of this case, his time for filing will not expire until December 31, 1969, I perceive no necessity for an extension at this stage. No reason appears why the time remaining will not be sufficient for the preparation and filing of a petition for certiorari.

Applicant also requests a stay of the mandate of the Court of Appeals for the Second Circuit and continuance of bail pending determination of his petition for certiorari. Pursuant to the opinion of the Court of Appeals, the mandate has already issued. Treating the papers as an application for bail pending action on the petition, I note that there is no sign that applicant has made a request to the Court of Appeals, as he may under Fed. Rule App. Proc. 23 (b). In my view that court should have an opportunity to consider applicant's request before it is entertained by a Justice of this Court. Cf. U. S. Sup. Ct. Rule 27.

PARISI *v.* DAVIDSON, COMMANDING GENERAL, ET AL.

ON APPLICATION FOR STAY

Decided December 29, 1969

Application by member of Armed Forces claiming he is entitled to a conscientious-objector classification for stay of deployment outside the Northern District of California denied where (1) District Court, though refusing to issue a writ of habeas corpus or to restrain respondents from transferring applicant outside that district, issued protective order against his having to engage in combat activities greater than his present duties required, pending Army board's review of his classification and further court order; (2) the Court of Appeals, though denying a deployment stay, specified that applicant will be produced in the Northern District if he wins his habeas corpus case; and (3) the fact that the Secretary of the Army is party to the action precludes mooting of the case by applicant's deployment. *Quinn* v. *Laird*, 89 S. Ct. 1491, and companion cases distinguished.

Solicitor General Griswold in opposition.

Mr. JUSTICE DOUGLAS, Circuit Justice.

Applicant claims he is a conscientious objector entitled to classification as such. The Army did not approve that classification and his appeal is now pending before the Army Board for Correction of Military Records.

Meanwhile he applied to the District Court for the Northern District of California for a writ of habeas corpus, and for an order restraining respondents from transferring him out of the Northern District of California. The District Court denied that relief but it did restrain respondents from assigning applicant "to any duties which require materially greater participation in combat activities or combat training than is required in

his present duties." The District Court retained jurisdiction of the case.

Applicant appealed to the Court of Appeals and asked for an order staying his deployment pending disposition of his appeal. That court denied his motion for a stay "on condition that Respondents produce the Appellant in this district if the appeal results in his favor." He now seeks a stay from me, as Circuit Justice; and he represents that he is under orders to report for deployment to Vietnam the day after tomorrow, December 31, 1969.

Applicant is at present assigned to duties of "psychological counseling." It would seem offhand that "psychological counseling" in Vietnam would be no different from "psychological counseling" in army posts here. He would, of course, be closer to the combat zones than he is at home; and he says that he could end up carrying combat weapons.

I heretofore granted like stays in cases involving deployment of alleged conscientious objectors to Vietnam. See *Quinn* v. *Laird,* 89 S. Ct. 1491. But this case is different because of the protective order issued by the District Court and the assurance given the Court of Appeals that the applicant will be delivered in the Northern District if he wins his habeas corpus case. Moreover, as the Solicitor General points out, the Secretary of the Army is a party to this action; hence the case will not become moot by the deployment.

If it were clear that applicant would win on the merits, a further protective order at this time would be appropriate. But the merits are in the hands of a competent tribunal and as yet unresolved. And I cannot assume that the Army will risk contempt by flouting the protective order of the District Court.

Application denied.

BEYER *v.* UNITED STATES

ON APPLICATION FOR RESTORATION OF BAIL PENDING APPEAL

Decided January 30, 1970

Application for restoration of bail pending appeal granted.

Solicitor General Griswold for the United States.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

While I am always reluctant to interfere with the action of the Court of Appeals on matters of bail pending appeal to that court, I feel constrained under all the circumstances revealed by the papers before me* to grant

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*The applicant was convicted in the District Court for the Western District of New York of assaulting a federal officer in the performance of his duties, the jury being unable to reach a verdict with respect to three codefendants. After sentencing the applicant to prison, the District Court admitted him to bail in the amount of $5,000 pending appeal to the Court of Appeals. His counsel filed a notice of appeal and docketed the record in the Court of Appeals. However, no brief was filed on the applicant's behalf at the time it was due.

On January 5, 1970, when the applicant's brief was seven months overdue, the United States moved to dismiss the appeal for want of prosecution. The applicant's counsel responded, attempting to explain his failure to file a brief or to request any extension of time from either the United States Attorney or the Court of Appeals on the grounds that it resulted from an oversight and that counsel had been engaged in preparations for the retrial of the codefendants who had not been convicted at the first trial.

Before action on the motion to dismiss the appeal, the United States also moved in the District Court for the Western District of New York for revocation of applicant's bail pending appeal, on the ground that petitioner had been indicted in state court for burglary, criminal mischief, riot, and criminal tampering, arising out of an incident subsequent to the applicant's conviction in this case. The

this application. Cf. Fed. Rule App. Proc. 9 (b); *Febre* v. *United States*, *ante*, p. 1225. This is of course without prejudice to any application by the United States for a further revocation of bail upon an appropriate showing.

District Court delayed action on that motion pending decision by the Court of Appeals on the motion to dismiss.

On January 19, 1970, the Court of Appeals declined to dismiss the appeal, but rather granted applicant until February 9, 1970, to file his brief and appendix and revoked the order admitting him to bail. The Court of Appeals did not give a reason for the revocation of bail, and the United States does not dispute the applicant's statement that the pending state indictment was not called to the attention of the Court of Appeals on the motion to dismiss.

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ABUSE OF DISCRETION. See **Administrative Procedure**, 2–3; **Injunctions**, 5; **Railroad Mergers**; **School Desegregation**, 2.

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2. *Interstate Commerce Commission — Railroad merger — Stock exchange ratios.*—ICC's determination that stock exchange ratio applicable to Great Northern and Northern Pacific stockholders, established after protracted arm's-length negotiations with approval of companies and large majority of their stockholders, is just and reasonable, is supported by substantial evidence, and ICC's refusal to reopen record to update evidence was not an abuse of discretion. Northern Lines Merger Cases, p. 491.

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ADMINISTRATIVE PROCEDURE—Continued.

harm to the city has disappeared, and *a fortiori* the ICC's refusal to take further evidence on the merger's impact on the city was not an abuse of discretion. Northern Lines Merger Cases, p. 491.

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AGRICULTURAL MARKETING AGREEMENT ACT OF 1937. See also **Administrative Procedure,** 1; **Milk Producers.**

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APPEALS. See also **Bail,** 2; **Civil Rights; Constitutional Law,** I, 2–3; II, 8, 10; VI; **Damages; Evidence,** 1; **Injunctions,** 3; **Jurisdiction,** 1–2; **Procedure,** 7, 10–11, 14–15; **School Desegregation,** 5; **Standing to Sue.**

Church property dispute—Religious doctrine—No federal question.—Since state court's resolution of property dispute between church bodies was made on basis of state law that did not involve inquiry into religious doctrine, appeal involves no substantial federal question. Md. & Va. Churches v. Ch. at Sharpsburg, p. 367.

APPLICATION FOR BAIL. See **Bail,** 1, 3–4; **Procedure,** 8.

APPLICATION FOR DISCHARGE. See **Stay,** 2.

APPLICATION FOR INJUNCTION. See **Elections,** 1–2; **Injunctions,** 1–2.

APPLICATION FOR STAY. See **Injunctions,** 4; **Stay,** 1–3.

APPLICATION FOR VACATION OF STAY. See **Injunctions,** 5; **School Desegregation,** 2.

APPLICATION TO VACATE SUSPENSION OF ORDER. See **School Desegregation,** 3.

ARMED FORCES. See **Stay,** 3.

ARMORED CARS. See **Banks,** 1–2.

ARMY RESERVISTS. See **Habeas Corpus.**

ARRESTS. See **Confessions**, 1; **Constitutional Law**, IV.

ASSIGNMENTS. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

ATLANTA. See **Elections**, 2.

ATTORNEY GENERAL. See **Jurisdiction**, 3.

ATTORNEYS' FEES. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

AUBURN, WASHINGTON. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

BACK PAY. See **Administrative Procedure**, 4; **Judicial Review**, 1.

BAIL. See also **Procedure**, 8.

1. *Civil contempt—Grand jury appearance—Corporate records doctrine.*—Applicant released on own recognizance pending disposition of appeal by Court of Appeals, as circumstances here warrant departure from practice of denying relief where request has not been ruled on by court below, viz., the corporate records doctrine can be invoked only against custodian of records but no evidence appears here that applicant was custodian or connected with the corporations; no substantial risk was shown that applicant would not appear at future proceedings; and applicant assertedly has no criminal record. Brussel v. United States (MARSHALL, J., in chambers), p. 1229.

2. *Court of Appeals—Restoration of bail.*—Application for restoration of bail pending appeal granted. Beyer v. United States (HARLAN, J., in chambers), p. 1235.

3. *Federal Rules of Appellate Procedure—No written explanation for denial—Remand.*—Application for bail pending appeal from conviction held in abeyance and matter remanded to Circuit Court Judge. District Court denied bail without written explanation mandated by Fed. Rule App. Proc. 9 (b), and it does not appear why Court of Appeals did not remand matter to District Court for compliance with rule as it had done in case of a codefendant's similar bail application. Febre v. United States (HARLAN, J., in chambers), p. 1225.

4. *Military prisoner—Expiration of sentence—Court in recess.*—Although military prisoner had been denied bail by lower courts and Circuit Justice, referral to full Court is not immediately possible, since Court is in recess. There are substantial problems of whether Article 134 of the Uniform Code of Military Justice, which applicant had been convicted of violating, satisfies standards of

BAIL—Continued.

vagueness required by due process, and of First Amendment rights. While applicant's sentence will expire shortly, a live controversy will continue and applicant should be released on bail until the full Court can act on the application. Levy v. Parker (DOUGLAS, J., in chambers), p. 1204.

BAIL JUMPERS. See **Procedure**, 7.

BALLOTS. See **Mootness**, 1.

BANKS.

1. *Branch banking—National banks and state banks—Competitive equality.*—Policy of "competitive equality" between national and state banks is firmly embedded in statutes governing national banking system, and under the McFadden Act a national bank may establish a "branch" within the meaning of the federal definition in 12 U. S. C. § 36 (f) only under the same conditions as state law would authorize a state bank to do so. First National Bank v. Dickinson, p. 122.

2. *Branch banks—Place for receiving deposits—Armored cars and off-premises receptacles.*—Term "branch bank" in 12 U. S. C. § 36 (f) includes *any* place for receiving deposits apart from the chartered premises. Here, at the time a customer delivers money either to the armored car or to the stationary receptacle, the bank has received a deposit within the meaning of that provision, and the place of delivery is an "additional office or . . . branch place of business . . . at which deposits are received" within the federal definition of branch bank in the statute. First National Bank v. Dickinson, p. 122.

BENEFICIARIES. See **Injunctions**, 3; **Jurisdiction**, 2.

BILLS OF COMPLAINT. See **Jurisdiction**, 3.

BITUMINOUS PAVEMENT. See **Patents.**

BLACKTOP PAVING. See **Patents.**

BOARD OF DIRECTORS. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

BOARDS OF EDUCATION. See **Constitutional Law**, II, 1–2, 4, 6–8.

BORROWED TRANSCRIPTS. See **Constitutional Law**, II, 10; **Procedure**, 14–15.

BOSTON. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

BRANCH BANKING. See **Banks**, 1–2.

BRIG. See **Stay**, 2.

BROKERAGE FEES. See **Constitutional Law**, 5; **Procedure**, 13.

BURDEN OF PROOF. See **Constitutional Law**, I, 2–3; IV, 4; VI; **Evidence**, 1–4; **Presumptions**, 1–2.

BURLINGTON RAILROAD. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

CALIFORNIA. See **Constitutional Law**, II, 10; **Procedure**, 14–15.

CALIFORNIA INDETERMINATE SENTENCE LAW. See **Certiorari**; **Procedure**, 2.

CANDIDATES. See **Elections**, 2; **Mootness**, 1.

CARGO HANDLING. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

CARRIERS. See **Interstate Commerce Commission**; **Judicial Review**, 2; **Railway Labor Act.**

CAUSATION. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

CERTIORARI. See also **Civil Rights**; **Constitutional Law**, I, 2–3; VI; **Damages**; **Evidence**, 1; **Jurisdiction**, 1; **Procedure**, 2, 10–11; **Standing to Sue.**

California Indeterminate Sentence Law—Compulsory self-incrimination—Facts do not support issue.—Writ of certiorari, granted to consider petitioner's contention that his privilege against compulsory self-incrimination had been infringed by California prison authorities, dismissed as improvidently granted, as respondents have presented documentary evidence in their brief that actual facts do not present the issue for which certiorari was granted. Conway v. Adult Authority, p. 107.

CHARITABLE TRUSTS. See **Constitutional Law**, II, 9; **Trusts.**

CHICAGO. See **Interstate Commerce Commission**; **Judicial Review**, 2.

CHURCH OF GOD. See **Appeals.**

CHURCH PROPERTY. See **Appeals.**

CITY ELECTIONS. See **Elections**, 1–2; **Injunctions**, 1–2.

CIVIL CONTEMPT. See **Bail**, 1.

CIVIL RIGHTS. See also **Damages**; **Procedure**, 11; **Standing to Sue.**

Membership shares—Assignment to lessee—Discriminatory refusal to approve.—Petitioner Sullivan's membership in Little Hunting Park (which is clearly not a private social club) was an integral

CIVIL RIGHTS—Continued.

part of the lease and respondents' racially discriminatory refusal to approve the assignment to the lessee constituted a violation of 42 U. S. C. § 1982, the right to lease being protected by that provision against the action of third parties as well as against the action of the lessor. Sullivan v. Little Hunting Park, p. 229.

CIVIL RIGHTS ACT OF 1964. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

CLASS ACTIONS. See **Constitutional Law,** II, 1–2, 6; **Mootness,** 2; **Procedure,** 3; **Relief; Securities Exchange Act of 1934; Stockholders,** 1–2.

CLASSIFICATION. See **Judicial Review,** 3; **Procedure,** 12; **Selective Service Act,** 1–2.

CLUBS. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

COCAINE. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

CODEFENDANTS. See **Bail,** 3; **Constitutional Law,** II, 10; **Procedure,** 14–15.

COLLATERAL REMEDIES. See **Constitutional Law,** II, 10; **Procedure,** 14–15.

COLLECTIVE-BARGAINING AGREEMENT. See **Railway Labor Act.**

COLLECTIVE JUDGMENT. See **Stay,** 1.

COLORADO. See **Mootness,** 2; **Procedure,** 3.

COMBAT ACTIVITIES. See **Stay,** 3.

COMBINATION PATENTS. See **Patents.**

COMMERCIALLY SUCCESSFUL PROCESS. See **Patents.**

COMMISSION GOVERNMENT. See **Elections,** 1; **Injunctions,** 1.

COMMUNIST PARTY. See **National Labor Relations Act; Perjury,** 1.

COMMUNITY PARK. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

COMPENSATION. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

COMPETITIVE EQUALITY. See **Banks,** 1–2.

COMPLAINTS. See **Interstate Commerce Commission; Judicial Review,** 2.

COMPTROLLER OF THE CURRENCY. See **Banks**, 1–2.

CONFESSIONS. See also **Constitutional Law**, I, 1; III; **Procedure**, 4.

1. *Totality of circumstances—Pre-Miranda confessions—Voluntariness.*—The determination that the confessions were voluntary is not disturbed, as the trial occurred prior to *Miranda* v. *Arizona*, 384 U. S. 436, and the totality of the circumstances shows that the confessions were not coerced. Morales v. New York, p. 102.

2. *Voluntariness — State criminal procedure — Post-conviction review.*—When a federal court finds a *Jackson* v. *Denno*, 378 U. S. 368, error (failure of trial judge to find confessions voluntary before admitting them into evidence) in a state proceeding, it must allow State reasonable time to make an error-free determination of the voluntariness of the confessions. Sigler v. Parker, p. 482.

CONFINEMENT. See **Stay**, 2.

CONGRESSIONAL CANDIDATES. See **Mootness**, 1.

CONSCIENTIOUS OBJECTORS. See **Procedure**, 12; **Selective Service Act**, 1; **Stay**, 2–3.

CONSIGNMENTS. See **Antitrust Acts**; **Procedure**, 1.

CONSTITUTIONAL LAW. See also **Appeals**; **Bail**, 1, 4; **Certiorari**; **Civil Rights**; **Confessions**, 1–2; **Damages**; **Elections**, 2; **Evidence**, 1–4; **Habeas Corpus**; **Jurisdiction**, 1; **Mootness**, 2; **National Labor Relations Act**; **Perjury**, 2; **Presumptions**, 1–2; **Procedure**, 4–6, 9–11, 13–15; **School Desegregation**, 1, 4–5; **Standing to Sue**; **Stay**, 2; **Trusts.**

I. Due Process.

1. *Confessions—State criminal procedure.*—When a federal court finds a *Jackson* v. *Denno*, 378 U. S. 368, error (failure of trial judge to find confessions voluntary before admitting them into evidence) in a state proceeding, it must allow State reasonable time to make an error-free determination of the voluntariness of the confessions. Sigler v. Parker, p. 482.

2. *Juvenile court—Standard of evidence.*—It is not appropriate for this Court to decide whether Nebraska law providing for proof of delinquency in juvenile proceeding under preponderance-of-evidence standard violates due process where no objection to that standard was made at hearing by appellant, who took no direct appeal, and his counsel acknowledged that evidence was sufficient to support delinquency finding even under reasonable-doubt standard. DeBacker v. Brainard, p. 28.

CONSTITUTIONAL LAW—Continued.

3. *Prosecutor's discretion—Barren record.*—Because standing alone the issue could not be subject to review by appeal, this Court declines, in view of barrenness of record, to exercise its certiorari jurisdiction to pass on appellant's contention that prosecutor's assertedly unreviewable discretion under Nebraska case law, whether to proceed against appellant in juvenile court rather than in ordinary criminal proceedings, violated due process. DeBacker v. Brainard, p. 28.

II. Equal Protection of the Laws.

1. *Freeholders—Qualifications for school boards.*—Appellants and members of their class have constitutional right to be considered for public service without burden of invidiously discriminatory qualifications, and, on this record, limitation of school-board membership to freeholders violates the Equal Protection Clause. Turner v. Fouche, p. 346.

2. *Grand jury lists—Racial discrimination.*—District Court erred in determining that new grand jury list had been properly compiled, as underrepresentation of Negroes on list as compared with population of county, absent countervailing explanation by appellees, warranted corrective action by court, and court should have responded to the elimination of 171 Negroes out of 178 citizens disqualified for lack of "intelligence" or "uprightness," and the elimination of 225 citizens for lack of information. Turner v. Fouche, p. 346.

3. *Jury commission—Racial discrimination.*—Apart from problems involved in federal court's ordering Governor to exercise discretion in specific way, it cannot be said on record here that absence of Negroes from jury commission amounted in itself to prima facie showing of discriminatory exclusion. Appellants are no more entitled to proportional representation by race on jury commission than on any particular grand or petit jury. Carter v. Jury Commission, p. 320.

4. *Mississippi schools—Immediate desegregation.*—Continued operation of racially segregated schools under standard of "all deliberate speed" is no longer constitutionally permissible. Court of Appeals is directed to enter an order, effective immediately, that schools in certain Mississippi districts be operated on unitary basis. Alexander v. Board of Education, p. 19.

5. *Qualifications for jurors—Racial discrimination.*—Alabama Code requirement that jury commissioners select for jury service persons "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment . . ." is not unconstitutional on its face, and al-

CONSTITUTIONAL LAW—Continued.

though jury commissioners abused the statutory discretion in preparing jury roll that does not mean the statute was not "capable of being carried out with no racial discrimination whatsoever." Carter v. Jury Commission, p. 320.

6. *School board selection—Racial discrimination.*—Constitutional and statutory scheme by which Taliaferro County, Georgia, grand jury selects the school board is not unconstitutional on its face, as the scheme is not inherently unfair, or necessarily incapable of administration without regard to race. Turner v. Fouche, p. 346.

7. *School desegregation—Injunctions.*—Petitioners, who seek review of Court of Appeals' ruling authorizing delay in student desegregation in three Louisiana school districts until September 1970, are—pending disposition of their petition for certiorari—granted temporary relief requiring respondent school boards to take necessary preliminary steps to effectuate complete student desegregation by February 1, 1970. Carter v. West Feliciana School Board, p. 226.

8. *School desegregation—School boundaries.*—The District Court approved a school board's proposal to revise school boundaries effective at the start of the school year and ordered the board to submit a complete desegregation plan within two months thereafter. The Court of Appeals, which, upon an appeal by intervenors with respect to the boundary provision, summarily vacated the order as inappropriate except as part of an overall plan, should have allowed the implementation of the proposal, to which petitioners did not object, pending argument and decision of the appeal. Dowell v. Board of Education, p. 269.

9. *Testamentary trust—Park for exclusive use of white people.*—Georgia Supreme Court's action terminating testamentary trust, which provided for creation of park for exclusive use of white people, did not violate any constitutionally protected rights. Termination was not the imposition of a "penalty," the forfeiture of the park because of the city's compliance with the constitutional mandate of *Evans* v. *Newton*, 382 U. S. 296, but was the result of the construction of the will, and there is no violation of the Fourteenth Amendment where a state court without any racial animus applies its normal principles of construction to determine the testator's true intent and concludes that everyone is to be deprived of the benefits of the trust. Evans v. Abney, p. 435.

10. *Trial transcripts—Free copies.*—This Court need not decide whether the Constitution requires State to furnish indigent prisoners with free trial transcripts to aid in petitioning for collateral relief unless it appears that petitioner cannot again borrow a copy from

CONSTITUTIONAL LAW—Continued.

the State, or procure one from codefendant or other custodian, or show that it would be significantly more advantageous for him to own rather than borrow a copy. Wade v. Wilson, p. 282.

III. Fourth Amendment.

Custodial questioning—Probable cause for arrest.—Issue of legality of custodial questioning on less than probable cause for a full-fledged arrest, which goes beyond *Terry* v. *Ohio,* 392 U. S. 1, and *Sibron* v. *New York,* 392 U. S. 40, is not decided in view of absence of a record which squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises. Morales v. New York, p. 102.

IV. Self-Incrimination.

1. *False statements on wagering tax forms.*—By filing false statements appellee took a course other than the one that 26 U. S. C. § 4412 was designed to compel, a course that the Fifth Amendment gave him no privilege to take. United States v. Knox, p. 77.

2. *Harrison Narcotics Act—Sale of heroin without order form.*—Petitioner seller's self-incrimination claim under the Harrison Narcotics Act is insubstantial, as his assumption that an order form would be forthcoming if he refused to sell without it is unrealistic, there being no substantial possibility that a buyer could have secured a form to obtain heroin, virtually all dealings in which are illicit; since his customer was not a registered buyer, the possibility of incrimination is purely hypothetical; and even if his customer were registered, the result would probably be the same, since it is unlikely that a registered dealer would enter the name of an unregistered seller on the form and record an illegal sale. Minor v. United States, p. 87.

3. *Marihuana Tax Act—Sale of marihuana without order form.*—Petitioner seller's claim of violation of his privilege against self-incrimination is not substantial, as there is no real possibility that purchasers would comply with the order form requirement even if the seller insisted on selling only pursuant thereto, in view of the $100 per ounce tax on an unregistered transferee; the illegality under federal and state law; and the fact that the Fifth Amendment, as held in *Leary* v. *United States,* 395 U. S. 6, relieves unregistered buyers of any duty to pay the tax and secure the form. Minor v. United States, p. 87.

4. *Possession of heroin—Inference drawn by jury.*—Trial court's instructions on inference that might be drawn under 21 U. S. C. § 174 with respect to petitioner's possession of heroin did not vio-

CONSTITUTIONAL LAW—Continued.

late his right to be convicted only on finding of guilt beyond a reasonable doubt and did not place impermissible pressure on him to testify in his own defense. Turner v. United States, p. 398.

V. Seventh Amendment.

Stockholder's derivative suit—Jury trial.—Right to trial by jury preserved by the Seventh Amendment extends to a stockholder's derivative suit with respect to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury trial. Ross v. Bernhard, p. 531.

VI. Sixth Amendment.

Trial by jury—Juvenile court.—Juvenile's challenge in habeas corpus proceeding that he was unconstitutionally deprived of right to trial by jury is inappropriate for resolution by this Court since Nebraska juvenile court hearing at which he was adjudged delinquent was held before decisions in *Duncan* v. *Louisiana*, 391 U. S. 145, and *Bloom* v. *Illinois*, 391 U. S. 194, which were held in *DeStefano* v. *Woods*, 392 U. S. 631, to apply only prospectively, and appellant would therefore have had no constitutional right to jury trial had he been tried as an adult. DeBacker v. Brainard, p. 28.

CONSTRUCTION OF WILLS. See **Constitutional Law**, II, 9; **Trusts.**

CONTEMPT. See **Bail**, 1.

CONTINGENCIES. See **Mootness**, 2; **Procedure**, 3.

CORPORATE DIRECTORS. See **Constitutional Law**, V; **Procedure**, 13; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

CORPORATE RECORDS. See **Bail**, 1.

CORPORATIONS. See **Constitutional Law**, V; **Procedure**, 13; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

CORRECTION OF TRANSCRIPTS. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

COST OF DELAY. See **Administrative Procedure**, 4; **Judicial Review**, 1.

COSTS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

COUNCIL-MANAGER GOVERNMENT. See **Elections**, 1; **Injunctions**, 1.

"COUNTRY" MILK PRODUCERS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

COURT RULES. See **Constitutional Law**, II, 10; **Procedure**, 11, 14–15.

COURTS. See **Constitutional Law**, I, 2–3; II, 4, 7; VI; **Evidence**, 1; **Injunctions**, 4; **Jurisdiction**, 1; **Procedure**, 10; **School Desegregation**, 1, 4; **Trusts.**

COURTS-MARTIAL. See **Bail**, 4; **Stay**, 2.

COURTS OF APPEALS. See **Administrative Procedure**, 4; **Bail**, 2; **Constitutional Law**, II, 7–8; **Injunctions**, 5; **Judicial Review**, 1; **Procedure**, 6; **School Desegregation**, 1, 5.

CRANES. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

CRIMINAL LAW. See **Bail**, 2–4; **Certiorari**; **Confessions**, 1–2; **Constitutional Law**, I, 1–3; III; IV, 1–4; VI; **Evidence**, 1–4; **Jurisdiction**, 1; **National Labor Relations Act**; **Perjury**, 1–2; **Presumptions**, 1–2; **Procedure**, 2, 4–5, 7–8, 10, 12, 14–15; **Selective Service Act**, 1.

CUSTODIAL QUESTIONING. See **Confessions**, 1; **Constitutional Law**, III.

CUSTODIAN OF RECORDS. See **Bail**, 1.

CY PRES DOCTRINE. See **Constitutional Law**, II, 9; **Trusts.**

DAIRY FARMERS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

DAMAGES. See also **Antitrust Acts**; **Civil Rights**; **Constitutional Law**, V; **Procedure**, 1, 11, 13; **Relief**; **Securities Exchange Act of 1934**; **Standing to Sue**; **Stockholders**, 1–2.

Violation of civil rights—Federal standards—Federal and state rules.—Petitioners are entitled to compensatory damages for violation of their civil rights under 42 U. S. C. § 1982 and, though such damages are measured by federal standards, both federal and state rules on damages may be used. Sullivan v. Little Hunting Park, p. 229.

DECEDENT'S ESTATES. See **Injunctions**, 3; **Jurisdiction**, 2.

DEFERMENTS. See **Judicial Review**, 3; **Selective Service Act**, 2.

DELAY. See **Administrative Procedure**, 4; **Judicial Review**, 1.

DELINQUENCY REGULATIONS. See **Judicial Review**, 3; **Procedure**, 12; **Selective Service Act**, 1–2.

DEPARTMENT OF JUSTICE. See **Administrative Procedure**, 2–3; **Railroad Mergers**; **School Desegregation**, 3.

DEPLOYMENT OUTSIDE DISTRICT. See **Stay**, 3.

DEPOSITS. See **Banks**, 1–2.

DERIVATIVE SUITS. See **Constitutional Law**, V; **Procedure**, 13; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

DESEGREGATION. See **Constitutional Law**, II, 4, 7–9; **Injunctions**, 5; **Jurisdiction**, 3; **Procedure**, 6; **School Desegregation**, 1–5.

DESEGREGATION PLAN. See **Constitutional Law**, II, 7–8; **Procedure**, 6; **School Desegregation**, 1–2, 5.

DETENTION FOR QUESTIONING. See **Confessions**, 1; **Constitutional Law**, III.

DIFFERENTIALS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

DIRECTORS OF CORPORATIONS. See **Constitutional Law**, V; **Procedure**, 13; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

DISCRETION. See **Administrative Procedure**, 2–3; **Constitutional Law**, I, 2–3; **Evidence**, 1; **Injunctions**, 5; **Jurisdiction**, 1; **Procedure**, 10; **Railroad Mergers**; **School Desegregation**, 2.

DISCRIMINATION. See **Constitutional Law**, II, 1–9; **Procedure**, 6, 9; **Trusts.**

DISMISSAL OF APPEAL. See **Procedure**, 7.

DISTRIBUTING DRUGS. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

DISTRICT COURTS. See **Constitutional Law**, II, 1–2, 6.

DRAFT BOARDS. See **Procedure**, 12; **Selective Service Act**, 1–2.

DRAFT CARDS. See **Judicial Review**, 3; **Selective Service Act**, 2.

DRUGS. See **Constitutional Law**, IV, 2–4; **Evidence**, 2–4; **Presumptions**, 1–2.

DUAL SCHOOL SYSTEMS. See **Constitutional Law**, II, 4; **School Desegregation**, 3–4.

DUE PROCESS. See **Bail,** 4; **Confessions,** 2; **Constitutional Law,** I, 1–3; II, 10; IV, 4; VI; **Evidence,** 1–4; **Habeas Corpus; Jurisdiction,** 1; **Mootness,** 2; **Presumptions,** 1–2; **Procedure,** 3–4, 10, 14–15.

DURESS. See **Constitutional Law,** IV, 1; **Perjury,** 2; **Procedure,** 5.

ECCLESIASTICAL QUESTIONS. See **Appeals.**

ELECTIONS. See also **Injunctions,** 1–2; **Mootness,** 1–2; **Procedure,** 3.

1. *Municipal election—Change of form of government—Injunction.*—Application for injunction to prevent City of Anniston from holding election to choose members of new city council in accordance with statute authorizing change from commission to council-manager government denied. Election will not result in the severe irreparable harm needed to justify an injunction; nor has three-judge panel designated to hear the case as yet considered the injunction request. Oden v. Brittain (BLACK, J., in chambers), p. 1210.

2. *Municipal ordinance — Filing fees — Injunction.*— Applicants claim that Atlanta ordinance will exclude political candidates who cannot afford filing fees it fixes and seek to enjoin an election on ground that ordinance violates Voting Rights Act of 1965, and on ground (upheld by District Court) that it violates the Equal Protection Clause. Since proximity of election practicably forecloses this Court's pre-election decision on the substantial constitutional issue involved, and a court-ordered postponement of the election could be disruptive, an injunction is denied, but applicants are temporarily relieved from paying the fee, and the candidates' filing time is extended. Matthews v. Little (BLACK, J., in chambers), p. 1223.

EMPLOYER AND EMPLOYEES. See **Administrative Procedure,** 4; **Judicial Review,** 1; **Railway Labor Act.**

ENLISTMENT CONTRACTS. See **Habeas Corpus.**

EQUAL PROTECTION OF THE LAWS. See **Civil Rights; Constitutional Law,** II; **Damages; Elections,** 2; **Mootness,** 2; **Procedure,** 3, 7, 9, 11, 14–15; **School Desegregation,** 1–5; **Standing to Sue; Trusts.**

EQUITY. See **Constitutional Law,** V; **Procedure,** 13; **Relief; Securities Exchange Act of 1934; Stockholders,** 1–2.

ESCROWED PAYMENTS. See **Administrative Procedure,** 1; **Agricultural Marketing Agreement Act of 1937; Milk Producers.**

ESTATES. See **Injunctions**, 3; **Jurisdiction**, 2.

EVIDENCE. See also **Administrative Procedure**, 2–3; **Bail**, 1; **Confessions**, 2; **Constitutional Law**, I, 1–3; IV, 4; VI; **Jurisdiction**, 1; **Presumptions**, 1–2; **Procedure**, 4, 10; **Railroad Mergers.**

1. *Juvenile court — Preponderance of evidence — Reasonable doubt.*—It is not appropriate for this Court to decide whether Nebraska law providing for proof of delinquency in juvenile proceeding under preponderance-of-evidence standard violates due process where no objection to that standard was made at hearing by appellant, who took no direct appeal, and his counsel acknowledged that evidence was sufficient to support delinquency finding even under reasonable-doubt standard. DeBacker v. Brainard, p. 28.

2. *Possession of heroin—Inference drawn by jury.*—Trial court's instructions on inference that might be drawn under 21 U. S. C. § 174 with respect to petitioner's possession of heroin did not violate his right to be convicted only on finding of guilt beyond a reasonable doubt and did not place impermissible pressure on him to testify in his own defense. Turner v. United States, p. 398.

3. *Presumptions—Possession of cocaine.*—Presumption under 21 U. S. C. § 174 will not support conviction with respect to possession of cocaine, as facts show that more cocaine is lawfully produced in, than is smuggled into, this country, and that the amount that is stolen from legal sources is sufficiently large to negate the inference that petitioner's cocaine came from abroad or that he must have known that it did. Turner v. United States, p. 398.

4. *Presumptions—Possession of heroin—26 U. S. C. § 4704 (a).*—Evidence that petitioner possessed heroin packaged in 275 glassine bags without revenue stamps established that the heroin was in process of being distributed, an act proscribed by statute; and the conviction can also be sustained on basis of inference in § 4704 (a) of purchasing the heroin not in or from a package, as there is no reasonable doubt that possessor of heroin, who presumably purchased it, did not purchase it in or from an original stamped package in view of fact that no lawfully manufactured or imported heroin is found in this country. Turner v. United States, p. 398.

EXCHANGE RATIOS. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

EXEMPTIONS. See **Judicial Review**, 3; **Selective Service Act**, 2.

EXHAUSTION OF REMEDIES. See **Procedure**, 12; **Selective Service Act**, 1.

EXPENSES OF LITIGATION. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

EXPIRATION OF SENTENCE. See **Bail**, 4.

EXTENSION OF ADMIRALTY JURISDICTION ACT. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

EXTENSION OF TIME. See **Procedure**, 8.

FAILURE OF TRUSTS. See **Constitutional Law**, II, 9; **Trusts.**

FAILURE TO OBJECT. See **Constitutional Law**, I, 2–3; VI; **Evidence**, 1.

FAIRFAX COUNTY. See **Civil Rights; Damages; Procedure**, 11; **Standing to Sue.**

FAIR HOUSING ACT OF 1968. See **Civil Rights; Damages; Procedure**, 11; **Standing to Sue.**

FAIRNESS OF MERGER. See **Relief; Securities Exchange Act of 1934; Stockholders**, 1–2.

FALSE AFFIDAVITS. See **National Labor Relations Act; Perjury**, 1.

FALSE STATEMENTS. See **Constitutional Law**, IV, 1; **Perjury**, 2; **Procedure**, 5.

FARM LOCATION DIFFERENTIALS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937; Milk Producers.**

FEDERAL QUESTION. See **Appeals.**

FEDERAL RULES OF APPELLATE PROCEDURE. See **Bail**, 3; **Procedure**, 8.

FEDERAL-STATE RELATIONS. See **Admiralty; Banks**, 1–2; **Civil Rights; Constitutional Law**, II, 9; **Damages; Elections**, 1; **Injunctions**, 1, 4; **Jurisdiction**, 3; **Longshoremen's and Harbor Workers' Compensation Act; Procedure**, 11; **Standing to Sue; Trusts.**

FEES. See **Elections**, 2.

FIFTH AMENDMENT. See **Bail**, 1, 4; **Constitutional Law**, IV, 1–4; **Evidence**, 2–4; **Perjury**, 2; **Presumptions**, 1–2; **Procedure**, 5.

FILING FEES. See **Elections**, 2.

FILLING STATIONS. See **Antitrust Acts; Procedure**, 1.

FIRST AMENDMENT. See **Appeals; Bail**, 4; **Stay**, 2.

FLORIDA. See **Banks**, 1–2; **Jurisdiction**, 3.

FORFEITURES. See **Constitutional Law**, II, 9; **Trusts.**

FOURTEENTH AMENDMENT. See **Civil Rights; Confessions,** 1–2; **Constitutional Law,** I–III; VI; **Damages; Elections,** 2; **Evidence,** 1; **Jurisdiction,** 1; **Mootness,** 2; **Procedure,** 3–4, 6, 9–11, 14–15; **School Desegregation,** 1–5; **Standing to Sue; Trusts.**

FOURTH AMENDMENT. See **Confessions,** 1; **Constitutional Law,** III.

FRAUDULENT STATEMENTS. See **National Labor Relations Act; Perjury,** 1.

FREEDOM OF RELIGION. See **Appeals.**

FREEHOLDERS. See **Constitutional Law,** II, 1–2, 6.

FREE TRANSCRIPTS. See **Constitutional Law,** II, 10; **Procedure,** 14–15.

FUGITIVES FROM JUSTICE. See **Procedure,** 7.

GASOLINE DEALERS. See **Antitrust Acts; Procedure,** 1.

GENERAL ELDERSHIP. See **Appeals.**

GEORGIA. See **Constitutional Law,** II, 9; **Trusts.**

GOVERNOR. See **Constitutional Law,** II, 3, 5; **Procedure,** 9.

GRAND JURIES. See **Bail,** 1; **Constitutional Law,** II, 1–3, 6; **Procedure,** 9.

GREAT NORTHERN RAILWAY CO. See **Administrative Procedure,** 2–3; **Railroad Mergers.**

GREENE COUNTY. See **Constitutional Law,** II, 3, 5; **Procedure,** 9.

GUIDELINES. See **Procedure,** 12; **Selective Service Act,** 1.

HABEAS CORPUS. See also **Bail,** 4; **Constitutional Law,** II, 10; **Procedure,** 14–15; **Stay,** 2–3.

Military service—Scope of writ—Release from military custody.—Motion by Army reservist for release from military custody pending Court of Appeals' review of District Court's denial of petition for writ of habeas corpus granted. Reservist's claims that the order requiring him to serve 17 months beyond his enlistment contract was without notice and opportunity to be heard, and in violation of his enlistment contract, are within the scope of the writ of habeas corpus. There is no statutory provision for a hearing, and the issue is substantial and should be resolved. Scaggs v. Larsen (DOUGLAS, J., in chambers), p. 1206.

HARRISON NARCOTICS ACT. See **Constitutional Law,** IV, 2–3.

HEARINGS. See **Habeas Corpus; Procedure,** 12; **Selective Service Act,** 1.

HEIRS. See **Constitutional Law,** II, 9; **Injunctions,** 3; **Jurisdiction,** 2; **Trusts.**

HEROIN. See **Constitutional Law,** IV, 2–4; **Evidence,** 2–4; **Presumptions,** 1–2.

HOME OWNERS. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

HOUSES. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

ILLEGAL DETENTION. See **Confessions,** 1; **Constitutional Law,** III.

ILLEGAL MILITARY INDUCTION. See **Habeas Corpus.**

ILLICIT DRUGS. See **Constitutional Law,** IV, 2–3.

IMMEDIATE DESEGREGATION. See **Constitutional Law,** II, 4, 7; **Procedure,** 6; **School Desegregation,** 1, 3–4.

IMMUNITY. See **Bail,** 1.

IMPORTATION OF DRUGS. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

INDEPENDENT CANDIDATES. See **Mootness,** 1.

INDETERMINATE SENTENCE LAW. See **Certiorari; Procedure,** 2.

INDICTMENTS. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

INDIGENT PRISONERS. See **Constitutional Law,** II, 10; **Procedure,** 14–15.

INDUCTION. See **Procedure,** 12; **Selective Service Act,** 1.

INFERENCES. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

INFRINGEMENT OF PATENTS. See **Patents.**

INJUNCTIONS. See also **Administrative Procedure,** 1; **Agricultural Marketing Agreement Act of 1937; Civil Rights; Constitutional Law,** II, 7–8; **Damages; Elections,** 1–2; **Jurisdiction,** 2; **Milk Producers; Procedure,** 6, 11; **Railway Labor Act; School Desegregation,** 1–2, 5; **Standing to Sue.**

1. *Municipal election—Change of form of government—Irreparable harm.*—Application for injunction to prevent City of Anniston from holding election to choose members of new city council in accordance with statute authorizing change from commission to

INJUNCTIONS—Continued.

council-manager government denied. Election will not result in the severe irreparable harm needed to justify an injunction; nor has three-judge panel designated to hear the case as yet considered the injunction request. Oden v. Brittain (BLACK, J., in chambers), p. 1210.

2. *Municipal ordinance—Filing fees—Elections.*—Applicants claim that Atlanta ordinance will exclude political candidates who cannot afford filing fees it fixes and seek to enjoin an election on ground that ordinance violates Voting Rights Act of 1965, and on ground (upheld by District Court) that it violates the Equal Protection Clause. Since proximity of election practicably forecloses this Court's pre-election decision on the substantial constitutional issue involved, and a court-ordered postponement of the election could be disruptive, an injunction is denied, but applicants are temporarily relieved from paying the fee, and candidates' filing time is extended. Matthews v. Little (BLACK, J., in chambers), p. 1223.

3. *Preliminary injunctive relief—Interlocutory orders—Jurisdiction to review.*—The only interlocutory orders that the Supreme Court has power to review under 28 U. S. C. § 1253 are those granting or denying *preliminary* injunctions, and therefore this Court lacks jurisdiction to review the District Court's interlocutory order, which involved no question of preliminary injunctive relief. Goldstein v. Cox, p. 471.

4. *Railway labor dispute—State court injunction—Federal court enjoinder.*—In view of long-standing policy embodied in 28 U. S. C. § 2283 that federal court, with limited exceptions, may not enjoin state court proceedings, and the difficult and important question presented here, the District Court's injunction, enjoining enforcement of state court injunction restraining union picketing in a railway labor dispute, is stayed pending disposition of petition for certiorari to be expeditiously filed in this Court. Atlantic Coast Line v. Engineers (BLACK, J., in chambers), p. 1201.

5. *School desegregation—Public support—Judicial review.*—Application for vacation of Court of Appeals' stay of preliminary injunction entered by District Court which had the effect of requiring partial implementation of school desegregation plan is granted, Court of Appeals' order vacated, and District Court's order directed to be reinstated. A district court's order granting preliminary injunction should not be disturbed on review unless grant was an abuse of discretion, which Court of Appeals did not find here. Nor does desire to develop public support for the plan justify delay in its implementation. Keyes v. Denver School District (BRENNAN, J., in chambers), p. 1215.

INSTRUCTIONS TO JURY. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

INTEGRATION. See **Constitutional Law,** II, 9; **Trusts.**

INTERIM AWARDS. See **Relief; Securities Exchange Act of 1934; Stockholders,** 1–2.

INTERIM RELIEF. See **Constitutional Law,** II, 7–8; **Procedure,** 1; **School Desegregation,** 1, 5.

INTERLOCUTORY ORDERS. See **Injunctions,** 3; **Jurisdiction,** 2.

INTERNAL REVENUE CODE. See **Constitutional Law,** IV, 1–4; **Evidence,** 2–4; **Perjury,** 2; **Presumptions,** 1–2; **Procedure,** 5.

INTERSTATE COMMERCE. See **Injunctions,** 4.

INTERSTATE COMMERCE ACT. See **Administrative Procedure,** 2–3; **Interstate Commerce Commission; Judicial Review,** 2; **Railroad Mergers.**

INTERSTATE COMMERCE COMMISSION. See also **Judicial Review,** 2.

Termination of passenger trains—Discontinuing investigations—Judicial review.—Orders of the Interstate Commerce Commission discontinuing investigations conducted under § 13a (1) of the Interstate Commerce Act with regard to the notice of rail carriers to terminate passenger services are judicially reviewable on the complaint of aggrieved persons. City of Chicago v. United States, p. 162.

INTERVENING AMENDMENT. See **Mootness,** 2; **Procedure,** 3.

INTERVENORS. See **Constitutional Law,** II, 8; **School Desegregation,** 5.

INVENTIONS. See **Patents.**

INVESTIGATIONS. See **Interstate Commerce Commission; Judicial Review,** 2.

INVESTMENT COMPANY. See **Constitutional Law,** V; **Procedure,** 13.

JUDGES. See **Bail,** 3; **Confessions,** 2; **Constitutional Law,** I, 1; **Procedure,** 4.

JUDGMENTS. See **Antitrust Acts; Procedure,** 1.

JUDICIAL REVIEW. See also **Administrative Procedure,** 4; **Civil Rights; Confessions,** 1; **Constitutional Law,** III; **Damages; Injunctions,** 3, 5; **Interstate Commerce Commission; Jurisdiction,** 2; **Procedure,** 11; **Railroad Mergers; School Desegregation,** 2; **Selective Service Act,** 2; **Standing to Sue.**

1. *Administrative procedure—National Labor Relations Board—Inordinate delay.*—While delay in the administrative process is de-

JUDICIAL REVIEW—Continued.

plorable, the Court of Appeals here exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of delay from the company to the employees. NLRB v. Rutter-Rex Mfg. Co., p. 258.

2. *Interstate Commerce Commission—Termination of passenger trains—Discontinuing investigations.*—Orders of the Interstate Commerce Commission discontinuing investigations conducted under § 13a (1) of the Interstate Commerce Act with regard to the notice of rail carriers to terminate passenger services are judicially reviewable on the complaint of aggrieved persons. City of Chicago v. United States, p. 162.

3. *Military Selective Service Act of 1967—Delinquency reclassification—Pre-induction review.*—Section 10 (b) (3) of the Act does not bar pre-induction judicial review of petitioner's delinquency reclassification which deprived him of a deferment to which he was entitled under the Act. Breen v. Selective Service Board, p. 460.

JURIES. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

JURISDICTION. See also **Admiralty; Civil Rights; Constitutional Law**, I, 2–3; VI; **Damages; Evidence**, 1; **Injunctions**, 3; **Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Act; Perjury**, 1; **Procedure**, 10–11; **Standing to Sue; Stay**, 1.

1. *Supreme Court—Certiorari—Barren record.*—Because standing alone the issue could not be subject to review by appeal, this Court declines, in view of barrenness of record, to exercise its certiorari jurisdiction to pass on appellant's contention that prosecutor's assertedly unreviewable discretion under Nebraska case law, whether to proceed against appellant in juvenile court rather than in ordinary criminal proceedings, violated due process. DeBacker v. Brainard, p. 28.

2. *Supreme Court — Interlocutory orders — Preliminary injunctions.*—The only interlocutory orders that the Supreme Court has power to review under 28 U. S. C. § 1253 are those granting or denying *preliminary* injunctions, and therefore this Court lacks jurisdiction to review the District Court's interlocutory order, which involved no question of preliminary injunctive relief. Goldstein v. Cox, p. 471.

3. *Supreme Court—Original jurisdiction—Suit by States.*—States' motions for leave to file complaints invoking Supreme Court's original jurisdiction fail to state claims warranting exercise of such jurisdiction. Florida v. Alabama, p. 490; Alabama v. Finch, p. 552; and Mississippi v. Finch, p. 553.

JURY COMMISSIONERS. See **Constitutional Law**, II, 1–3, 5–6; **Procedure**, 9.

JURY ROLLS. See **Constitutional Law**, II, 1–2, 6.

JURY TRIALS. See **Constitutional Law**, I, 2–3; V–VI; **Evidence**, 1; **Jurisdiction**, 1; **Procedure**, 13.

JUVENILE COURTS. See **Constitutional Law**, I, 2–3; **Evidence**, 1; **Jurisdiction**, 1.

JUVENILE DELINQUENTS. See **Constitutional Law**, I, 2–3; **Evidence**, 1; **Jurisdiction**, 1.

LABOR. See **Administrative Procedure**, 4; **Injunctions**, 4; **Judicial Review**, 1; **Railway Labor Act.**

LABOR UNIONS. See **National Labor Relations Act**; **Perjury**, 1.

LAND HOLDINGS. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

LEASES. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

LITIGATION EXPENSES. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

LIVINGSTON, MONTANA. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

LOCAL BOARDS. See **Procedure**, 12; **Selective Service Act**, 1.

LONG-HAUL COMPETITION. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

LONGSHOREMEN. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT. See also **Admiralty.**

Navigable waters—Piers—Extension of Admiralty Jurisdiction Act.—Longshoremen's Act, which covers injuries occurring "upon navigable waters," and furnishes a remedy only "if recovery . . . through workmen's compensation proceedings may not validly be provided by state law," does not provide compensation to workmen injured on a pier permanently affixed to land, and though the Extension of Admiralty Jurisdiction Act extends admiralty tort jurisdiction to ship-caused injuries on a pier, it does not enlarge the coverage of the Longshoremen's Act. Nacirema Co. v. Johnson, p. 212.

LOUISIANA. See **Constitutional Law**, II, 7; **Procedure**, 6; **School Desegregation**, 1.

MACON. See **Constitutional Law**, II, 9; **Trusts.**

MANDAMUS. See **Mootness**, 1.

MANDATES. See **Procedure**, 8.

MANUFACTURING DRUGS. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

MARIHUANA DEALERS. See **Constitutional Law**, IV, 2–3.

MARIHUANA TAX ACT. See **Constitutional Law**, IV, 2–3.

MARKETING AREAS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

MARYLAND. See **Appeals.**

MATERIAL OMISSIONS. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

McFADDEN ACT. See **Banks**, 1–2.

MEDIATION. See **Railway Labor Act.**

MEMBERSHIP SHARES. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

MEMBERS OF CLASS. See **Mootness**, 2; **Procedure**, 3.

MERGENTHALER LINOTYPE CO. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

MERGERS. See **Administrative Procedure**, 2–3; **Railroad Mergers**; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

MILITARY INDUCTION. See **Procedure**, 12; **Selective Service Act**, 1.

MILITARY PRISONERS. See **Bail**, 4.

MILITARY SELECTIVE SERVICE ACT OF 1967. See **Judicial Review**, 3; **Procedure**, 12; **Selective Service Act**, 1–2.

MILITARY SERVICE. See **Habeas Corpus**; **Judicial Review**, 3; **Selective Service Act**, 2; **Stay**, 2–3.

MILK PRODUCERS. See also **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937.**

Agricultural Marketing Agreement Act of 1937—Farm location differentials—Department of Agriculture regulations.—The statutory scheme, which was to provide uniform prices to all producers in the marketing area, subject only to specifically enumerated adjustments, contemplated that "market differentials . . . customarily applied" would be based on *cost* adjustments; and the "nearby"

MILK PRODUCERS—Continued.

differentials do not fall into the category of permissible adjustments, which are limited to compensation for rendering an economic service, and neither the Secretary of Agriculture nor the "nearby" farmers have advanced any economic justifications for them which have substantial record support. Zuber v. Allen, p. 168.

MILWAUKEE RAILROAD. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

MINORITY SHAREHOLDERS. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

MISREPRESENTATION. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

MISSISSIPPI. See **Constitutional Law**, II, 4; **Jurisdiction**, 3; **School Desegregation**, 3–4.

MOBILE DRIVE-INS. See **Banks**, 1–2.

MOOTNESS. See also **Bail**, 4; **Procedure**, 3; **Stay**, 3.

1. *Nominating petition — Congressional election — Mandamus.*— In view of limited nature of relief requested by appellant, whose nominating petition bore signatures of about 1% of those in the congressional district who had voted in the last gubernatorial election (although Ohio law then required 7%), and who sought, as his sole relief, writ of mandamus to compel Board of Elections to place his name on ballot as an independent candidate in the November 1968 election, case is dismissed as moot. Brockington v. Rhodes, p. 41.

2. *Residency requirements — Presidential election — Statutory amendment.*—Amendment of Colorado residency statute, under which appellants, who were refused permission to vote in the 1968 presidential election because they could not meet the State's six-month residency requirement, could have voted in that election, has mooted the case. Hall v. Beals, p. 45.

MOTION FOR STAY. See **Habeas Corpus.**

MUNICIPAL GOVERNMENT. See **Elections**, 1; **Injunctions**, 1.

MUNICIPAL ORDINANCES. See **Elections**, 2.

MUSIC STUDENTS. See **Judicial Review**, 3; **Selective Service Act**, 2.

NARCOTICS. See **Constitutional Law**, IV, 2–4; **Evidence**, 2–4; **Presumptions**, 1–2.

NARCOTICS DEALERS. See **Constitutional Law**, IV, 2–3.

NATIONAL BANKS. See **Banks**, 1–2.

NATIONAL LABOR RELATIONS ACT. See also **Perjury**, 1.

Union officers—Non-Communist affidavit—Criminal conviction.—The constitutionality of § 9 (h) of the Act, since repealed, is legally irrelevant to the validity of union officer's conviction under 18 U. S. C. § 1001, which punishes making of fraudulent statements to the Government because none of the elements of proof for petitioner's conviction for filing a false non-Communist affidavit has been shown to depend on the validity of § 9 (h). Bryson v. United States, p. 64.

NATIONAL LABOR RELATIONS BOARD. See **Administrative Procedure**, 4; **Judicial Review**, 1.

NATIONAL MEDIATION BOARD. See **Railway Labor Act.**

NAVIGABLE WATERS. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

"NEARBY" FARMERS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

NEBRASKA. See **Confessions**, 2; **Constitutional Law**, I, 1–3; VI; **Evidence**, 1; **Jurisdiction**, 1; **Procedure**, 4, 10.

NEGROES. See **Civil Rights**; **Constitutional Law**, II, 1–9; **Damages**; **Elections**, 1–2; **Injunctions**, 1–2, 5; **Procedure**, 6, 9, 11; **School Desegregation**, 1–5; **Standing to Sue**; **Trusts.**

NEW YORK. See **Confessions**, 1; **Constitutional Law**, III; **Injunctions**, 3; **Jurisdiction**, 2.

NOMINATING PETITIONS. See **Mootness**, 1.

NON-COMMUNIST AFFIDAVITS. See **National Labor Relations Act**; **Perjury**, 1.

NON-PATENTED ARTICLES. See **Antitrust Acts**; **Procedure**, 1.

NONSTOCK CORPORATIONS. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

NORTHERN LINES. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

NORTHERN PACIFIC RAILWAY CO. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

NOTICE. See **Civil Rights**; **Damages**; **Habeas Corpus**; **Interstate Commerce Commission**; **Judicial Review**, 2; **Procedure**, 11; **Standing to Sue.**

OFFICERS. See **Relief; Securities Exchange Act of 1934; Stockholders,** 1–2.

OFF-PREMISES SERVICES. See **Banks,** 1–2.

OHIO. See **Mootness,** 1.

OKLAHOMA CITY. See **Constitutional Law,** II, 8; **School Desegregation,** 5.

OPEN RESTRICTED BARRACKS. See **Stay,** 2.

ORDER FORMS. See **Constitutional Law,** IV, 2–3.

ORDER-OF-CALL PROVISION. See **Procedure,** 12; **Selective Service Act,** 1.

ORIGINAL JURISDICTION. See **Jurisdiction,** 3.

ORIGINAL PACKAGES. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

ORIGIN OF DRUGS. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

OUTLYING WORK ASSIGNMENTS. See **Railway Labor Act.**

OVERBREADTH. See **National Labor Relations Act; Perjury,** 1.

OWNERSHIP OF CHURCH PROPERTY. See **Appeals.**

PACIFIC NORTHWEST GATEWAYS. See **Administrative Procedure,** 2–3; **Railroad Mergers.**

PARKS. See **Constitutional Law,** II, 9; **Trusts.**

PASSENGER TRAINS. See **Interstate Commerce Commission; Judicial Review,** 2.

PATENTABILITY. See **Patents.**

PATENT INFRINGEMENT. See **Patents.**

PATENTS.

Combination patent—Useful and commercially successful—Invention.—While combination of old elements performed a useful and commercially successful function it added nothing to the nature of the previously patented radiant-heat burner, and to those skilled in the art the use of the old elements in combination was not an invention under the standard of 35 U. S. C. § 103. Anderson's-Black Rock v. Pavement Co., p. 57.

PAVING MATERIALS. See **Patents.**

PENALTIES. See **Constitutional Law,** II, 9; **Trusts.**

PERFECTING APPEALS. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

PERJURY. See also **Constitutional Law,** IV, 1; **National Labor Relations Act; Procedure,** 5.

1. *Conviction under 18 U. S. C. § 1001—Filing false affidavit.*—The decision in *Dennis* v. *United States,* 384 U. S. 855, negates any general principle that a citizen has a privilege to answer fraudulently a question that the Government should not have asked, and petitioner's conviction for filing a false non-Communist affidavit is affirmed. Bryson v. United States, p. 64.

2. *Violation of 18 U. S. C. § 1001—Wagering tax forms.*—One who furnishes false information on wagering tax forms submitted to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself. United States v. Knox, p. 77.

PETIT JURIES. See **Constitutional Law,** II, 3, 5; **Procedure,** 9.

PICKETING. See **Injunctions,** 4.

PIERS. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

PLANS FOR DESEGREGATION. See **Constitutional Law,** II, 7–8; **Injunctions,** 5; **Procedure,** 6; **School Desegregation,** 1–2, 5.

PLAYGROUND FACILITIES. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

POLICE INTERROGATION. See **Confessions,** 1; **Constitutional Law,** III.

POSSESSION OF DRUGS. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

POST-CONVICTION PROCEEDINGS. See **Confessions,** 2; **Constitutional Law,** I, 1; **Procedure,** 4.

POST-CONVICTION RELIEF. See **Constitutional Law,** II, 10. **Procedure,** 14–15.

POSTPONEMENT OF ELECTION. See **Elections,** 2.

PRE-INDUCTION REVIEW. See **Judicial Review,** 3; **Selective Service Act,** 2.

PRELIMINARY INJUNCTIONS. See **Injunctions,** 3, 5; **Jurisdiction,** 2; **School Desegregation,** 2.

PREPONDERANCE OF EVIDENCE. See **Constitutional Law,** I, 2–3; VI; **Evidence,** 1; **Jurisdiction,** 1.

PRESIDENTIAL ELECTIONS. See **Mootness,** 2; **Procedure,** 3.

PRESUMPTIONS. See also **Constitutional Law**, IV, 4; **Evidence**, 2–4.

1. *Possession of cocaine—21 U. S. C. § 174.*—Presumption under § 174 will not support conviction with respect to possession of cocaine, as facts show that more cocaine is lawfully produced in, than is smuggled into, this country, and that the amount that is stolen from legal sources is sufficiently large to negate the inference that petitioner's cocaine came from abroad or that he must have known that it did. Turner v. United States, p. 398.

2. *Possession of heroin—26 U. S. C. § 4704 (a).*—Evidence that petitioner possessed heroin packaged in 275 glassine bags without revenue stamps established that the heroin was in process of being distributed, an act proscribed by statute; and the conviction can also be sustained on basis of inference in § 4704 (a) of purchasing the heroin not in or from a package, as there is no reasonable doubt that possessor of heroin, who presumably purchased it, did not purchase it in or from an original stamped package in view of fact that no lawfully manufactured or imported heroin is found in this country. Turner v. United States, p. 398.

PRICE DIFFERENTIALS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

PRICE FIXING. See **Antitrust Acts**; **Procedure**, 1.

PRIMA FACIE EVIDENCE. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

PRIORITIES. See **Procedure**, 12; **Selective Service Act**, 1.

PRISONERS. See **Constitutional Law**, II, 10; **Procedure**, 14–15.

PRIVATE SOCIAL CLUBS. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

PRIVILEGES AND IMMUNITIES CLAUSE. See **Mootness**, 2; **Procedure**, 3.

PROBABLE CAUSE. See **Confessions**, 1; **Constitutional Law**, III.

PROCEDURE. See also **Administrative Procedure**, 1–4; **Agricultural Marketing Agreement Act of 1937**; **Antitrust Acts**; **Appeals**; **Bail**, 1–4; **Certiorari**; **Civil Rights**; **Confessions**, 1–2; **Constitutional Law**, I, 1–3; II, 4, 7–8; III; IV, 1, 4; VI; **Damages**; **Elections**, 1; **Evidence**, 1–4; **Habeas Corpus**; **Injunctions**, 1, 3–5; **Interstate Commerce Commission**; **Judicial Review**, 1–3; **Jurisdiction**, 1–2; **Milk Producers**; **Mootness**, 1–2; **Perjury**, 2; **Presumptions**, 1–2; **School Desegregation**, 1–5; **Selective Service Act**, 1–2; **Standing to Sue**; **Stay**, 1–3.

1. *Antitrust Acts—Damages—Prospective application of rule.*—The reservation in *Simpson* v. *Union Oil Co.*, 377 U. S. 13, of

PROCEDURE—Continued.
question whether there might be any equities that would warrant only prospective application in damage suits of rule governing price fixing of non-patented articles by "consignment" device, announced therein, was not intended to deny fruits of successful litigation to petitioner. Question was reserved for possible application in other cases where product distribution was structured on different considerations. Simpson v. Union Oil Co., p. 13.

2. *Certiorari—Facts do not support issue—Writ dismissed.*—Writ of certiorari, granted to consider petitioner's contention that his privilege against compulsory self-incrimination had been infringed by California prison authorities, dismissed as improvidently granted as respondents have presented documentary evidence in their brief that actual facts do not present the issue for which certiorari was granted. Conway v. Adult Authority, p. 107.

3. *Class actions—Members of class—Contingencies.*—Appellants, who were refused permission to vote in the 1968 presidential election because they could not meet Colorado's six-month residency requirement, cannot represent a class (here Colorado voters disqualified by the subsequently enacted two-month requirement) to which they never belonged. The contingencies that would have to occur before appellants could be disenfranchised in the next election are too speculative to warrant this Court's passing on the substantive issues of this case. Hall v. Beals, p. 45.

4. *Confessions—Voluntariness—State criminal procedure.*—When a federal court finds a *Jackson* v. *Denno,* 378 U. S. 368, error (failure of trial judge to find confessions voluntary before admitting them into evidence) in a state proceeding, it must allow State reasonable time to make an error-free determination of the voluntariness of the confessions. Sigler v. Parker, p. 482.

5. *Defenses of duress and lack of willfulness—False statement on wagering tax forms.*—Appellee's arguments raised on the Government's appeal from the dismissal of an indictment for violating 18 U. S. C. § 1001 that he gave the false statements under the duress of §§ 4412 and 7203 of the Internal Revenue Code, or that his false statements were not made "willfully" as required by 18 U. S. C. § 1001, must be determined initially at his trial. United States v. Knox, p. 77.

6. *Delay in school desegregation—Temporary injunctive relief.*—Petitioners, who seek review of Court of Appeals' ruling authorizing delay in student desegregation in three Louisiana school districts until September 1970, are—pending disposition of their petition for certiorari—granted temporary injunctive relief requiring respond-

PROCEDURE—Continued.

ent school boards to take necessary preliminary steps to effectuate complete student desegregation by February 1, 1970. Carter v. West Feliciana School Board, p. 226.

7. *Dismissal of appeal—Fugitive from justice.*—Supreme Court, absent any contrary provision in statute under which this criminal appeal was made, declines to adjudicate merits since appellant who was free on bail refused to surrender himself to state authorities and is now a fugitive from justice. Molinaro v. New Jersey, p. 365.

8. *Extension of time—Motion for stay—Application for bail.*—Time extension for filing petition for certiorari denied since sufficient time remains for that purpose. Stay of Court of Appeals mandate denied as that mandate has already issued. Application for bail pending action on petition for certiorari denied since initial ruling on such applicaton should be made by Court of Appeals, under Fed. Rule App. Proc. 23 (b). United States v. Follette (HARLAN, J., in chambers), p. 1232.

9. *Jury discrimination—Attack by civil suit.*—There is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of civil suit brought by Negro citizens of Greene County, Alabama, alleging that they were qualified and willing to serve as jurors, but had never been summoned. Carter v. Jury Commission, p. 320.

10. *Juvenile court—Trial by jury.*—Juvenile's challenge in habeas corpus proceeding that he was unconstitutionally deprived of right to trial by jury is inappropriate for resolution by this Court since Nebraska juvenile court hearing at which he was adjudged delinquent was held before decisions in *Duncan* v. *Louisiana*, 391 U. S. 145, and *Bloom* v. *Illinois*, 391 U. S. 194, which were held in *DeStefano* v. *Woods*, 392 U. S. 631, to apply only prospectively, and appellant would therefore have had no constitutional right to jury trial had he been tried as an adult. DeBacker v. Brainard, p. 28.

11. *Perfecting appeals—Notice to opposing counsel to correct transcripts—Virginia court rule.*—Virginia Supreme Court of Appeals' rule requiring that opposing counsel must be given reasonable notice and opportunity to examine and correct transcripts is discretionary and not jurisdictional, not having been so consistently applied by that court as to deprive it of jurisdiction to entertain the federal claim presented here or to bar this Court's review by certiorari. Sullivan v. Little Hunting Park, p. 229.

12. *Selective Service regulations—Declaration of delinquency—Failure to take administrative appeal.*—Petitioner's failure to appeal

PROCEDURE—Continued.

administratively from order declaring him delinquent does not deprive him of standing to contest conviction, as regulations conferring hearing rights apply to those contesting classifications made by local boards and not to those like petitioner declared delinquent and whose induction has been accelerated. Gutknecht v. United States, p. 295.

13. *Trial by jury—Stockholder's derivative suit.*—Right to trial by jury preserved by the Seventh Amendment extends to a stockholder's derivative suit with respect to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury trial. Ross v. Bernhard, p. 531.

14. *Trial transcripts—Collateral relief—Free copies.*—This Court need not decide whether the Constitution requires State to furnish indigent prisoners with free trial transcripts to aid in petitioning for collateral relief unless it appears that petitioner cannot again borrow a copy from the State, or procure one from codefendant or other custodian, or show that it would be significantly more advantageous for him to own rather than borrow a copy. Wade v. Wilson, p. 282.

15. *Trial transcripts — State court rules — On loan.* — Petitioner may not attack state court rules, which concern only furnishing of transcripts for direct appeal, since he had transcript for that purpose and did not complain that having it only on loan impaired its use on appeal. Wade v. Wilson, p. 282.

PRODUCT DISTRIBUTION. See **Antitrust Acts; Procedure,** 1.

PROPERTY. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

PROPERTY DISPUTE. See **Appeals.**

PROPORTIONAL REPRESENTATION. See **Constitutional Law,** II, 3, 5; **Procedure,** 9.

PROSECUTORS. See **Constitutional Law,** I, 2–3; VI; **Evidence,** 1; **Jurisdiction,** 1.

PROSPECTIVITY. See **Antitrust Acts; Constitutional Law,** I, 2–3; VI; **Evidence,** 1; **Jurisdiction,** 1; **Procedure,** 1, 10.

PROTECTIVE CONDITIONS. See **Administrative Procedure,** 2–3; **Railroad Mergers.**

PROTECTIVE ORDERS. See **Stay,** 3.

PROXY STATEMENTS. See **Relief; Securities Exchange Act of 1934; Stockholders,** 1–2.

PUBLIC ACCOMMODATIONS. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

PUBLIC INTEREST. See **Administrative Procedure,** 2–3; **Railroad Mergers.**

PUBLIC PARKS. See **Constitutional Law,** II, 9; **Trusts.**

PUBLIC SCHOOLS. See **Constitutional Law,** II, 4, 7–8; **Injunctions,** 5; **Jurisdiction,** 3; **Procedure,** 6; **School Desegregation,** 1–5.

PUBLIC SUPPORT. See **Injunctions,** 5; **School Desegregation,** 2.

PURCHASING DRUGS. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

QUALIFICATIONS FOR JURORS. See **Constitutional Law,** II, 3, 5; **Procedure,** 9.

QUALIFICATIONS FOR SCHOOL BOARDS. See **Constitutional Law,** II, 1–2, 6.

RACIAL DISCRIMINATION. See **Civil Rights; Constitutional Law,** II, 9; **Damages; Procedure,** 11; **Standing to Sue; Trusts.**

RACIAL SEGREGATION. See **Constitutional Law,** II, 4, 7–8; **School Desegregation,** 1–5.

RADIANT-HEAT BURNER. See **Patents.**

RAILROAD CHARTERS. See **Administrative Procedure,** 2–3; **Railroad Mergers.**

RAILROAD MERGERS. See also **Administrative Procedure,** 2–3.

Northern Lines merger—Interstate Commerce Act—Public interest.—ICC's conclusion that the merger comported with the public interest under § 5 of the Act, as amended by the Transportation Act of 1940, is supported by findings that the ICC made on basis of substantial evidence after measuring the competitive consequences of the merger against its resulting benefits. Northern Lines Merger Cases, p. 491.

RAILROADS. See **Injunctions,** 4; **Interstate Commerce Commission; Judicial Review,** 2; **Railway Labor Act.**

RAILWAY LABOR ACT.

Outlying work assignments—Unilateral action by carrier—Injunction.—The status quo which is to be maintained pursuant to § 6 of the Act while the Act's procedures are being exhausted consists of the actual, objective working conditions out of which the dispute arose, whether or not those conditions are covered in an existing collective-bargaining agreement. Shore Line v. Transportation Union, p. 142.

RAILWAY LABOR DISPUTE. See **Injunctions**, 4.

REASONABLE DOUBT. See **Constitutional Law**, I, 2–3; VI; **Evidence**, 1; **Jurisdiction**, 1.

RECESS. See **Bail**, 4.

RECLASSIFICATION. See **Judicial Review**, 3; **Selective Service Act**, 2.

RECORD. See **Confessions**, 1; **Constitutional Law**, I, 2–3; III; VI; **Evidence**, 1; **Jurisdiction**, 1; **Procedure**, 4, 10.

RECORDS. See **Bail**, 1.

REFUSAL TO BARGAIN. See **Administrative Procedure**, 4; **Judicial Review**, 1.

REGISTERED DEALERS. See **Constitutional Law**, IV, 2–3.

REGISTRATION. See **Judicial Review**, 3; **Procedure**, 12; **Selective Service Act**, 1–2.

REGULATIONS. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Judicial Review**, 3; **Milk Producers**; **Procedure**, 12; **Selective Service Act**, 1–2.

REINSTATEMENT. See **Administrative Procedure**, 4; **Judicial Review**, 1.

RELEASE FROM MILITARY CUSTODY. See **Habeas Corpus.**

RELIEF. See also **Antitrust Acts**; **Constitutional Law**, II, 7–8; **Injunctions**, 3; **Jurisdiction**, 2; **Mootness**, 1; **Procedure**, 6; **School Desegregation**, 1, 5; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

Stockholders' derivative suits — Violation of proxy rules — Mergers.—In devising retrospective relief for corporate violation of proxy rules federal courts should be guided by principles of equity. Fairness of the merger may be a relevant consideration in determining relief, and merger should be set aside only if court of equity concludes from all circumstances that it would be equitable to do so, and damages should be recoverable only to extent they can be proved. Mills v. Electric Auto-Lite Co., p. 375.

RELIGIOUS CORPORATIONS. See **Appeals.**

RELIGIOUS DOCTRINE. See **Appeals.**

REMAND. See **Bail**, 3.

REMEDIAL ORDERS. See **Administrative Procedure**, 4; **Judicial Review**, 1.

REMEDIES. See **Admiralty; Constitutional Law,** II, 3, 5; **Longshoremen's and Harbor Workers' Compensation Act; Procedure,** 9.

RENTALS. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

RESERVED QUESTION. See **Antitrust Acts; Procedure,** 1.

RESERVISTS. See **Habeas Corpus.**

RESIDENCE REQUIREMENTS. See **Mootness,** 2; **Procedure,** 3.

RESIDENTS. See **Civil Rights; Damages; Procedure,** 11; **Standing to Sue.**

RESTORATION OF BAIL. See **Bail,** 2.

RETROACTIVITY. See **Antitrust Acts; Constitutional Law,** I, 2–3; VI; **Evidence,** 1; **Jurisdiction,** 1; **Procedure,** 1, 10.

REVENUE STAMPS. See **Constitutional Law,** IV, 4; **Evidence,** 2–4; **Presumptions,** 1–2.

REVERTER. See **Constitutional Law,** II, 9; **Trusts.**

REVOCATION OF BAIL. See **Bail,** 2.

ROMANIAN HEIRS. See **Injunctions,** 3; **Jurisdiction,** 2.

RULES. See **Civil Rights; Constitutional Law,** II, 10; **Damages; Procedure,** 11, 14–15; **Standing to Sue.**

RULES OF APPELLATE PROCEDURE. See **Bail,** 3; **Procedure,** 8.

SCHOOL BOARDS. See **Constitutional Law,** II, 1–2, 4, 6–8; **Procedure,** 6; **School Desegregation,** 1–5.

SCHOOL BOUNDARIES. See **Constitutional Law,** II, 8; **School Desegregation,** 5.

SCHOOL DESEGREGATION. See also **Constitutional Law,** II, 4, 7–8; **Injunctions,** 5; **Jurisdiction,** 3; **Procedure,** 6.

1. *Injunctions—Delay in student desegregation.*—Petitioners, who seek review of Court of Appeals' ruling authorizing delay in student desegregation in three Louisiana school districts until September 1970, are—pending disposition of their petition for certiorari—granted temporary injunctive relief requiring respondent school boards to take necessary preliminary steps to effectuate complete student desegregation by February 1, 1970. Carter v. West Feliciana School Board, p. 226.

2. *Judicial review — Injunctions.* — Application for vacation of Court of Appeals' stay of preliminary injunction entered by Dis-

SCHOOL DESEGREGATION—Continued.

trict Court that had the effect of requiring partial implementation of school desegregation plan is granted, Court of Appeals' order vacated, and District Court's order directed to be reinstated. A district court's order granting preliminary injunction should not be disturbed on review unless grant was an abuse of discretion, which Court of Appeals did not find here. Nor does desire to develop public support for the plan justify delay in its implementation. Keyes v. Denver School District (BRENNAN, J., in chambers), p. 1215.

3. *Mississippi schools—Delay in submission of plans—"All deliberate speed."*—On motion of Department of Justice, the Court of Appeals suspended its July 3, 1969, order requiring the submission of new plans to be effective this fall to accelerate desegregation in 33 Mississippi school districts, and postponed the date for submission of new plans to December 1, 1969. Although MR. JUSTICE BLACK believes that the "all deliberate speed" standard is no longer relevant and that unitary school systems should be instituted without further delay, he recognizes that in certain respects his views go beyond anything the Court has held, and he reluctantly upholds the lower court's order. Alexander v. Board of Education (BLACK, J., in chambers), p. 1218.

4. *Mississippi schools—Immediate desegregation.*—Continued operation of racially segregated schools under standard of "all deliberate speed" is no longer constitutionally permissible. Court of Appeals is directed to enter an order, effective immediately, that schools in certain Mississippi districts be operated on unitary basis. While the schools are being thus operated, District Court may consider any proposed amendments to the order, but such amendments may become effective only with Court of Appeals' approval. Alexander v. Board of Education, p. 19.

5. *School boundaries—Overall plan—Court of Appeals.*—The District Court approved a school board's proposal to revise school boundaries effective at the start of the school year and ordered the board to submit a complete desegregation plan within two months thereafter. The Court of Appeals, which, upon an appeal by intervenors with respect to the boundary provision, summarily vacated the order as inappropriate except as part of an overall plan, should have allowed the implementation of the proposal, to which petitioners did not object, pending argument and decision of the appeal. Dowell v. Board of Education, p. 269.

SCOPE OF REVIEW. See **Administrative Procedure**, 4; **Judicial Review**, 1.

SEARCH AND SEIZURE. See **Confessions**, 1; **Constitutional Law**, III.

SECESSIONIST CONGREGATIONS. See **Appeals.**

SECRETARY OF AGRICULTURE. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Jurisdiction**, 3.

SECRETARY OF THE ARMY. See **Stay**, 3.

SECURED RECEPTACLES. See **Banks**, 1–2.

SECURITIES EXCHANGE ACT OF 1934. See also **Relief**; **Stockholders**, 1–2.

Solicitation of proxies—Material omission—Merger.—Fairness of merger terms does not constitute defense to private action for violation of § 14 (a) of the Act complaining of materially misleading solicitation of proxies that authorized merger. Mills v. Electric Auto-Lite Co., p. 375.

SEGREGATED SCHOOLS. See **Constitutional Law**, II, 4, 7–8; **Procedure**, 6; **School Desegregation**, 1–5.

SEGREGATION. See **Constitutional Law**, II, 3, 5, 9; **Jurisdiction**, 3; **Procedure**, 9; **Trusts.**

SELECTIVE SERVICE ACT. See also **Judicial Review**, 3; **Procedure**, 12.

1. *Military Selective Service Act of 1967—Delinquency regulations—Not authorized.*—Delinquency regulations under which petitioner was deprived of order-of-call preference are not authorized by the Act and are void, as Congress intended to punish delinquents through criminal law and not delinquency procedure, which has no statutory sanction, and power to declare registrant "delinquent" lacks statutory standards or guidelines without which legality of declaration cannot be judged. Gutknecht v. United States, p. 295.

2. *Student deferments—Delinquency reclassification—Military Selective Service Act of 1967.*—Section 6 (h)(1) of the Act makes undergraduate student deferments mandatory when the student, as here, has met the statutory criteria, and the reference in that section to "rules and regulations" only authorizes such additional administrative procedures as necessary to ensure that qualified students are given deferment. Congress did not authorize induction by local boards as a penalty for violation of administrative regulations. Breen v. Selective Service Board, p. 460.

SELF-INCRIMINATION. See **Bail**, 1; **Certiorari**; **Constitutional Law**, IV; **Evidence**, 2–4; **Perjury**, 2; **Presumptions**, 1–2; **Procedure**, 2, 5.

SELLING MARIHUANA. See **Constitutional Law**, IV, 2–3.

SELLING NARCOTICS. See **Constitutional Law**, IV, 2–3.

SENTENCES. See **Bail**, 4; **Certiorari**; **Procedure**, 2.

SEVENTH AMENDMENT. See **Constitutional Law**, V; **Procedure**, 13.

SHAREHOLDERS. See **Constitutional Law**, V; **Procedure**, 13; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

SHARES. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

SHERMAN ACT. See **Antitrust Acts**; **Procedure**, 1.

SHIP'S CRANES. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

SITUS OF INJURY. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

SIXTH AMENDMENT. See **Constitutional Law**, VI; **Evidence**, 1; **Jurisdiction**, 1; **Procedure**, 10.

SMUGGLED DRUGS. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

SOCIAL CLUBS. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

SOLICITATION OF PROXIES. See **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

STAMPED PACKAGES. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

STANDING. See **Procedure**, 12; **Selective Service Act**, 1.

STANDING TO SUE. See also **Civil Rights**; **Damages**; **Procedure**, 11.

Civil rights—Discriminatory refusal to approve assignment of membership share to lessee.—Lessor has standing under 42 U. S. C. § 1982 to maintain this action as the "effective adversary" in the lessee's behalf. Sullivan v. Little Hunting Park, p. 229.

STATE BANKS. See **Banks**, 1–2.

STATE COURT INJUNCTIONS. See **Injunctions**, 4.

STATE COURT RULES. See **Constitutional Law**, II, 10; **Procedure**, 14–15.

STATE COURTS. See **Confessions**, 2; **Constitutional Law**, I, 1; II, 9; **Procedure**, 4; **Trusts.**

STATEMENTS. See **National Labor Relations Act**; **Perjury**, 1.

STATE SUPERIOR COURT JUDGES. See **Constitutional Law**, II, 1–2, 6.

STATUS OF LONGSHOREMEN. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

STATUS QUO. See **Railway Labor Act.**

STATUTORY AMENDMENTS. See **Mootness**, 2; **Procedure**, 3.

STATUTORY PRESUMPTIONS. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

STATUTORY STANDARDS. See **Procedure**, 12; **Selective Service Act**, 1.

STAY. See also **Habeas Corpus**; **Injunctions**, 5; **Procedure**, 8.

1. *Action by individual Justice—Accelerated schedule.*—Application for interim stay and other relief should be passed on by full Court, since factors involved in granting stay call for Court's collective judgment, the Court has denied a similar stay at different stage of the case, and an individual Justice cannot order an accelerated schedule which is importantly related to the stay request. Rosado v. Wyman (HARLAN, J., in chambers), p. 1213.

2. *Courts-martial — Discharge from service — Conscientious objector.*—Applicant, who had been court-martialed for unauthorized absence, and having exhausted all military administrative remedies, sought habeas corpus relief in District Court, claiming that improper processing of his application for discharge from service should have barred his conviction. Court of Appeals denied a broad and sweeping stay. Pending disposition of appeal on merits of case, which involves contention that matter of conscientious objection is one of First Amendment proportions, stay is granted directing that applicant be confined in "open restricted barracks" and not in the brig. Jones v. Lemond (DOUGLAS, J., in chambers), p. 1227.

3. *Military service—Conscientious objector—Deployment outside district.*—Application by member of Armed Forces claiming conscientious objector status for stay of deployment outside district denied where (1) District Court issued protective order against his having to engage in combat activities greater than his present duties required, pending Army board's review of his classification and further court order; (2) Court of Appeals specified that he will be produced in District Court if he wins his habeas corpus case; and (3) fact that Secretary of the Army is party to case precludes mooting of case by applicant's deployment. Parisi v. Davidson (DOUGLAS, J., in chambers), p. 1233.

STAY OF DEPLOYMENT OUTSIDE DISTRICT. See **Stay**, 3.

STOCK EXCHANGE RATIOS. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

STOCKHOLDERS. See also **Administrative Procedure**, 2–3; **Railroad Mergers**; **Relief**; **Securities Exchange Act of 1934.**

1. *Derivative actions—Violation of securities laws—Expenses and attorneys' fees.*—Where minority stockholders have established a violation of the securities laws by their corporation and its officials, they are entitled to an interim award of litigation expenses and reasonable attorneys' fees incurred in proving the violation, since the expenses incurred were for the benefit of the corporation and the other stockholders. Mills v. Electric Auto-Lite Co., p. 375.

2. *Solicitation of proxies—Material omission—Merger.*—Fairness of merger terms does not constitute defense to private action for violation of § 14 (a) of Securities Exchange Act of 1934 complaining of materially misleading solicitation of proxies that authorized merger. Mills v. Electric Auto-Lite Co., p. 375.

STOCKHOLDER'S SUIT. See **Constitutional Law**, V; **Procedure**, 13.

STOLEN DRUGS. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

STRIKES. See **Administrative Procedure**, 4; **Judicial Review**, 1; **Railway Labor Act.**

STUDENT DEFERMENTS. See **Judicial Review**, 3; **Selective Service Act**, 2.

SUBSTANTIAL EVIDENCE. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

SUFFICIENCY OF EVIDENCE. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

SUMMARY JUDGMENTS. See **Injunctions**, 3; **Jurisdiction**, 2; **Relief**; **Securities Exchange Act of 1934**; **Stockholders**, 1–2.

SUPREME COURT. See **Injunctions**, 3; **Jurisdiction**, 2; **Procedure**, 7; **Stay**, 1.

SURROGATE'S COURT PROCEDURE ACT. See **Injunctions**, 3; **Jurisdiction**, 2.

SYSTEMATIC EXCLUSION. See **Constitutional Law**, II, 1–3, 5–6; **Procedure**, 9.

TALIAFERRO COUNTY. See **Constitutional Law**, II, 1–2, 6.

TAXES. See **Constitutional Law**, IV, 1–3; **Perjury**, 2; **Procedure**, 5.

TAX STAMPS. See **Constitutional Law**, IV, 4; **Evidence**, 2–4; **Presumptions**, 1–2.

TERMINATION OF TRAIN SERVICE. See **Interstate Commerce Commission**; **Judicial Review**, 2.

TERMINATION OF TRUSTS. See **Constitutional Law**, II, 9; **Trusts.**

TESTAMENTARY TRUSTS. See **Constitutional Law**, II, 9; **Trusts.**

THIRTEENTH AMENDMENT. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

TITLE TO RAILROAD. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

TORTS. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

TRAINS. See **Interstate Commerce Commission**; **Judicial Review**, 2.

TRANSCRIPTS. See **Civil Rights**; **Constitutional Law**, II, 10; **Damages**; **Procedure**, 11, 14–15; **Standing to Sue.**

TRANSFER TAXES. See **Constitutional Law**, IV, 2–3.

TRANSPORTATION. See **Interstate Commerce Commission**; **Judicial Review**, 2.

TRANSPORTATION ACTS. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

TRIAL BY JURY. See **Constitutional Law**, V–VI; **Evidence**, 1; **Jurisdiction**, 1; **Procedure**, 10, 13.

TRIAL JUDGES. See **Confessions**, 2; **Constitutional Law**, I, 1; **Procedure**, 4.

TRIAL TRANSCRIPTS. See **Constitutional Law**, II, 10; **Procedure**, 14–15.

TRUSTS. See also **Constitutional Law**, II, 9.

Testamentary trust—Racial restrictions—Failure of the trust.—Georgia Supreme Court's action terminating testamentary trust, which provided for creation of park for exclusive use of white people, did not violate any constitutionally protected rights. Termination was not the imposition of a "penalty," the forfeiture of the park because of the city's compliance with the constitutional mandate of *Evans* v. *Newton*, 382 U. S. 296, but was the result of the construction of the will, and there is no violation of the Fourteenth Amend-

TRUSTS—Continued.
ment where a state court without any racial animus applies its normal principles of construction to determine the testator's true intent and concludes that everyone is to be deprived of the benefits of the trust. Evans v. Abney, p. 435.

UNDERCOVER AGENTS. See **Constitutional Law**, IV, 2–3.

UNDERGRADUATE STUDENTS. See **Judicial Review**, 3; **Selective Service Act**, 2.

UNDERREPRESENTATION. See **Constitutional Law**, II, 1–2, 6.

UNIFORM CODE OF MILITARY JUSTICE. See **Bail**, 4.

UNILATERAL ACTION. See **Railway Labor Act.**

"UNINTELLIGENT" CITIZENS. See **Constitutional Law**, II, 1–2, 6.

UNION OFFICERS. See **National Labor Relations Act**; **Perjury**, 1.

UNIONS. See **Administrative Procedure**, 4; **Injunctions**, 4; **Judicial Review**, 1; **National Labor Relations Act**; **Perjury**, 1; **Railway Labor Act.**

UNITARY SCHOOLS. See **Constitutional Law**, II, 4; **School Desegregation**, 3–4.

"UPRIGHT" CITIZENS. See **Constitutional Law**, II, 1–2, 6.

USEFULNESS OF PROCESS. See **Patents.**

VACATION OF STAY. See **Injunctions**, 5; **School Desegregation**, 2.

VAGUENESS. See **Bail**, 4; **National Labor Relations Act**; **Perjury**, 1.

VALIDITY OF PATENTS. See **Patents.**

VALUATION OF PROPERTY. See **Administrative Procedure**, 2–3; **Railroad Mergers.**

VERMONT. See **Administrative Procedure**, 1; **Agricultural Marketing Agreement Act of 1937**; **Milk Producers.**

VIETNAM. See **Judicial Review**, 3; **Procedure**, 12; **Selective Service Act**, 1–2; **Stay**, 3.

VIRGINIA. See **Civil Rights**; **Damages**; **Procedure**, 11; **Standing to Sue.**

VOLUNTARINESS. See **Confessions**, 1–2; **Constitutional Law**, I, 1; III; **Procedure**, 4.

VOTERS. See **Elections**, 2.

VOTING RIGHTS ACT OF 1965. See **Elections**, 1; **Injunctions**, 1.

WAGERING TAX FORMS. See **Constitutional Law**, IV, 1; **Perjury**, 2; **Procedure**, 5.

WEST FELICIANA PARISH. See **Constitutional Law**, II, 7; **Procedure**, 6; **School Desegregation**, 1.

WILLFULNESS. See **Constitutional Law**, IV, 1; **Perjury**, 2; **Procedure**, 5.

WILLS. See **Constitutional Law**, II, 9; **Trusts.**

WORDS.

1. *"Affiliated."*—§ 9 (h), National Labor Relations Act, 29 U. S. C. § 159 (h) (1958 ed.). Bryson v. United States, p. 64.

2. *"Branch bank."*—12 U. S. C. § 36 (f). First National Bank v. Dickinson, p. 122.

WORK ASSIGNMENTS. See **Railway Labor Act.**

WORKING CONDITIONS. See **Railway Labor Act.**

WORKMEN'S COMPENSATION. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

WRITTEN EXPLANATION. See **Bail**, 3.